VANCOUVER
10-May-21
COURT OF APPEAL
REGISTRY

Court of Appeal File No: CA46728

COURT OF APPEAL

BETWEEN:

PATRICIA DAWN ELLIOTT

RESPONDENT
(PLAINTIFF)

And:

RYAN McCLIGGOT AND
SLEGG CONSTRUCTION MATERIALS LTD

APPELLANTS
(DEFENDANTS)

BOOK OF AUTHORITIES [1]

Ryan McCliggot and
Slegg Construction Materials Ltd

Jennifer J.L. Brun and
Robert C. Brun. Q.C.
Harris and Brun Law Corp
500-555 West Georgia Street
Vancouver, BC V6B 1Z6
Tel: 604 683 2466
Fax:604 683 4541
Email:jbrun@harrisbrun.com
Email: rbrun@harrisbrun.com

Patricia Dawn Elliott

Karl J. Hauer

Vancouver Island Law
1-1007 Johnson Street
Victoria, BC
Tel: 250 900 1159
Fax: 250 900 0368
Email: khauer@hauerandco.com

[1] Filed by the respondent

Index to Book of Authorities

No.	Authority
1	Andrews v. Grand & Toy Alberta Ltd., 2 SCR 229, 1978 CanLII 1
2	Basra v. Gill , 1994 CanLII 1435 (BC CA),
3	Boyd v. Harris, 2004 BCCA 146
4	Ciolli v. Galley, 2011 BCCA 106
5	Cory v. Marsh 1993 CanLII 1150 (BC CA)
6	Daleh v. Schroeder, 2019 BCSC 1179
7	Dilello v. Montgomery, 2005 BCCA 56
8	Dube v. Labar, [1986] 1 SCR 649
9	Earnshaw v. Despins, 45 BCLR (2d) 380, 1990 CanLII 596 (BC CA)
10	Evans v. Keill, 2018 BCSC 1651
11	Evans v. Metcalfe, 2011 BCCA 507
12	Fast v. Moss, 2005 BCCA 571, 47 B.C.L.R. (4th) 44
13	Ferguson v. Lush, 2003 BCCA 579
14	Findlay v. George, 2021 BCCA 12
15	Harder v. Poettcker, 2016 BCCA 477
16	Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC)
17	Johnson v. Laing, 2004 BCCA 364
18	Klingler v. Lau, 2019 BCSC 1776
19	Knauf v. Chao, 2009 BCCA 605
20	Laidlaw v. Couturier, 2010 BCCA 59
21	Laycock v. Longo, 2002 BCCA 186
22	Lennox v. New Westminster (City), 2011 BCCA 182
23	Little v. Schlyecher, 2020 BCCA 381
24	M.B. v. 2014052 Ontario Ltd. (Deluxe Windows of Canada), 2012 ONCA 135
25	M.B. v. British Columbia, 2003 SCC 53
26	McCannell v. McLean, 1937 CanLII 1 (SCC)
27	McCormick v. Plambeck, 2020 BCSC 881
28	Merko v. Plummer, 2016 BCSC 1403
29	Montgomery v. Williamson, 2015 BCSC 792
30	Moskaleva v. Laurie, 2009 BCCA 260
31	Nance v. British Columbia Electric Railway, 1951 CanLII 374 (UK JCPC),
32	Oberholtzer v. Tocher, 2018 BCSC 1089
33	Olson v. Ironside, 2012 BCSC 546
34	Rendall v. Ewert, 1989 CanLII 232 (BC CA)
35	Stapley v. Hejslet 2006 BCCA 34
36	Taraviras v. Lovig, 2011 BCCA 200
37	Thomas v. Foskett, 2020 BCCA 322
38	Toor v. Toor, 2007 BCCA 354
39	Tsoukas v. Segura, 2001 BCCA 664
40	White v. Gait, 2004 BCCA 517
41	Whiten v. Pilot Insurance Co., 2002 SCC 18
42	Young v. Bella, 2006 SCC 3

SUPREME COURT OF CANADA
Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229
Date: 1978-01-19

J. A. Andrews, Dorothy Andrews, Ivan Stefanyk *(Plaintiffs) Appellants;*

and

Grand & Toy Alberta Ltd. and Robert G. Anderson *(Defendants) Respondents.*

1977: June 15, 16; 1978: January 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages — Young adult rendered a quadriplegic and faced with lifetime of dependency on others — Applicable principles in assessment of damages.

In a negligence action for personal injury involving a young man rendered a quadriplegic in a traffic accident, ' the trial judge awarded $1,022,477.48. The Appellate Division of the Supreme Court of Alberta reduced that sum to $516,544.48. Leave to appeal to this Court was granted on the question whether the Appellate Division erred in law in the assessment of damages.

Liability was not an issue. The trial judge found that the fault was entirely that of the respondents. The Appellate Division (one member dissenting on this issue) found the appellant James Andrews 25 per cent contributorily negligent. Those findings did not arise for discussion in this appeal. Nor did the question of special damages.

This Court was called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others. On the date of the accident, Andrews was an apprentice carman, 21 years of age and unmarried.

Held: The appeal should be allowed. General damages were assessed at $740,000 which together with the special damages of $77,344 gave a final figure of $817, 344. Of this amount the appellant was granted judgment for 75 per cent, that is $613,008, under the uncontested apportionment of liability.

[Page 230]

1. Pecuniary loss

(a) Future care

(i) Standard of care: The paramount issue to be decided was whether in a case of total or near-total disability the future care of the victim should be in an institutional or a home care environment. The trial judge chose home care and

found that it would take $4,135 per month to provide such care for Andrews. The Appellate Division agreed that home care would be better but denied it to him. It considered that this standard of care was unreasonably and unrealistically high. Without giving any reason for selecting the particular figure chosen, it substituted $l,000 per month. The Court of Appeal erred in law in the approach it took. It failed to show that the trial judge applied any wrong principle of law or that the overall amount awarded by him was a wholly erroneous estimate of the damage.

Contrary to the view expressed in the Appellate Division, there is no duty to mitigate damage, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him. The ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims against him are legitimate and justifiable.

Was it reasonable for Andrews to ask for $4,135 per month for home care? Home care is expensive, but auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court was offered no middle ground.

(ii) Life expectancy: Figures introduced at trial showed that the life expectancy of 23-year-old persons in general is 50 years. However, a statistical average is helpful only if the appropriate group is used. Medical testimony at trial indicated that possibly five years less than normal would be a reasonable expectation of life

[Page 231]

for a quadriplegic. This figure was accepted by the Appellate Division and also by this Court.

(iii) Contingencies of life: The trial judge allowed a 20 per cent discount for "contingencies and hazards of life". The allowance by the Appellate Division of a further 10 per cent discount was an error. The trial judge's figure of 20 per cent as a discount for contingencies was not an allowance for a decreased life expectancy, as the Appellate Division characterized it, for this had already been taken into account by reducing the normal 50-year expectancy to 45 years. The "contingencies and hazards of life" in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve a cumulative result. The trial judge's figure

of 20 per cent was accepted by this Court as a reasonable allowance for the contingencies relating to future care.

(iv) Duplication with compensation for loss of future earnings: Proper future care is the paramount goal of damages for personal injuries. To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of necessaries when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. The projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

(v) Cost of special equipment: In addition to his anticipated monthly expenses, Andrews required an initial capital amount for special equipment. The assessment by both Courts below was correct in principle and was therefore accepted.

(b) Prospective loss of earnings

It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made.

(i) Level of earnings: The holding of the Appellate Division that $1,200 per month represents a reasonable estimate of Andrews' future average level of earnings was affirmed.

(ii) Length of working life: The capitalization of future earning capacity must be based not on the shortened life expectancy but rather on the expected working life span prior to the accident. It is the loss of the

[Page 232]

income-earning capacity which existed prior to the accident for which the appellant must be compensated.

(iii) Contingencies: The figure used to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression, is obviously an arbitrary one. The figure of 20 per cent which was used in the lower Courts (and in many other cases), although not entirely satisfactory, should be accepted.

(iv) Duplication of the cost of future basic maintenance: At trial evidence was given that the cost of basics for a person in the position of Andrews prior to the accident would be approximately 53 per cent of income. This figure was accepted and his anticipated future monthly earnings were accordingly reduced to $564.

(c) Considerations relevant to both heads of pecuniary loss

(i) Capitalization rate: allowance for inflation and the rate of return on investments: The discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case should be varied from five to seven per cent. The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. The approach adopted by this Court was to use present rates of return on long-term investments and to make some allowance for the effects of future inflation.

(ii) Allowance for Tax: As it is earning capacity and not lost earnings which is the subject of compensation, no consideration should be taken of the amount by which the income from the award for prospective earnings will be reduced by payment of taxes on the interest, dividends or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

The impact of taxation upon the income from the capital sum for future care is mitigated by the existence of s. 110(1) (c) (IV.1) of the *Income Tax Act* in respect of the deduction of medical expenses. Because of this provision and because of the position taken in the Courts below, where no allowance was made to adjust the amount assessed for future care in light of the reduction from taxation, this Court made no allowance for that item.

[Page 233]

Also, with respect to the determination of the present value of the cost of future care, the calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him.

2. Non-pecuniary losses

In the case of a young adult quadriplegic like Andrews the amount of $100,000 should be adopted as the appropriate award for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities and loss of expectation of life. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

Total award

Rather than make an overall assessment of the total sum, it is more appropriate to make an overall assessment of the total under each head of future care, prospective earnings, and non-pecuniary loss, in each case in light of general considerations such as the awards of other courts in similar cases and an assessment of the reasonableness of the award.

Nance v. B.C. Electric Railway Co., [1951] A.C. 601; *Admiralty Commissioners v. S.S. Susquehanna,* [1926] A.C. 655; *West & Son Ltd. v. Shephard,* [1964] A.C. 326; *Admiralty Commissioners v. S.S. Valeria,* [1922] 2 A.C. 242; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Cunningham v. Harrison,* [1973] 3 All E.R. 463; *Fletcher v. Autocar & Transporters Ltd.,* [1968] 1 All E.R. 726; *R. v. Jennings,* [1966] S.C.R. 532; *Bisson v. Corporation of Powell River* (1967), 62 W.W.R. 707, 64 W.W.R. 768; *Jennings v. Cronsberry* (1965), 50 D.L.R. (2d) 385; *Skelton v. Collins* (1966), 39 A.L.J.R. 480; *Olivier v. Ashman,* [1962] 2 Q.B. 210; *McCann v. Sheppard,* [1973] 1 W.L.R. 540; *Warren v. King,* [1963] 3 All E.R. 521; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan,* [1968] S.C.R. 589; *Bresatz v. Przibilla* (1962), 108 C.L.R. 541; *Mallet v. McMonagle,* [1970] A.C. 166; *Re: Anti-Inflation Act,* [1976] 2 S.C.R. 373; *Schroth v. Innes, Perry and Shiels,* [1976] 4 W.W.R. 225; *Ward v. James,* [1965] 1 All E.R. 563; *Hamel v. Prather,* [1976] 2 W.W.R. 742; *Jackson v. Millar,* [1976] 1 S.C.R. 225, referred to.

APPEAL by the plaintiffs, from a judgment of the Supreme Court of Alberta, Appellate Division[1], reducing an award of damages of Kirby

[Page 234]

J. in a negligence action for personal injuries. Appeal allowed.

D. K. Laidlaw, Q.C., R. Cummings and D. Andrews, for the plaintiffs, appellants.

J. A. Weir and B. Larbalestier, for the defendants, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is a negligence action for personal injury involving a young man rendered a quadriplegic in a traffic accident for which the respondent Anderson and his employer, Grand & Toy Alberta Ltd., have been found partially liable. Leave to appeal to this Court was granted on the question whether the Appellate Division of the Supreme Court of Alberta erred in law in the assessment of damages. At trial Mr. Justice Kirby awarded $1,022,477.48; the Appellate Division reduced that sum to $516,544.48.

The amount awarded in each Court under each of the several heads of damages is set out below:

Pecuniary Loss		
(a) Cost of Future Care	Trial	Appellate Division
—special equipement	$14,200	$14,200
—monthly amount	4,135	1,000
—contingencies	20%	30%
—capitalization rate	5%	5%
—life expectancy	45 years	45 years

[1] [1976] 2 W.W.R. 385, 64 D.L.R. (3d) 663.

	$735,594	$164,200
(b) Loss of Prospective Earnings —level of earnings	$ 830	$1,200
—basic deduction to avoid duplication between the award for future care and that part of the lost earnings that would have been spent on living expenses	440	—
Net	$390	$1,200
—contingencies	20%	20%
—work span	30.81	30.81
—capitalization rate	5%	5%
Total	$ 59,539	$175,000
Non-Pecuniary Loss		
—Pain and Suffering	$150,000	$100,000
—Loss of Amenities		
—Loss of Expectation of Life		
Special Damages	$77,344	$77,344

[Page 235]

Liability is not an issue. The trial judge found that the fault was entirely that of the respondents. The Appellate Division (McDermid J.A. dissenting on this issue) found the appellant James Andrews 25 per cent contributorily negligent. Those findings do not arise for discussion in this appeal. Nor does the question of special damages.

This Court is called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others. The question of "million dollar" awards has not arisen in Canada until recently, but within the past several years four such cases have been before the Courts, namely: (i) the case at bar; (ii) *Thornton v. The v Board of School Trustees of School District No. 57 (Prince George),* at present under appeal to this Court, in which the award at trial was $1,534,058, reduced on appeal to $649,628; (iii) *Teno v. Arnold,* also under appeal to this Court, in which the award for general damages at trial was $950, 000, reduced on appeal to $875,000; (iv) *McLeod v. Hodgins,* (unreported), in which Mr. Justice Robins, of the Ontario High Court, awarded at trial an amount of $1,041,197, of which $1,000, 000 were general damages.

Let me say in introduction what has been said many times before, that no appellate court is justified in substituting a figure of its own for that awarded at trial simply because it would have awarded a different figure if it had tried the case at first instance. It must be satisfied that a wrong principle of law was applied, or that the overall amount is a wholly erroneous estimate of the damage; *Nance v. B.C. Electric Railway Co.*[2]

The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording

[Page 236]

reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby, that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs. In making this comment I am not unaware of the negative recommendation of the British Law Commission (Law Corn. *56-Report on Personal Injury Litigation-Assessment of Damages)* following strong opposition from insurance interests and the plaintiffs' bar.

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not 'purport to, speak as to the individual sufferer. So long as we are tied to lump sum

[2] [1951] A.C. 601.

[Page 237]

awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

I proceed now to a brief recital of the injuries sustained by the appellant James Andrews in the present case. He suffered a fracture with dislocation of the cervical spine between the fifth and sixth cervical vertebrae, causing functional transection of the spinal cord, but leaving some continuity; compound fracture of the left tibia and left humerus; fracture of the left patella. The left radial nerve was damaged. The lesion of the spinal cord left Andrews with paralysis involving most of the upper limbs, spine and lower limbs. He has lost the use of his legs, his trunk, essentially his left arm and most of his right arm. To add to the misery he does not have normal bladder, bowel and sex functions. He suffers from spasticity in both upper and lower limbs. He has difficulty turning in bed and must be repositioned every two hours. He needs regular physiotherapy and should have someone in close association with him at all times, such as a trained male orderly. The only functioning muscles of respiration are those of the diaphragm and shoulders. There is much more in the evidence but it need not be recited. Andrews is severely, if not totally disabled. Dr. Weir, a specialist in neurosurgery, said of Andrews' condition that "there is no hope of functional improvement." For the rest of his life he will be dependent on others for dressing, personal hygiene, feeding and, indeed, for his very survival. But, of utmost importance, he is not a vegetable or a piece of cordwood. He is a man of above average intelligence and his mind is unimpaired. He can see, hear and speak as before. He has partial use of his right arm and

[Page 238]

hand. With the aid of a wheelchair he is mobile. With a specially-designed van he can go out in the evening to visit friends, or to the movies, or to a pub. He is taking driving lessons and proving to be an apt pupil. He wants to live as other human beings live. Since May 31, 1974, he has resided in his own apartment with private attendant care. The medical long-term care required is not at a sophisticated level but rather at a practical care level.

Andrews was twenty-one years of age and unmarried on the date of the accident. On that date he was an apprentice carman employed by the Canadian National Railways in the City of Edmonton.

I turn now to consider assessment of the damages to which Andrews is entitled.

Pecuniary Loss

(a) Future Care

(i) Standard of Care: While there are several subsidiary issues to be decided in this case, there is one paramount issue: in a case of total or near-total disability should the future care of the victim be in an institutional or a home care environment? The trial judge chose home care. The Appellate Division agreed that home care would be better but denied it to him. Chief Justice McGillivray who delivered the judgment of the Court on this issue said: "All the evidence called supports the proposition that psychologically and emotionally Andrews would be better in a home of his own, where he would be lord of the manor, as it were." Some evidence even indicated the medical superiority of a home environment.

The trial judge found that it would take $4,135 per month to provide care for Andrews in a home environment. The Appellate Division considered that this standard of care was unreasonably and unrealistically high. Without giving any reason for selecting the particular figure chosen, the Appellate Division substituted $1,000 per month. Obviously, here is the heart of the controversy. On

[Page 239]

other matters there was substantial agreement between the lower Courts.

In my opinion, the Court of Appeal erred in law in the approach it took. After the statement quoted above that Andrews would be better psychologically and emotionally in a home of his own, Chief Justice McGillivray referred to some of the evidence supporting that proposition. He quoted the following passage from the evidence of Dr. Weir:

> Well, J think [sic] that the greatest problem they have and the greatest burden of their affliction is the fact that they are all depressed because not only have they lost the potential for many normal and enjoyable human activities. In fact up until the present they pretty well have been converted into lifelong inhabitants of a hospital institution and an institution is an institution, it is virtually a life sentence and has been to this date. I would say that if you really, you know, if you wanted to give him the optimal potential it would be in a home environment in which he had some, in which he had the control of it to the same extent that the rest of us have control over our own homes and dwelling places. I don't really think that any hospital or medical institution has the potential to give someone that same feeling that they are in fact the lords and masters of their own castle.

The Chief Justice noted that Andrews had said he would not live in an institution and the following excerpts from the evidence were quoted:

> Q. Tell us, Jim, would you be prepared to live in an auxiliary hospital?
>
> A. Never.
>
> Q. Would you elaborate on that?
>
> A. Well there is just no way that I would go into an auxiliary hospital that is—I don't know, I think that is one step into a grave, that is all it is, too many old

> folks that have nothing to do but reminisce, you know, I don't know, but just from what I have heard of auxiliary hospitals.
>
> Q. Well how about other disabled people, do you have any difficulty getting along with them, would you be prepared to live with them, say if they were even younger?
>
> A. My age?
>
> Q. Yes.
>
> A. With my same disability?
>
> Q. Yes, if you were in some place with people that have disabled problems?
>
> A. No, because it is the same thing, people get into a state of depression and they throw it on the group,

[Page 240]

> like even now in the hospital like the way it is now there is a group of younger people and, you know, even friction can be created amongst us because of one person's bad day kind of thing, and I wouldn't want to live with other disabled persons, not at all.

I am hesitant to enter upon a detailed analysis of the reasons advanced by the Appellate Division for its decision, but in view of the importance of the matters raised in this litigation, not only for the appellant Andrews but for others in a similar plight, I do not think any other course is open.

Following the passage from the evidence of Andrews which I have quoted, Chief Justice McGillivray said:

> In having a home of his own, it is stated that Andrews needs at least 20 hours a day care. He has to be turned at night every two hours, he has to have constant attention, and it is on this footing that two orderlies and a housekeeper and the cost of operating a three-bedroom home are advanced as being reasonable costs. Now, while the proposition that to the extent that money can do it, a plaintiff should be put into the position he would have been in, but for the accident, this does not mean that the plaintiff does not have to be reasonable and mitigate damage.

With respect, I agree that a plaintiff must be reasonable in making a claim. I do not believe that the doctrine of mitigation of damages which might be applicable, for example, in an action for conversion of goods, has any place in a personal injury claim. In assessing damages in claims arising out of personal injuries, the ordinary common law principles apply. The basic principle was stated by. Viscount Dunedin in *Admiralty Commissioners v. S.S. Susquehanna*[3], at p. 661 (cited with approval in *West & Son Ltd. v. Shephard*[4], at p. 345) in these words:

[3] [1926] A.C. 655.

[4] [1964] A.C. 326.

> ... the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act .. .

The principle was phrased differently by Lord Dunedin in the earlier case of *Admiralty Commissioners*

[Page 241]

v. S.S. Valeria[5]*,* at p. 248, but to the same effect:

> … in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do, the loss which he has suffered as the natural result of the wrong done to him.

The principle that compensation should be full for pecuniary loss is well established. See *McGregor on Damages,* 13 ed., at p. 738:

> The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law.

To the same effect, Kemp & Kemp, *Quantum of Damages, vol.* 1, 3rd ed., at p. 4: "The person suffering the damage is entitled to full compensation for the financial loss suffered." This broad principle was propounded by Lord Blackburn at an early date in *Livingstone v. Rawyards Coal Company*[6]*,* at p. 39, in these words:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum is* not possible. Money is a barren substitute for health and personal happiness, but to the exent [sic] within reason that money can be used to sustain or improve the mental or physical health of the injured person it

[Page 242]

may properly form part of a claim.

Contrary to the view expressed in the Appellate Division of Alberta, there is no duty to mitigate, in the sense of being forced to accept less than real loss. There

[5] [1922] 2 A.C. 242.

[6] (1880), 5 App. Cas. 25.

is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him.

The reasons for judgment of the Appellate Division embodied three observations which are worthy of brief comment. The first: "It is the choice of the Respondent to live in a home of his own, and from the point of view of advancing a claim for damages, it is a most salutary choice, because it is vastly the most expensive." I am not entirely certain as to what is meant by this observation. If the import is that the appellant claimed a home life for the sole purpose of inflating his damage claim, then I think the implication is both unfair and unsupported by evidence. There is no doubt upon the medical and other evidence that a home environment would be salutary to the health of the appellant and productive of good effects. It cannot be unreasonable for a person to want to live in a home of his own.

The next observation:

> Secondly, it should be observed that in many cases, particularly in Alberta, where damages have been awarded, the persons injured were going to live with their families. Here, the evidence (in spite of the fact that the Respondent's mother advanced a claim for $237.00 which represented a towing charge for the motor cycle and parking, taxis and bus fare expended on visits to her son in the Hospital for approximately a

[Page 243]

> nine-month period prior to the issue of the Statement of Claim) is that the Respondent and his mother were not close before the accident, and matters proceeded on the footing that the mother's natural love and affection should have no part in Andrews' future. Again, this situation is the most expensive from the point of view of the Respondent.

The evidence showed that the mother of the appellant James Andrews was living alone, in a second-floor apartment and that relations between Andrews and his mother were strained at times. This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis. The second observation is irrelevant.

The third observation was in these words:

> Thirdly, it should be observed that the learned trial judge has referred with approval to the English authorities which held that full compensation for pecuniary loss must be given. It does not, however, follow that every conceivable expense which a plaintiff may conjure up is a pecuniary loss.

> On the evidence, then, should this Court consider that Andrews should live in a home of his own for the next 45 years at the expense of the Appellant?

I agree that a plaintiff cannot "conjure up" "every conceivable expense." I do not think that a request for home care falls under that rubric.

Each of the three observations seems to look at the matter solely from the point of view of the respondents and the expense to them. An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised

[Page 244]

against him are legitimate and justifiable.

The Appellate Division relied upon *Cunningham v. Harrison*[7]. In that case, as a result of an accident, the plaintiff was permanently paralyzed in his body and all four limbs. The trial judge found that the plaintiff was a self-opinionated person who should, if possible, live in some dwelling of his own where he would be looked after by a housekeeper and the persons who did the nursing. The Court of Appeal held that the plaintiff's entitlement to reasonable expenses for nursing and accommodation appropriate to a normal person should not be increased by reason of his exceptional personality. The Court of Appeal in reducing the award from £72,616 to £59,316 took into account three factors: (i) the difficulty of obtaining a housekeeper and nurses; (ii) that ground floor flats specially designed for handicapped persons were being built in the Borough; (iii) that the plaintiff might accept the aid of statutory and voluntary organizations at much less cost. None of these factors is significant in the present case. Although it reduced the award, the Court nevertheless affirmed that the award included provision for a housekeeper and nursing services and also for extra accommodation. The case does not stand for the proposition that though home care is better, it will not be provided because the cost is excessive. In the present case, the Appellate Division asked: "If Andrews does have a home of his own, however, should he not so locate that orderly service from existing hospitals could be available to him at night and in the daytime for his hygienic and getting-up periods? Is it to be assumed that in a province such as Alberta, orderly services could not be given outside the four walls of an institution if the subject of the service is a nearby resident?" The respondents did not raise the possibility about which the Court speculated. There was no evidence as to the feasibility of such a proposal, no evidence as to the availability or cost of outpatient care.

[Page 245]

With respect to Andrews' disinclination to live in an institution, the Court commented: "He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reasons, and that he wished to live in

[7] [1973] 3 All E.R. 463.

Switzerland or the Bahamas." Andrews is not asking for a life in Europe or in the Carribean. He asks that he be permitted to continue to live in Alberta and to see his old friends, but in his own home or apartment, not in an institution.

The Court then expressed the view that the standard accepted by the trial judge was the equivalent of supplying a private hospital. The phrase "private hospital" is both pejorative and misleading. It suggests an extravagant standard of care. The standard sought by the appellant is simply practical nursing in the home. The amount Andrews is seeking is, without question, very substantial, but essentially it means providing two orderlies and a housekeeper. The amount is large because the victim is young and because life is long. He has forty-five years ahead. That is a long time.

In reducing the monthly amount to $1,000, the Appellate Division purported to apply a "final test" which was expressed in terms of the expenses that reasonably-minded people would incur, assuming sufficient means to bear such expense. It seems to me difficult to conceive of any reasonably-minded person of ample means who would not be ready to incur the expense of home care, rather than institutional care, for himself or for someone in the condition of Andrews for whom he was responsible. No other conclusion is open upon the evidence adduced in this case. If the test enunciated by the Appellate Division is simply a plea for moderation then, of course, no one would question it. If the test was intended to suggest that reasonably-minded people would refuse to bear the expense of home care, there is simply no evidence to support that conclusion.

The Appellate Division, seeking to give some meaning to the test, said that it should be open to consider "standards of society as a whole as they

[Page 246]

presently exist." As instances of such standards the Court selected the daily allowances provided under *The Workmen's Compensation Act,* 1973 (Alta.), c. *87, s.* 56, and the federal *Pension Act,* R.S.C. 1970, *c. P-7, s. 28.* The standard of care expected in our society in physical injury cases is an elusive concept. What a legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. The standard to be applied to Andrews is not merely "provision", but "compensation": *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment, or in the case of an immobile quadriplegic, the results might well be different; but where the victim is mobile and still in full control of his mental facilities, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.

Other points raised by the Appellate Division in support of its reversal of the trial judge, may be briefly noted: (i) "It seems to me probable that there will be, at Government expense, people employed to look after quadriplegics. In the United States, there are now a few institutions which have special apartments as part of the hospital setting, where patients can receive attention and, at the same time,

have privacy." There is no evidence that the Government of Alberta at present has any plans to provide special care or institutions for quadriplegics. Any such possibility is speculation. (ii) "Will the Respondent, in fact, operate a home of his own?" The Court expressed the fear that Andrews would take the award, then go into an auxiliary hospital and have the public pay. It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of

[Page 247]

compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies. The preference of our law to date has been to leave this flexibility in the plaintiffs hands: see Fleming, "Damages: Capital or Rent?" (1969), 19 U. of Toronto L.J. 295. Save for infants and the mentally incompetent, the courts have no power to control the expenditure of the award. There is nothing to show that the dangers the Appellate Division envisaged have any basis in fact.

In its conclusion, the Appellate Division held that the damages awarded by the trial judge were "unreasonably and unrealistically high" and an award which would result in the appellant receiving approximately $1,000 a month for cost of care would be entirely adequate and would constitute a generous award. The Appellate Division further reduced the award by 30 per cent for potential contingencies. Why $1,000? The main issue at trial was the choice between home care and institutional care. There is no question but that Andrews could be taken care of in an auxiliary hospital, but both Courts below concluded that home care was the appropriate standard. The trial judge made an award reflecting the cost of home care. The Appellate Division made an award related to neither home care nor institutional care. The effect is to compel a youthful quadriplegic to live the rest of his life in an auxiliary hospital. In my opinion, the Appellate Division failed to show that the trial judge applied any wrong principle of law or that the overall amount awarded by him was a wholly erroneous estimate of the damage. With great respect, the irrelevant considerations which the Appellate Division took into account were errors in law.

Is it reasonable for Andrews to ask for $4,135 per month for home care? Part of the difficulty of this case is that twenty-four hour orderly care was not directly challenged. Counsel never really engaged in consideration of whether, assuming

[Page 248]

home care, such care could be provided at lesser expense. Counsel wants the Court, rather, to choose between home care and auxiliary hospital care. There are unanimous findings below that home care is better. Although home care is expensive, auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court is offered no middle ground.

The basic argument, indeed the only argument, against home care is that the social cost is too high. In these days the cost is distributed through society through insurance premiums. In this respect, I would adopt what was said by Salmon L.J. in *Fletcher v. Autocar & Transporters, Ltd.*[8], at p. 750, where he stated:

> Today, however, virtually all defendants in accident cases are insured. This certainly does not mean compensation should be extravagant, but there is no reason why it should not be realistic... . It might result in some moderate increase in premium rates which none would relish, but of which no one in my view, could justly complain. It would be monstrous to keep down premiums by depressing damages below their proper level, i.e., a level which ordinary men would regard as fair-unprejudiced by its impact on their own pockets.

I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly in a case like the present where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss. Greater weight might be given to this consideration where the choice with respect to future care is not so stark as between home care and an auxiliary hospital. Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable.

[Page 249]

(ii) Life expectancy: At trial, figures were introduced which showed that the life expectancy of 23-year-old persons in general is 50 years. As Chief Justice McGillivray said in the Appellate Division, it would be more useful to use statistics on the expectation of life of quadriplegics. A statistical average is helpful only if the appropriate group is used. At trial, Dr. Weir and Dr. Gingras testified that possibly five years less than normal would be a reasonable expectation of life for a quadriplegic. The Appellate Division accepted this figure. On the evidence I am willing to accept it.

(iii) Contingencies of Life: The trial judge did, however, allow a 20 per cent discount for "contingencies and hazards of life." The Appellate Division allowed a further 10 per cent discount. It characterized the trial judge's discount as being for "life expectancy" or "duration of life", and said that this ignored the contingency of "duration of expense": *i.e.* that despite any wishes to the contrary, Andrews in the years to come may be obliged to spend a great deal of time in hospital for medical reasons or because of the difficulty of obtaining help. With respect, the Appellate Division appears to have misunderstood what the trial judge did. The figure of 20 per cent as a discount for contingencies was arrived at first under the heading of Prospective Loss of Earnings and then simply transferred to the calculation of Costs of Future Care. It was not an allowance for a decreased life expectancy, for this had already been taken into account by reducing the normal 50-year

[8] [1968] 1 All E.R. 726.

expectancy to 45 years. The "contingencies and hazards of life" in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve a cumulative result. Thus, so far as the action taken by the Appellate Division is concerned, in my opinion, it was an error to increase by an extra 10 per cent the contingency allowance of the trial judge.

This whole question of contingencies is fraught with difficulty, for it is in large measure pure speculation. It is a small element of the illogical

[Page 250]

practice of awarding lump sum payments for expenses and losses projected to continue over long periods of time. To vary an award by the value of the chance that certain contingencies may occur is to assure either over-compensation or under-compensation, depending on whether or not the event occurs. In light of the considerations I have mentioned, I think it would be reasonable to allow a discount for contingencies in the amount of 20 per cent, in accordance with the decision of the trial judge.

(iv) Duplication with compensation for loss of future earnings

It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: *i.e.* the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: *i.e.* to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.

[Page 251]

The costs of necessaries when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as

attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings. For the acceptability of this method of proceeding see the judgment of this Court in *The Queen v. Jennings*[9], at pp. 540-1, and also *Bisson v. Corporation of Powell River*[10], at pp. 720-1, *Jennings v. Cronsberry*[11], at p. 418,

(v) Cost of special equipment: In addition to his anticipated monthly expenses, Andrews requires an initial capital amount for special equipment. Both Courts below held that $14,200 was an appropriate figure for the cost of this equipment. In my opinion, this assessment is correct in principle, and I would therefore accept it.

(b) Prospective loss of earnings

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings, supra. A* capital asset has been lost: what was its value?

(i) Level of earnings: The trial judge fixed the projected level of earnings of Andrews at $830 per month, which would have been his earnings on January 1, 1973. The Appellate Division raised this to $1,200 per month, a figure between his present salary and the maximum for his type of work of $1,750 per month. Without doubt the value of Andrews' earning capacity over his working life is higher than his earnings at the time of

[Page 252]

the accident. Although I am inclined to view even that figure as somewhat conservative, I would affirm the holding of the Appellate Division that $1,200 per month represents a reasonable estimate of Andrews' future average level of earnings.

(ii) Length of working life: Counsel for the appellants objected to the use of 55 rather than 65 as the projected retirement age for Andrews. It is agreed that he could retire on full pension at 55 if he stayed with his present employer, Canadian National Railways. I think it is reasonable to assume that he would, in fact, retire as soon as it was open for him to do so on full pension.

One must then turn to the mortality tables to determine the working life expectancy for the appellant over the period between the ages of 23 and 55. The controversial question immediately arises whether the capitalization of future earning capacity should be based on the expected working life span prior to the

[9] [1966] S.C.R. 532.

[10] (1967), 62 W.W.R. 707.

[11] (1965), 50 D.L.R. (2d) 385.

accident, or the shortened life expectancy. Does one give credit for the "lost years"? When viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income, the answer is apparent: it must be the loss of that capacity which existed prior to the accident. This is the figure which best fulfils the principle of compensating the plaintiff for what he has lost: see *Mayne and McGregor on Damages,* 12 ed., at p. 659; Kemp & Kemp, *Quantum of Damages,* 3rd ed., vol. 1, Supplement, c. 3, p. 28; *Skelton v. Collins*[12]*.* In the instant case, the trial judge refused to follow the *Olivier v. Ashman*[13] approach, the manifest injustice of which is demonstrated in the much criticized case of *McCann v. Sheppard*[14]*,* and in this I think the judge was right. I would accept his decision that Andrews had a working life expectancy of 30.81 years.

[Page 253]

(iii) Contingencies: It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression. In the *Bisson* case, which also concerned a young quadriplegic, an allowance of 20 per cent was made. There is much support for the view that such a discount for contingencies should be made: see *e.g. Warren v. King*[15]*; McKay v. Board of Govan School Unit No. 29 of Saskatchewan*[16]*.* There are, however, a number of qualifications which should be made. First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse, as the above list would appear to indicate. As is said in *Bresatz v. Przibilla*[17]*,* in the Australian High Court, at p. 544: "Why count the possible buffets and ignore the rewards of fortune?" Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small: see Stevens, "Actuarial Assessment of Damages: The Thalidomide Case" (1972), 35 M.L.R. 140, at p. 150.

In reducing Andrews' award by 20 per cent Mr. Justice Kirby gives no reasons. The Appellate Division also applied a 20 per cent reduction. It seems to me that actuarial evidence could be of great help here. Contingencies are susceptible to more exact calculation than is usually apparent in the cases; see Traversy: "Actuaries and the Courts", 29 Aust. L.J. 557. In my view, some degree of specificity, supported by evidence, ought to be forthcoming at trial.

[12] (1966), 39 A.L.J.R. 480.
[13] [1962] 2 Q.B. 210.
[14] [1973] 1 W.L.R. 540.
[15] [1963] 3 All E.R. 521.
[16] [1968] S.C.R. 589.
[17] (1962), 108 C.L.R. 541.

[Page 254]

The figure used to take account of contingencies is obviously an arbitrary one. The figure of 20 per cent which was used in the lower Courts (and in many other cases) although not entirely satisfactory, should, I think, be accepted.

(iv) Duplication of the Cost of Future Basic Maintenance

As discussed, since basic needs such as food, shelter, and clothing have been included in the cost of future care, a deduction must be made from the award for prospective earnings to avoid duplication. The injured person would have incurred expenses of this nature even if he had not suffered the injury. At trial evidence was given that the cost of basics for a person in the position of Andrews prior to the accident would be approximately 53 per cent of income. I would accept this figure and reduce his anticipated future monthly earnings accordingly to a figure of $564.

(c) Considerations relevant to both heads of pecuniary loss

(i) Capitalization rate: allowance for inflation and the rate of return on investments

What rate of return should the Court assume the appellant will be able to obtain on his investment of the award? How should the Court recognize future inflation? Together these considerations will determine the discount rate to use in actuarially calculating the lump sum award.

The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. This approach is widely referred to as the Lord Diplock approach, as he lent it his support in *Mallett v. McMonagle*[18]. Although this method of proceeding has found favour in several jurisdictions in this country and elsewhere, it has an air of unreality. Stable, non-inflationary economic conditions do not exist at present, nor did they exist in the recent past, nor are they to be expected in the foreseeable future.

[Page 255]

In my opinion, it would be better to proceed from what known factors are available rather than to ignore economic reality. Analytically, the alternate approach to assuming a stable economy is to use existing interest rates and then make an allowance for the long-term expected rate of inflation. At trial the expert actuary, Mr. Grindley, testified as follows:

> Yes, as J mentioned yesterday, I was comfortable with that assumption 5% interest because it produces the same result as for example 8% interest and 3% inflation.
>
> …
>
> I would be happy to use either of the following two packages of assumption, either an 8% interest rate combined with provision for amounts which would

[18] [1970] A.C. 166.

> increase 3% in every year in the future or a 5% interest rate and level amount, level amounts, that is no allowance for inflation.

One thing is abundantly clear: present interest rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff. It is not, however, the level of inflation in the short term for which allowance must be made, but that predicted over the long term. It is this expectation which is built into present interest rates for long-term investments. It is also this level of inflation which may at present be predicted to operate over the lifetime of the plaintiff to increase the cost of care for him at the level accepted by the Court, and to erode the value of the sum provided for lost earning capacity.

In *Bisson v. Corporation of Powell River, supra,* the British Columbia Court of Appeal held that there had been a misdirection, or non-direction amounting to misdirection, in the trial judge's charge to the jury with respect to quantum of damages for the plaintiff's personal injuries. Bull J.A. listed several instances of misdirection, including failure to instruct the jury that although they might give some thought to possibilities of future inflation, it was wrong to include any built-in inflation factors in the actuarial calculations with respect to the sums for future care and loss of prospective earnings. An appeal to this Court was

[Page 256]

dismissed[19], Cartwright C.J.C. giving short oral reasons as follows:

> We are all of opinion that the Court of Appeal (1968) 62 W.W.R. 707, were right in holding that they were justified in setting aside the assessment of damages made by the jury. In such circumstances they had jurisdiction under R. 36 of the British Columbia Court of Appeal Rules to reduce the damages instead of ordering a new trial. We find ourselves unable to say that in fixing the amount of damages the Court of Appeal erred in principle or that the figure at which they arrived was such as to represent a wholly erroneous estimate.

In my opinion, this cannot be taken as an express endorsement by this Court of the method of calculation expressed by Bull J.A. When discussing this issue, Bull J.A. stated that the correct procedure was to use a capitalization rate of five or six per cent, since there was evidence that six per cent was a normal and available rate of return on first-class securities, and not to build in any inflation rate at all. With respect, I cannot under-stand how thought is to be given to the possibility of inflation in calculating the award if no inflation factor is to be built into the calculation of the award. In his judgment, Bull J.A. further states, p. 723:

> If inflationary trends appear, it may well be that the use to which the money is put, whatever it may be, will itself increase its own amount as part of an inflationary process. It is well known that interest rates, or the "wages" of money, rise in times of inflation.

[19] [1968] S.C.R. v., 64 W.W.R. 768.

One might offer two comments: First, the words: "If inflationary trends appear ..." reflect economic conditions in 1967 when serious inflation was only on the horizon. During the past ten years, inflation has become one of the most serious Canadian problems. This Court[20] recognized the *Anti-Inflation Act,* 1974-75-76 (Can.), c. 75, as a measure necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole. Second, the passage immediately

[Page 257]

above quoted accepts the proposition that interest rates or the "wages" of money rise in times of inflation. This rise is attributable, at least in part, to the erosion of the dollar. Accepting the highly unlikely proposition that the appellant will be able to invest for the balance of his lifetime at current high rates the capital sum awarded to him, this investment will provide him with a constant number of dollars each year, but the services which those dollars will provide will become more costly by the year. If current high interest rates abate with a reduction of inflationary pressures and return, say, to the 1967 rates of five or six per cent, it is obvious that reinvestment from time to time in later years of the equities or fixed income securities comprising the capital sum will be at rates which fall far short of those at present available. Then, even the number of dollars the appellant gets will be less than *even the present cost of care.* With respect, the economic analysis in *Bisson* proceeds on the erroneous basis that the cost of services decreases as the rate of inflation decreases. On the contrary, a decrease in the rate of inflation merely results in a lower rate of increase in the cost of these services.

In *Schroth v. Innes, Perry and Shiels*[21]*,* Bull J.A., delivering the judgment of the Court, repeated his views on this matter. Again, the relevance of inflation was recognized in principle but was excluded from the calculation of the award. At p. 236, Bull J.A. states, "... it is today's money to which the respondent Shiels is entitled in damages." With respect, we are not concerned only with today's money. The real concern is in determining what that money will provide in the way of services over the next 45 years.

Bull J.A. voiced his disapproval of any recognition for inflation, whether by building in an inflation factor while using current rates of return, or by using a hypothetical "stable state." The learned judge attempted to refute the conclusion that inflation should be included. He said, p. 239:

[Page 258]

> With the greatest deference, I do not agree with the basic premises of those conclusions. To me what was really said was that current interest rates, much higher than those prevailing in the old days of the so-called "stable economy", exist only because of an existing inflated economy and of current

[20] [1976] 2 S.C.R. 373.

[21] [1976] 4 W.W.R. 225.

> fear of future inflation; and hence should not be used unless future inflation estimates or factors are fed into the computer also. That may well be so in England but I am not prepared to accede to that proposition with respect to this country. I think it general knowledge that interest rates in Canada for many years have reached higher levels because of the desire and need to attract new capital from abroad to create and service our expanding industrial and commercial economy. But I content myself with saying that I am satisfied that the current high rates of interest (which have been with us for years with only modest variations up and down) reflect today the present value of already inflated money in exactly the same way as do current high wages and prices generally. They live together, and the use of a high level of wages as one side of the coin and a low level of interest for the other is, in my respectful view, wrong.

In my opinion, this analysis is manifestly in error. Fear of future inflation is not confined to England. It is such as to have constituted a national emergency in this country. The current high rates of interest do not merely reflect the present value of already inflated money. They reflect the present expectation of *future* inflation. This is not the only factor which determines the existing interest rate, but it is without doubt one of the major factors. In my opinion, recognition of this fact must be made in the calculations of a damage award.

The approach which I would adopt, therefore, is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation. Once this approach is adopted, the result, in my opinion, is different from the five per cent discount figure accepted by the trial judge. While there was much debate at trial over a difference of a half to one percentage point, I think it is clear from the evidence that high quality long-term investments were available at time of trial at rates of return in excess of ten per cent. On the other hand, evidence was specifically introduced that the former' head of the Economic Council of Canada, Dr. Deutsch, had recently forecast a

[Page 259]

rate of inflation of three and one-half per cent over the long-term future. These figures must all be viewed flexibly. In my opinion, they indicate that the appropriate discount rate is approximately seven per cent. I would adopt that figure. It appears to me to be the correct result of the approach I have adopted: *i.e.* having regard to present investment market conditions and making an appropriate allowance for future inflation. I would, accordingly, vary to seven per cent the discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case. The result in future cases will depend upon the evidence adduced in those cases.

(ii) Allowance for tax: In *The Queen v. Jennings, supra,* this Court held that an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results [sic] from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award

will be reduced by payment of taxes on the interest, dividends, or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

In contrast with the situation in personal injury cases, awards under the *Fatal Accident Acts* should reflect tax considerations, since they are to compensate dependants for the loss of support payments made by the deceased. These support payments could only come out of take-home pay, and the payments from the award will only be received net of taxes: see the contemporaneous decision of this Court in *Keizer v. Hanna and Buch.*

The impact of taxation upon the income from the capital sum for future care is mitigated by the

[Page 260]

existence of s. 110(1)(c)(iv.1) of the *Income Tax Act,* in respect of the deduction of medical expenses, which provides that medical expenses in excess of three per cent of the taxpayer's income includes "remuneration for one full-time attendant upon an individual who was a taxpayer ... in a self-contained domestic establishment in which the cared for person lived." This exemption, I should think, permits a deduction for the payment of one full-time attendant for seven days a week, regardless of whether this attendance is provided by several attendants working over twenty-four hour periods, or one person working twenty-four hour shifts seven days a week.

The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds. What concerns us here is whether some allowance must be made to adjust the amount assessed for future care in light of the reduction from taxation. No such allowance was made by the Courts below. Elaborate calculations were provided by the appellant to give an illusion of accuracy to this aspect of the wholly speculative projection of future costs. Because of the provision made in the *Income Tax Act* and because of the position taken in the Alberta Courts, I would make no allowance for that item. The Legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.

One subsidiary point should be affirmed with respect to the determination of the present value of the cost of future care. The calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him. This point was accepted by the lower Courts and not challenged by the parties.

Non-Pecuniary Losses

Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is

[Page 261]

entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

It is also the area where there is the clearest justification for moderation. As one English commentator has suggested, there are three theoretical approaches to the problem of non-pecuniary loss (Ogus, 35 M.L.R.I). The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot," or tariff system, which prevailed in the days of King Alfred, when a thumb was worth thirty shillings. Our law has long since thought such a solution unsubtle. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach,

[Page 262]

accepts the personal premise of the second, but rather than attempting to set a value on lost happiness, it attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way. As Windeyer J. said in *Skelton v. Collins, supra,* at p. 495:

> ... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction.... But the money is not then a recompense for a loss of

> something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional. As Denning L.J. said

[Page 263]

in *Ward v. James*[22]*,* there is a great need in this area for assessability, uniformity and predictability. In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional. In *Warren v. King, supra,* at p. 528, the following dictum of Harman L.J. appears, which I would adopt, in respect of the assessment of non-pecuniary loss for a living plaintiff:

> It seems to me that the first element in assessing such compensation is not to add up items as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances.

Cases like the present enable the Court to establish a rough upper parameter on these awards. It is difficult to conceive of a person of his age losing more than Andrews has lost. Of course, the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions.

The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this

[22] [1965] 1 All E.R. 563.

[Page 264]

loss, but variation should not be made merely for the province in which he happens to live.

There has been a significant increase in the size of awards under this head in recent years. As Moir J.A., of the Appellate Division of the Alberta Supreme Court, has warned: "To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada." *(Hamel v. Prather*[23]*,* at p. 748.) In my opinion, this time has come.

It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, [sic] favour a composite award for all non-pecuniary losses.

There is an extensive review of authorities in the Court of Appeal judgment in this case (reported [1976] 2 W.W.R. 385) as well as in the *Thornton* (reported [1976] 5 W.W.R. 240) and *Teno* (reported (1976), 67 D.L.R. (3d.) 9) cases to which I have referred. I need not review these past authorities. What is important is the general picture. It is clear that until very recently damages for non-pecuniary losses, even from very serious injuries such as quadriplegia, were substantially below $100,000. Recently, though, the figures have increased markedly. In *Jackson v. Millar*[24]*,* this Court affirmed a figure of $150,000 for non-pecuniary loss in an Ontario case of a paraplegic. However, this was done essentially on the principle of non-interference with awards allowed by provincial Courts of Appeal. The need for a general assessment with respect to damages for non-pecuniary

[Page 265]

loss, which is now apparent, was not as evident at that time. Even in Ontario, prior to these recent cases, general damages allocable for non-pecuniary loss, such as pain and suffering and loss of amenities, were well below $100,000.

In the present case, $150,000 was awarded at trial, but this amount was reduced to $100,000 by the Appellate Division. In *Thornton* and *Teno* $200,000 was awarded in each case, unchanged in the provincial Courts of Appeal.

I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of $100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

[23] [1976] 2 W.W.R. 742.

[24] [1976] 1 S.C.R. 225.

Total Award

This is largely a matter of arithmetic. Of course, in addition, it is customary for the Court to make an overall assessment of the total sum. This, however, seems to me to be a hangover from the days of global sums for all general damages. It is more appropriate to make an overall assessment of the total under each head of future care, prospective earnings, and non-pecuniary loss, in each case in light of general considerations such as the awards of other courts in similar cases and an assessment of the reasonableness of the award.

In the result I would assess general damages for the appellant Andrews as follows:

1. Pecuniary Loss	
(a) Cost of future care	
—special equipment	$14,200
—amount for monthly payments (monthly amount $4,135: life expectancy 45 years; contingencies 20%; capitalization rate 7%	557,232

[Page 266]

(b) Prospective loss of earnings	
(monthly amount $564; work span 30.81 years; contingencies 20%; capitalization rate 7%)	$ 69,981
2. Non-pecuniary Loss	
—compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life	100,000
Total General Damages	$741,413
Rounded off at	$740,000

To arrive at the total damage award, the special damages of $77,344 must be added to give a final figure of $817,344.

The appellant Andrews will have judgment for seventy-five per cent of that amount, that is, $613,008.

The appellants should have their costs in this Court and in the trial court. The respondents should have their costs in the Court of Appeal as they achieved substantial success in that Court in respect of the finding of contributory negligence on the part of Andrews.

Judgment accordingly.

Solicitors for the plaintiffs, appellants.. Klingle, Cummings, Andrews & Wilton, Edmonton.

Solicitors for the defendants, respondents: Newson, Hyde, Edmonton.

CA016708
Vancouver Registry

Court of Appeal for British Columbia

1994 CanLII 1435 (BC CA)

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Cumming — September 12, 1994
The Honourable Mr. Justice Hollinrake
The Honourable Mr. Justice Goldie — Vancouver, B.C.

BETWEEN:

KARTAR BASRA

PLAINTIFF
(APPELLANT)

AND:

JASWANT SINGH GILL

DEFENDANT
(RESPONDENT)

A.S. Berna — appearing for the Appellant
G.D. Hoffman — appearing for the Respondent

1994 CanLII 1435 (BC CA)

1 **CUMMING, J.A.:** This is an appeal from the judgment of Mr. Justice Houghton, sitting with a jury, pronounced on January 15, 1993, dismissing the appellant's action in negligence for injuries sustained in a motor vehicle accident.

2 The appellant and the respondent were friends and co-workers who shared a car-pool arrangement to travel from their homes in Kamloops, British Columbia to their place of employment in Savona, British Columbia.

3 On the morning of March 10, 1989, the respondent was driving a vehicle in which the appellant was a passenger, along with other co-workers. They were travelling from Kamloops, westbound to Savona, to go to work.

4 As the vehicle passed through an area known as Cherry Creek it went out of control and ran off the roadway into a snowbank in the ditch.

5 At about the same time as the vehicle went out of control some of its occupants saw some people at a service station ahead of them waving their hands. The timing of when these people were first noticed and when the vehicle went out of control differed somewhat between the witnesses. The respondent's evidence was to

the effect that his vehicle was already sliding, out of control, when he saw them.

6 At the time the respondent's vehicle went out of control he was travelling between 70 and 75 kilometres per hour in a posted 90 kilometre per hour zone.

7 After the vehicle came to a stop the occupants got out of it and, only then, discovered that the roadway was covered in black ice and was extremely slippery.

8 In his factum the appellant submits that (1) the learned trial judge erred in his directions to the jury and, (2) the jury erred in finding no negligence on the part of the respondent and accepting the defence of inevitable accident.

9 The statement of defence raised two defences to the plaintiff's claim with respect to liability. The first defence was that the defendant was not negligent, and the second defence was that of "inevitable accident".

10 The learned trial judge dealt with both defences in his charge to the jury in the manner set out in Bouck and Smith, *CIVJI.* He said:

> In this action, the plaintiff's claim comes under the heading of negligence. It is a word that is hard to define for all

1994 CanLII 1435 (BC CA)

situations. Generally speaking, a person is negligent when he or she shows a lack of care towards another person in circumstances where he or she owes that person a legal duty to take care and avoid doing that person harm.

The standard of care is that of a reasonable and careful person in the community. Before an injured party, such as the plaintiff here, can recover damages for an act of negligence, the plaintiff must also prove that the damages he or she suffered resulted from the negligent conduct of the defendant.

There are three elements a plaintiff must prove in a negligence action. They are:

(1) That there was a duty of care owed to the plaintiff by the defendant. That is a question of law for me to decide.
(2) That there was a breach of that duty of care in that the defendant failed to exercise the standard of care required of a reasonable and careful person in the circumstances. That is a question of fact for you to decide.
(3) That the plaintiff suffered damages as the direct result of the defendant's negligence. This is also a question of fact for you to decide.

The first element I told you about is a question of law. In other words, it is for me to decide whether the defendant did owe a duty of care to the plaintiff at the time of the accident on the 10th day of March, 1989. In these circumstances I have decided that the defendant owed a duty of care to the plaintiff at the relevant time.

However, it is for you to determine whether the defendant was negligent after you apply the tests I will now describe.

I will now discuss with you the second element dealing with the standard of care.

If the defendant failed to meet the standard of care expected in the circumstances, he was in breach of his duty of care to the plaintiff. The conduct of the defendant is not measured against perfection but rather against the conduct of a person of ordinary prudence and intelligence in the community. He is not required to exercise extraordinary caution or unusual skill or

1994 CanLII 1435 (BC CA)

foresight. You must decide what a reasonable and careful person would have done in the circumstances described in the evidence.

If the conduct of the defendant fell below that standard then, subject to what I say elsewhere, you must find the defendant liable on negligence. But if you find that the defendant met the standard of care required of a reasonable and careful person in the circumstances, you must dismiss the action.

Conduct is negligent if it creates a unreasonable risk of harm. Whether the defendant, by his conduct, created an unreasonable risk depends both on the likelihood that an accident would occur and on the seriousness of the harm that might have resulted from it.

Keep in mind that there is usually some risk in all human activity. For example, there is a risk in driving a car. But that does not mean that a person who drives is creating an unreasonable risk. Rather, it is the manner of driving that creates the risk. Where the potential injury to others is small and the likelihood that injury will occur is slight, the risk may not be unreasonable. On the other hand, for the defendant to create even a slight risk of a potentially serious injury may be negligent.

It is for you to decide whether the defendant failed to consider the harm that he might cause others by reason of his conduct.

The third element I mentioned to you is causation. For the defendant to be liable in damages to the plaintiff, it is necessary for the plaintiff to prove that the defendant's conduct caused or contributed to the plaintiff's injuries. If the conduct of the defendant was unrelated to any alleged loss of the plaintiff, the defendant is not liable for the loss.

You do not need to be satisfied that there was causation on the basis of scientific precision. Causation is essentially a practical question of fact which can best be answered by ordinary common sense.

The burden of proof is on the plaintiff. I have told you that as a matter of law the defendant owed a duty of care to the plaintiff at the relevant time. The plaintiff must satisfy you on a balance of probabilities:

1994 CanLII 1435 (BC CA)

(a) that the defendant failed to meet the standard of care required in the circumstances and
(b) that as a result of this breach of duty of care, the plaintiff suffered the damages he complains of.

If the plaintiff does not meet that burden of proof, the action must be dismissed. If he does, then you should go on to decide what amount of damages you should award him.

In this case, the defence is that the accident was an inevitable or unavoidable accident so far as the defendant is concerned because his motor vehicle suddenly, and without warning, skidded on ice on the highway. The burden of establishing that defence rests on the defendant. An inevitable accident may be described as an accident that could not have been prevented by the defendant exercising reasonable care, caution and skill.

The burden is on the defendant to satisfy you on a balance of probabilities that his car skidded on the icy highway and the resulting collision with the bank was beyond his control. In this respect the defendant must prove that he had no prior warning or indication of the icy condition and that the icy condition could not have been anticipated by the exercise of reasonable care, caution and skill.

Finally, the onus is on the defendant to satisfy you that no reasonable steps could have been taken to avoid the accident, after the skid which affected the control of the vehicle developed. In other words, assuming there was a skid on the icy road, the defendant must also show that he could not have avoided the accident with the exercise of reasonable care, skill and caution.

If the defendant fails to satisfy you as to any of these elements, or if the evidence weighs evenly both for and against the defendant, then the fails in this defence.

11 The appellant's counsel at trial made no objection to the charge to the jury on the issue of no negligence. After a brief

1994 CanLII 1435 (BC CA)

discussion, he stated that he was content with the charge to the jury on the "inevitable accident" defence.

12 In my view, the charge with respect to negligence and the defence of no negligence on the part of the defendant in this case properly set out the requirements of duty, standard of care, and breach of the standard of care by the defendant and properly defined the standard of care applicable in these circumstances. Further, the charge to the jury correctly set out the elements of the defence of inevitable accident as being:

(a) that the defendant had no prior warning or indication of the hazard; and that

(b) once the hazard had become apparent, there were no reasonable steps the defendant could have taken to avoid the accident.

13 The appellant in his factum submits that the learned trial judge should have directed the jury that the skid was evidence of carelessness, unless the respondent could show that he neither expected ice at that point nor had any reason to expect it.

14 The burden of proof was squarely placed on the respondent in this regard.

1994 CanLII 1435 (BC CA)

15 As was held by this Court in ***Rendall v. Ewert*** (1989), 38 B.C.L.R. (2d) 1 at 10, the appellant's failure to object is a powerful circumstance militating against treating the alleged defect as a ground to set aside the jury verdict.

16 In my respectful view, in all of the circumstances in this case, there was no substantial misdirection of the jury and there was no substantial wrong or miscarriage of justice and therefore no reason to set aside the jury verdict.

17 With respect to the second ground of appeal I would refer to the judgment of the Supreme Court of Canada in ***McLean v. McConnell***, [1937] S.C.R. 341, (1937] 2 D.L.R, 639 where Chief Justice Duff said, at 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

18 In my opinion, it cannot be said that the jury's verdict is perverse or against the preponderance of the evidence. Indeed, there was ample evidence upon which the jury, properly instructed as this one was, could reach the verdict it did.

I would dismiss the appeal.

1994 CanLII 1435 (BC CA)

HOLLINRAKE, J.A.: I agree with the conclusion of Mr. Justice Cumming and substantially for the reasons he has given.

1994 CanLII 1435 (BC CA)

19 The one reservation I have is whether this is a case of "inevitable accident". I say this become of the judgment of Davey, C.J.B.C. in ***Hackman v. Vecchio*** (1969) 4 D.L.R. (3d) 444 at 446-7. However, in my opinion, even if it could be said that this is not a case of "inevitable accident", I can see no prejudice whatever to the appellant in the charge to the jury on the elements of that defence. I say this because in my opinion, had the jury been charged on negligence alone the same factual issues would have necessarily have been before it as is the case of a defence of inevitable accident.

20 Assuming a charge on an issue of liability began with the trial judge telling the jury that the respondent's vehicle having left the roadway was evidence of negligence, the judge would then have had to go on to tell the jury that no inference of negligence could be drawn if the respondent demonstrated how this could have happened without negligence on his part. On these facts the judge would have had to have told the jury that if it was satisfied the respondent did not expect ice on the roadway and could not have anticipated ice by the exercise of reasonable care on his part there could be no finding of negligence. That, in essence, is just what the jury was told in this case and it found for the respondent on the facts.

21 I conclude that even if it could be said that this was not a case of "inevitable accident" and the charge should have been on negligence without reference to "inevitable accident" the verdict would necessarily have been the same. That being so, I too would dismiss the appeal.

GOLDIE, J.A.: I agree with the judgment proposed by Mr. Justice Cumming and the reasons he has stated. I also agree with the observations of Mr. Justice Hollinrake.

22 I wish to add a short comment on a submission made to us by Mr. Berna. We were pressed to conclude that the effect of the charge was to focus the jury's attention on negligence after the skid developed. Mr. Berna relies upon this part of the charge:

> Finally, the onus is on the defendant to satisfy you that no reasonable steps could have been taken to avoid the accident, after the skid which affected the control of the vehicle developed. In other words, assuming there was a skid on the icy road, the defendant must also show that he could not have avoided the accident with the exercise of reasonable care, skill and caution.

He says the jury should have been directed to look only at events before the skid developed. In my view, the portion of the charge which immediately precedes what I have read required the jury to

1994 CanLII 1435 (BC CA)

address the defendant's behaviour prior to the skid. I refer in particular to:

> In this case, the defence is that the accident was an inevitable or unavoidable accident so far as the defendant is concerned because his motor vehicle suddenly, and without warning, skidded on ice on the highway. The burden of establishing that defence rests on the defendant. An inevitable accident may be described as an accident that could not have been prevented by the defendant exercising reasonable care, caution and skill.
>
> The burden is on the defendant to satisfy you on a balance of probabilities that his car skidded on the icy highway and the resulting collision with the bank was beyond his control. In this respect the defendant must prove that, he had no prior warning or indication of the icy condition and that the icy condition could not have been anticipated by the exercise of reasonable care, caution and skill.

23 In my view, the jury faced with this instruction could only have reached the verdict it did on the ground that the defendant's conduct prior to the skid was not negligent. I am not overlooking the instruction given on the defence of the respondent that he was not negligent generally. What I wish to emphasize is that the direction given with respect to the defence of "inevitable accident" was in no way unfavourable to the appellant.

CUMMING, J.A.: The appeal is dismissed.

1994 CanLII 1435 (BC CA)

"The Honourable Mr. Justice Cumming"

"The Honourable Mr. Justice Hollinrake"

"The Honourable Mr. Justice Goldie"

1994 CanLII 1435 (BC CA)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Boyd v. Harris,***
2004 BCCA 146

Date: 20040315
Docket: CA29934

Between:

Robert William Boyd

Respondent
(Plaintiff)

And

Michael Brent Harris

Appellant
(Defendant)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Oppal

S.B. Stewart
M. Wilhelmson — Counsel for the Appellant

D.K. Hori — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
14 November 2003

Place and Date of Judgment: Vancouver, British Columbia
15 March 2004

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Oppal

2004 BCCA 146 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The appellant (defendant below) appeals from a judgment pronounced on June 21, 2002, after a ten-day trial before Mr. Justice Powers, sitting with a jury. The jury found the appellant liable for the fractured neck, permanent spinal cord injury, and other losses that the respondent suffered as a result of an automobile accident that occurred on February 4, 1996, and assessed damages of $225,000 for non-pecuniary loss, $85,000 for past loss of income, $340,000 for loss of earning capacity, and $33,500 for cost of future care. The trial judge pronounced judgment in accordance with the jury's verdict.

[2] The appellant submits that the awards for non-pecuniary loss and for loss of earning capacity are excessive and should be reduced by this Court.

[3] There is no serious dispute about the evidence. The appellant agrees that the respondent was a credible witness and that his testimony was consistent with the medical opinion evidence as to the nature and extent of his injuries. There was no significant disagreement of opinion among the medical witnesses. The respondent does not suggest that the jury must have misapprehended the evidence. He confines this appeal strictly to his allegation that the jury drew clearly wrong

2004 BCCA 146 (CanLII)

inferences as to the proper amounts of non-pecuniary damages and damages for impaired earning capacity.

[4] Before turning to the specifics of this appeal, I will make some general comments about the approach to appellate review of jury awards.

[5] Since ***DaSilva v. Dudas*** (1989), 38 B.C.L.R. (2d) 104 (C.A.) it has been settled that this Court has jurisdiction to vary a jury award of damages upward or downward: see ***Vaillancourt v. Molnar*** (2002), 8 B.C.L.R. (4th) 260, 31 M.V.R. (4th) 161, 176 B.C.A.C. 109, 290 W.A.C. 109, 2002 BCCA 685 ¶ 7 – 20. In ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.), former Chief Justice McEachern announced a comparative test, that is, this Court should not interfere with a jury award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case: for a discussion of the historical development of this test and its application, see ***Ferguson v. Lush***, 2003 BCCA 579 ¶ 32-48. More recently, in ***K.L.B. v. British Columbia*** (2003) 18 B.C.L.R. (4th) 1, 19 C.C.L.T. (3d) 66, [2003] 11 W.W.R. 203, 230 D.L.R. (4th) 513, 2003 SCC 51 ¶ 62 and in ***M.B. v. British Columbia*** (2003), 18 B.C.L.R. (4th) 60, 19 C.C.L.T. (3d) 1, [2003] 11 W.W.R. 262, 230 D.L.R. (4th) 567, 2003 SCC 53 ¶ 54, the Supreme Court of Canada reiterated

2004 BCCA 146 (CanLII)

that the amount of damages is a question of fact, which an appellate court cannot set aside absent “palpable and overriding error.” (See also the ***Negligence Act***, R.S.B.C. 1996, c. 333, s. 6.) This formulation differs from the usages that have guided courts in this province for many years (“inordinately high or low,” “unreasonable and unjust,” “wholly out of proportion”), but does not, in substance, affect the standard of review for jury awards established by ***Cory v. Marsh***: see ***Le v. Luz***, 2003 BCCA 640 ¶ 10-13. Nevertheless, ***K.L.B. v. British Columbia*** and ***M.B. v. British Columbia*** remind us of the high degree of deference to be accorded to such findings made at the trial level.

[6] The basic principles that support a deferential standard of review for factual findings made by trial judges are the restriction of the number, length, and cost of appeals; the promotion of the autonomy and integrity of the trial proceedings; and the recognition of the expertise of the trial judge and his or her advantageous position: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235 ¶ 34. These principles apply equally to civil jury trials.

[7] Civil juries make a valuable contribution to the efficiency and effectiveness of the judicial system, as the findings of the Ontario Law Reform Commission’s 1996 ***Report On***

2004 BCCA 146 (CanLII)

The Use of Jury Trials In Civil Cases demonstrate. Using actions commenced in Ontario over a period of several years, the Commission studied the relative lengths and costs of civil jury and non-jury trials. It concluded, at 77, that although the administrative cost of a jury trial is more than that of a trial by judge alone,

> ...this cost has to be balanced against the potential savings associated with the jury's apparent effect on settlements, both before and during trial. When account is taken of the tendency of the jury to induce settlements, the overall cost of the jury does not appear to be substantial.

[8] Although the Commission found no empirical evidence to prove that unpredictability of result was a clear cause of the enhanced settlement rates it discovered, it noted that "a number of lawyers and judges" interviewed in the study believed a causal connection to exist.

[9] While some argue that predictability of outcome enhances settlement prospects, I think the findings of the Commission support the contrary view. Because juries are not made aware of the range of awards that trial judges have established in previous cases, common sense and collective values must guide their deliberations. As a result, jury verdicts are unpredictable or, at least, less predictable than those of trial judges. This uncertainty of result inherent in a jury

2004 BCCA 146 (CanLII)

trial of a claim for damages, coupled with the additional costs associated with that mode of trial, must surely spur the parties to reach an accommodation short of trial. Risk, an important factor in settlement negotiations, is amplified when the trial is to be by jury; the range of settlements acceptable to the parties is thereby broadened and settlement prospects are enhanced. Appellate interference with jury awards, unless circumscribed, will tend to remove from the system this incentive to settle cases.

[10] Further, juries bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and its opinions of what would be fair, just, and reasonable in the circumstances. Mr. Justice Cory referred to the qualifications of juries to assess damages in ***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 ¶ 158 where he said:

> Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the

2004 BCCA 146 (CanLII)

> proper award for that of the jury merely because it would have arrived at a different figure.

[11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.

[12] The difficult problem is how to identify the extent of permissible deviation from the conventional range of awards. The comparative approach set out in ***Cory v. Marsh*** is fraught with subjective judgments. An attempt in ***Johns v. Thompson Horse Van Lines Ltd.*** (1984), 58 B.C.L.R. 273 (C.A.) to introduce a semi-objective approach found favour neither with the majority in that case nor, since then, with the Court. Interestingly, an attempt has been made in New York to base judicial review of jury non-pecuniary awards on empirical evidence and expert statistical opinion: see ***Geressy v. Digital Equipment Corporation***, 980 F. Supp. 640 (U.S. Dist. Ct., E.D., New York, 1997). Whether such an approach would be a desirable development in our law is debatable. However,

2004 BCCA 146 (CanLII)

absent an objective basis for measurement of deviations from normative awards, we are left with a vague, adjectival standard that carries with it a risk of arbitrariness: what is the acceptable range and what is an excessive deviation from the range in a given case are questions on which there may be reasonable differences of judicial opinion.

[13] In ***Foreman v. Foster*** (2001), 84 B.C.L.R. (3d) 184, 2001 BCCA 26, Lambert J.A., speaking for the majority, said:

> [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, *per* Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1985), 58 B.C.L.R. 273 (B.C.C.A.).
>
> [Emphasis added]

2004 BCCA 146 (CanLII)

[14] Those are useful remarks, in my view, and I take guidance from them.

The non-pecuniary award

[15] The appellant submits that the jury's non-pecuniary award of $225,000 is, in the circumstances, substantially beyond the range of reasonable awards and requires correction by this Court.

[16] The respondent was thirty-six years old at the time of the accident that caused his injuries. He was hospitalized for almost six weeks following the accident. He was discharged with a halo brace to stabilize his neck, which he wore for another nine weeks. He took physiotherapy treatments for a few weeks after his discharge and thereafter did exercises at home. He resided with his girlfriend for about three months so that she could assist him. Since then, he has lived on his own.

[17] There was medical opinion evidence before the jury that the respondent's spinal cord injury gives rise to localized areas of muscle dysfunction and that it interferes with the transmission of signals from the lower extremities to the brain. As well, there was evidence that he has a softening of the spinal cord in his neck and a worrisome fluid collection

2004 BCCA 146 (CanLII)

in the central part of his spinal cord that could lead to deterioration of spinal cord function and might require extensive surgery. Further, there was evidence that he is at increased risk of developing cysts in the spinal cord, which will be painful and could lead to neurological compromise and surgical intervention. His spinal cord condition will require close monitoring in years to come. In addition, there was evidence that his condition has worsened since the initial injury and that his spinal cord is atrophying and shrinking at the C5/C6 level.

[18] The respondent gave evidence from which the jury could reasonably have concluded that he has difficulty with proprioception or the ability to move appropriately in response to stimuli. As well, there was evidence that he has unusual reactive reflexes in both legs, increased sensitivity in his arms and legs, constant neck and shoulder pain, intermittent shooting pain in his left arm, loss of dexterity in both hands, loss of strength in his left hand, lack of balance, altered gait, lack of co-ordination, asymmetrical muscle tone in his legs, and intermittent tremors in both arms.

[19] Dr. Sundby, an orthopaedic surgeon, gave evidence that the respondent has accelerated disc degeneration at multiple

2004 BCCA 146 (CanLII)

levels of his spine as a result of the accident and may require a discectomy and fusion.

[20] Dr. Hirsch, a specialist in physical medicine and rehabilitation, opined that the respondent is at risk for the development of depression as a result of the effects his spinal cord injury and his constant pain. If he should develop depression, he may require psychiatric treatment and perhaps psychological counselling. Dr. Hirsch continued:

> Mr. Boyd's enjoyment and quality of life has been markedly negatively impacted upon by the injuries suffered in the motor vehicle accident on February 4, 1996 and its associated biological, emotional, social and psychological sequelae.
>
> Mr. Boyd has been unable to return to work since this motor vehicle accident. His residual impairments and disabilities probably will preclude him from getting back into his previous line of work. He does not have the balance, physical stamina or motor skills to perform the inherent tasks of his former line of work. This does not even take into account the persistent hypersensitivity and residual localized left sided neck pain and pain in the left shoulder blade region, which by themselves are probably barriers to successful reintegration into the workforce.
>
> Mr. Boyd's clinical situation may improve following the implementation of the aforementioned recommendations. However, I would consider it unlikely that such gains would be sufficient to find gainful employment in occupations for which he is qualified by means of his education, experience and transferable skills.
>
> A comprehensive functional capacity assessment at the conclusion of a rehabilitation program may be useful to determine Mr. Boyd's residual physical

2004 BCCA 146 (CanLII)

> capacity. If his residual functional capacity does not match the work requirements of his former jobs, then educational upgrading and vocational retraining will have to be considered. While Mr. Boyd has the potential to work in a sedentary or semi-sedentary light physically demanding occupation, the prospects for a career change do not look promising. Mr. Boyd has only limited education and has worked all his life as a labourer.

[21] Dr. Hirsch concluded that the respondent's hypersensitivity will not resolve, that he will be left indefinitely with neurological impairments, and that he is at increased risk of developing degenerative arthritis in his neck, which may increase his neurological disability and might require surgical intervention.

[22] Ms. Chappell, an occupational therapist, gave opinion evidence that the respondent has significant functional impairment and is no longer competitively employable. In her opinion, the respondent's function is limited by constant pain in the neck and left shoulder, supersensitivity in his hands and legs, and difficulties with walking.

[23] The appellant emphasized a statement made by the respondent to Mr. Wallace, a vocational rehabilitation expert, that his plans before the accident were to remain living where he was and to work at construction jobs "when they were

2004 BCCA 146 (CanLII)

available." However, the respondent also testified that, if he had been unable to find work in that area, he:

> ...would definitely have moved on. I wasn't about to sit on welfare. I'm not a welfare person. I've always found my own jobs.

[24] The jury was entitled to accept the appellant's testimony on this point and their award of damages for impairment of earning capacity indicates that they did so.

[25] The respondent testified as to the effects of his injuries. He has difficulty manipulating and gripping objects, such as when opening jars and cans, and often drops things. He cannot dress himself normally. He loses his balance. He tries to be self-sufficient and is able, for the most part, to do things for himself, albeit more slowly than before. As well, neighbours help the respondent from time to time. When he pushes himself too hard, he has to rest because of the consequent pain.

[26] The respondent testified that he enjoyed skiing, water-skiing, hiking, and playing recreational hockey before the accident and that he has not been able to do these things since the accident. He particularly liked to play his guitar but does so infrequently now; he finds that he cannot finger

2004 BCCA 146 (CanLII)

the chords and that he gets muscle cramps in his hand. He is able to fish, however, and enjoys that activity.

[27] The appellant submits that the respondent's pre-existing disc degeneration should serve "to reduce the award of damages that might otherwise be made." However, the trial judge properly instructed the jury that there was no evidence before them that the pre-existing disc degeneration might have become symptomatic but for the motor vehicle accident. Moreover, counsel for the appellant took no objection to the charge and cannot now be heard to say that the pre-existing latent condition should operate as a negative contingency on the award of damages.

[28] Next, the appellant submits that the upper limit for non-pecuniary damages established in 1978 is now $286,369, adjusted for inflation. He contrasts the respondent's injuries with those suffered by the plaintiff in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229 and other cases of "catastrophic" or "devastating" injuries and submits that the award of $225,000 in this case is excessive in relation to the upper limit.

[29] However, it is improper to compare the injuries of a particular plaintiff to those of the plaintiffs in the 1978 trilogy for the purpose of making a comparative award: see

2004 BCCA 146 (CanLII)

Lindal v. Lindal (1982), 34 B.C.L.R. 373 (S.C.C.); ***Penso v. Solowan*** (1982), 35 B.C.L.R. 250 (C.A.); ***Black v. Lemon*** (1983), 48 B.C.L.R. 145 (C.A.); ***Bracchi v. Horsland*** (1983), 44 B.C.L.R. 100 (C.A.); and ***Leischner v. West Kootenay Power & Light Co. Ltd.*** (1986), 24 D.L.R. (4th) 641 at 668 (B.C.C.A.), a decision of a five-judge panel of this Court. As MacDonald J.A. explained, in ***Penso v. Solowan***, at 264, such a comparison is inconsistent with the functional approach to the assessment of non-pecuniary damages:

> ...because it does not give weight to the factor of the need of the particular plaintiff for solace. The extent to which comparison is properly made is indicated a pp. 263-64 from the following passage in the reasons of Dickson J. for the court in *Andrews*:
>
> > The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss ....

[30] Moreover, a comparative approach based on the injuries of the plaintiffs in the 1978 trilogy does not accord with the fundamental principle that questions of law are for judges and questions of fact are for juries. The amount of damages is a question of fact in every case. The upper limit, on the other

2004 BCCA 146 (CanLII)

hand, is a matter of law and policy, of which a jury should not be told except in cases where the trial judge expects that they might assess damages in an unlawful amount: see ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674 at 725. Thus, (except in catastrophic cases, it seems) the decisions establishing the upper limit are not relevant to the factual determination of the amount of a non-pecuniary award in individual cases, whether assessed by a trial judge or by a jury.

2004 BCCA 146 (CanLII)

[31] In ***Brimacombe v. Matthews*** (2001), 87 B.C.L.R. (3d) 75, 2001 BCCA 206, Hall J.A., speaking for the Court on the damages issue, described the purpose and function of the upper limit in this way:

> [243] ...If a plaintiff is found by a court to be catastrophically injured as a result of tortious action, the Supreme Court of Canada, in the applicable authorities, has, in my opinion, decided such an individual should be entitled to a monetary award of non-pecuniary damages that will not bankrupt society but that will, to the limited degree possible, provide a fund of money to enhance the situation of that severely injured plaintiff. The rough upper limit is, rather like a governor on an engine, a device that limits what otherwise could be an unlimited sum of damages....

[32] The governor on an engine is a useful analogy. Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge

or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

[33] In a variant of this submission, the appellant emphasizes that the respondent did not suffer "any serious head injury, permanent cognitive damage or paralysis" and urges that the award is excessive for that reason. He observes that awards by trial judges since the upper limit on non-pecuniary damages was established exceed $200,000 only where there is severe brain or spinal injury resulting in profound cognitive impairment or physical paralysis. He refers to ***Unger v. Singh*** (2000), 72 B.C.L.R. (3d) 353, 2000 BCCA 94 ¶ 32-33 in support of this submission. In that case, this Court set aside a jury's non-pecuniary award of $187,000 and substituted a "fair" award of $90,000. In doing so, the Court remarked that the appropriate comparisons were to cases "which do not involve catastrophic injury" and that "an award in the magnitude of $187,000 for non-pecuniary damages is usually reserved for cases involving serious head injuries, permanent cognitive damage, and paralysis" [Emphasis added]. Thus, the

2004 BCCA 146 (CanLII)

Court did not purport to preclude an award of that magnitude for other injuries in an appropriate case.

[34] Although the Court in ***Unger v. Singh*** went on to observe that "the plaintiff did not sustain either near catastrophic psychological or near catastrophic physical harm," it is clear that the substituted award was based on a comparison of awards in cases that did not involve catastrophic injury. I would not draw an inference from this observation that the award was scaled to the upper limit, particularly since it does not appear that the Court's attention was drawn to ***Lindal v. Lindal*** or to the subsequent cases in this Court that have followed it.

[35] That trial judges have not previously awarded more than $200,000 except in cases of catastrophic or near catastrophic injury does not necessarily make an award in excess of that amount in a case involving other injuries excessive if the award is grounded in the evidence. The respondent noted that, in ***Alden v. Spooner***, 2002 BCCA 592, this Court refused to interfere with a jury's award of $200,000 in non-pecuniary damages for a young woman who suffered soft tissue injuries that developed into chronic pain syndrome, or fibromyalgia, and a serious depression. Although these injuries differ from the respondent's, the decision is nevertheless illustrative of

2004 BCCA 146 (CanLII)

the respondent's submission that an award in an amount approximating the award here can be justified without a finding of serious head injury, permanent cognitive impairment, or paralysis, contrary to the appellant's contention.

[36] Indeed, in many of the decisions that I have reviewed, the trial judges have remarked that the particular injury under consideration was neither "devastating" nor "catastrophic." As these are the conventional descriptors of injuries so severe that the award for non-pecuniary damages must be capped at the legal ceiling, it would appear that some judges may be assessing non-pecuniary damages in serious but non-devastating cases by comparing the injuries with the injuries of the plaintiffs in the 1978 trilogy, contrary to the authorities to which I have referred above. If so, the upper end of the reasonable range of awards by trial judges for such cases may be improperly suppressed.

[37] That observation has implications for the appellant's next submission: that the jury award is excessive in relation to comparable cases. He contends that a more appropriate range of non-pecuniary damages is $80,000 to $100,000 and that the circumstances of this case would warrant an award at the low end of that range.

2004 BCCA 146 (CanLII)

[38] The appellant's case at trial and before us is that the respondent has made a good recovery from his injuries. He canvassed in some detail the evidence from which he drew support for that proposition. However, the jury obviously rejected the conclusion that the appellant asks us to draw. Since there was evidence before the jury that would reasonably support their view of the respondent's condition, we cannot substitute our views.

[39] The appellant refers to the following as comparable cases that, in his submission, establish the appropriate range of non-pecuniary damages for this case: ***Fletcher v. Meyer***, [1993] B.C.J. No. 508 (Q.L.)(S.C.); ***Graham v. Rogers***, 2000 BCSC 605; ***Mirisklavos v. Manhas***, [1996] B.C.J. No. 2038 (Q.L.)(S.C.); ***Tom v. Truong,*** 2002 BCSC 643; ***Yu v. Yu*** (1999) M.V.R. (3d) 285, [1999] B.C.J. No. 2801 (Q.L.)(S.C.); and ***Lowe v. Hardcastle***, [1997] B.C.J. No. 2020 (Q.L.)(S.C.) .

[40] The respondent points out that, except for ***Lowe v. Hardcastle***, none of the cases relied upon by the appellant involved spinal cord injuries and he emphasizes that none of the plaintiffs in those cases were rendered unemployable by their injuries. He stresses the adverse effects of his injuries on his day-to-day activities. The only decision

2004 BCCA 146 (CanLII)

referred to by the respondent in this part of his submission is ***Alden v. Spooner***, *supra*.

[41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

[42] The identification of comparable cases is not a simple task. Each case is unique. The process should be systematic and rational, not conclusory. We must therefore search for common factors that influence the awards, such as, most obviously, the age of the plaintiff and the nature of the injury. However, comparisons can be made on a more abstract level, as well. The factors to be considered include the relative severity and duration of pain, disability, emotional suffering, and loss or impairment of enjoyment of life. The awards in the comparable cases must be adjusted for inflation. When the appropriate range is identified, adjustments must be made for the particular circumstances of this case, including the plaintiff's need for solace, which must be considered subjectively: ***Penso v. Solowan***, *supra*, at 261. Then, in determining whether the award falls so far outside the

2004 BCCA 146 (CanLII)

acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury. Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.

[43] In ***Lowe v. Hardcastle***, the trial judge assessed non-pecuniary damages at $75,000 ($85,000 adjusted for inflation to 2003) for a 69-year-old housewife whose injuries were similar to those suffered by the respondent in this case. She had been a traditional housewife and had never worked outside the home. As well, she was already suffering from diabetes, asthma, and "bouts of gout" when she was injured and continued to suffer from those debilitating conditions. At the time of trial, she was capable of doing most domestic chores, although with some pain. That she asked the trial judge to make an award in the range of only $65,000 to $80,000 limits the value of the $75,000 award as a comparator.

2004 BCCA 146 (CanLII)

[44] ***Fletcher v. Meyer*** involved a man nine years older than the respondent. He suffered serious soft tissue injuries of his neck and back which left him with frequent pain. His disability, although permanent, was less serious than that of the respondent. He would never return to his previous employment as a heavy equipment operator but was capable of more sedentary employment. On the other hand, he suffered from depression, unlike the respondent, whose depression is inchoate. His loss of enjoyment of life equals or exceeds that of the respondent. His award was $85,000 ($101,800 adjusted for inflation). The usefulness of this award as a comparator is diminished by the trial judge's comparative reference to "devastating" and "near catastrophic" cases.

[45] In ***Graham v. Rogers***, a 54-year-old male suffered soft tissue injury to his neck that aggravated a pre-existing degenerative condition. Physical activity triggered pain. His disability, emotional suffering, and loss of enjoyment of life were each less serious than were suffered by the respondent. Although he was rendered unable to do the heavy physical work he did before his injury, many kinds of work remained open to him. His award was $75,000 ($80,000 adjusted for inflation). In dismissing an appeal of the non-pecuniary award, this Court said (2001 BCCA 432):

2004 BCCA 146 (CanLII)

> [77] It must be remembered that non-pecuniary damages are awarded on a functional basis to the end of providing substitute pleasures for those which have been lost: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.). In this case, the appellant's recreational activities have been limited as a result of the accident but he continues to be able to enjoy some of his prior pursuits. When compared with awards in other cases, I am not persuaded that the award can be regarded as so inordinately low as to be a wholly erroneous assessment of the appellant's non-pecuniary loss.

2004 BCCA 146 (CanLII)

Clearly, the respondent has suffered a more serious impairment of his enjoyment of life.

[46] ***Mirisklavos v. Manhas*** involved a 57-year-old man who suffered a prolapsed disc in his lower back. Physical activity triggered pain but it was expected that, with time, this condition would improve. His physical disability was less severe than the respondent's. It was unlikely that he would be able to return to his previous employment, which involved heavy labour, although he might have been able to do so following corrective surgery. He was capable of other employment, and re-training was an option. His emotional suffering was relatively greater than that of the respondent, but his loss of amenities was comparable. His award was $85,000 ($99,000 adjusted for inflation). The trial judge relied heavily on ***Fletcher v. Meyer*** and was influenced, as was

the judge in that case, by her conclusion that the plaintiff's injuries were "neither catastrophic nor near catastrophic."

[47] The plaintiff in ***Tom v. Truong***, a young mother, suffered a fracture of her cervical spine, which healed uneventfully, and several other less serious injuries in an automobile collision. Soft tissue injuries of her neck and fractures of her ankles caused her ongoing difficulties. She was able to return to full-time work within approximately nine months of the injury. However, her disabilities prevented her from advancing in her career and threatened her ability to continue with it. She was left with chronic pain and depression. Her enjoyment of life was significantly impaired. She was likely to develop early degenerative arthritis in her neck. The trial judge awarded $80,000 ($81,000 adjusted for inflation) for non-pecuniary damages.

[48] In ***Yu v. Yu***, the plaintiff was a 36-year-old mother. Her daughter was killed in the automobile collision in which she was injured. She suffered spinal fractures in the lumbar and thoracic spine that were surgically repaired. She was left with a permanent partial disability. She developed a depression as a result of her daughter's death. Her condition was complicated by psychological difficulties which had their origin in either her chronic pain, which stemmed from her

2004 BCCA 146 (CanLII)

physical injuries, or her depression, or both. Her ability to participate in many physical activities was limited. Pain management treatment might have afforded her some relief had she taken it. As well, the conclusion of the litigation was expected to have a salutary effect on her complaints. The trial judge assessed non-pecuniary damages of $80,000 ($88,000 adjusted for inflation).

[49] In my view, this Court's reasons in ***Alden v. Spooner*** do not set out sufficient facts to permit meaningful comparison.

[50] I have examined some cases other than those cited by counsel for their possible value as comparators for purposes of identifying the upper end of the appropriate range.

[51] ***Lynn v. Pearson***, [1997] B.C.J. No. 539 (Q.L.) (B.C.S.C.) involved a 79-year-old man who suffered a subluxation fracture of the C5-6 vertebrae, severe narrowing of the spinal cord at the C5-6 level, and abrasions and bruising. As a result of surgery on his spine, he was left with permanent urinary incontinence. He suffered, as well, from partial paralysis of the right arm and leg. His physical abilities were seriously compromised and he could no longer carry, reach, or lift. Also, he could no longer walk moderate distances. The trial judge awarded $120,000 in non-pecuniary damages ($136,000 adjusted for inflation).

2004 BCCA 146 (CanLII)

[52] In ***Soligo v. Turner***, 2002 BCCA 73, aff'd 2001 BCSC 205, a 27-year-old school teacher suffered soft tissue injury to her left shoulder when struck by a truck. The result was chronic pain syndrome. It was unlikely that she would ever be able to teach again or that she would ever be capable of full-time work. She suffered pain more severe than that of the respondent and, as well, a profound impairment of her enjoyment of life. The trial judge awarded $150,000 in non-pecuniary damages ($152,000 adjusted for inflation).

[53] Finally, in ***Santi v. Pacific National Exhibition***, 2000 BCSC 716, a 41-year-old woman suffered injury to her cervical and thoracic nerve roots from a blow to the head. Initially, she was diagnosed with whiplash and muscle spasms, and later with a pain syndrome in her neck and left arm and a major depressive disorder with anxiety and panic attacks. She had started a business of manufacturing and installing fireplace mantels before the accident, but was unable to continue as a result of her injuries. Her condition was disabling and it was unlikely that she would ever recover fully. Her chronic pain was excruciating. She was permanently disabled from gainful employment and her loss of enjoyment of life was substantial. The trial judge awarded her $150,000 in non-pecuniary damages ($160,000 adjusted for inflation).

2004 BCCA 146 (CanLII)

[54] The cases of ***Fletcher v. Meyer***, ***Graham v. Rogers***, and ***Mirisklavos v. Manhas*** are the most similar comparators cited by counsel. However, the effects of the injuries on the plaintiffs in those cases were generally less severe than in the case under consideration. Moreover, none of the plaintiffs in those cases was rendered permanently incapable of gainful employment. This is a factor relevant not only to impairment of earning capacity, but also to the assessment of non-pecuniary damages as it may affect profoundly the plaintiff's enjoyment of life. As Dickson J. said in his dissenting opinion in ***Reference re Public Service Employee Relations Act, etc.***, [1987] 3 W.W.R. 577 at 618 (S.C.C.), in a passage that has been frequently quoted since:

> Work is one of the most fundamental aspects in a person's life.... A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[55] In my view, the upper end of the conventional range of non-pecuniary damages awarded by trial judges for present purposes lies somewhere above the $100,000 suggested by the cases the appellant cited and closer to the $150,000 to $160,000 awarded in ***Soligo*** and ***Santi***.

2004 BCCA 146 (CanLII)

[56] The trial judge instructed the jury as to the respondent's loss of enjoyment of life in these terms:

> With regard to loss of enjoyment of life, a person is entitled to be compensated for the negative effect of the injuries upon their enjoyment of life if there is liability. You should include an amount in your award to compensate the plaintiff if you conclude that because of the accident he may be unable to enjoy life the same way he could before the accident.
>
> You have heard evidence about the kinds of work and recreational activities that Mr. Boyd pursued before the accident and you have heard the evidence that he has given and that is in some of the reports about the limitations that he has at this time, both with regard to recreation and to work; and these are matters which affect his enjoyment of life. If you accept the evidence, then he is entitled to be compensated for the loss of enjoyment of life as part of those non-pecuniary losses. The extent of the award is a question of fact that is for you to determine and you bring to the law the common sense of the community.

[57] The jury was entitled to conclude that the respondent's inability to work at gainful employment for the rest of his working life was a profound interference with his enjoyment of life and to award damages commensurately. This conclusion is consistent with the direction of Dickson J. in ***Andrews v. Grand & Toy Alberta Ltd.***, *supra*, that variations from a conventional award should primarily reflect a solatium for what the individual has lost in the way of amenities and enjoyment of life.

2004 BCCA 146 (CanLII)

[58] It is obvious that the jury was favourably impressed by the respondent. Their award of non-pecuniary damages was certainly a generous one and, in my view, approaches the outer limit of what would be acceptable. However, I am not persuaded that it is so excessive that it demonstrates palpable and overriding error by the jury that would justify interference by this Court. I cannot say that it is so plainly unreasonable and unjust that on the evidence as a whole and acting judicially a jury should not have reached it. It is not, in my view, the "rare case" that would justify our interference. Accordingly, I would not accede to this ground of appeal.

Impairment of earning capacity

[59] I turn now to the issue of damages for impaired earning capacity.

[60] The respondent left school before completing Grade 11 and, between then and the accident, had worked in a variety of jobs. He was employed as a construction labourer from time to time, as a pizza deliverer, and as an installer of awnings. He was fired from his job delivering pizzas and he was laid off from several other jobs for various reasons. As a result, there have been times during the years preceding the accident when he was unemployed. In particular, he had been unemployed

2004 BCCA 146 (CanLII)

for approximately ten months preceding the accident, having been let go from his last job following completion of the construction project on which he was working. His total income during the years from 1985 to 1995 inclusive was $158,400. This included unemployment (now employment) insurance, which he received in each year except 1992 and 1993. In addition, he received social assistance benefits during the years from 1991 to 1995 inclusive. His total annual income varied in amount each year and ranged from nil in 1992 to $25,172 in 1989. His average annual income over the full period was $14,400.

[61] There was economic evidence that an appropriate multiplier for calculation of the respondent's earnings from the date of trial to age 65 is $16,229 per $1,000. The appellant accepts that multiplier as appropriate for purposes of the appeal.

[62] The respondent's economic expert projected the respondent's loss of earnings to age 65 on the basis of certain assumptions. All of the projections were reduced for the contingencies of mortality, labour force participation rates, unemployment rates, and part-time factors. As well, none of the projections included employers' contributions to non-wage benefits which, in the case of statutory benefits

2004 BCCA 146 (CanLII)

only, would add 5% to 7% to the projection and, in the case of private full-benefit packages, would add 15% to 18% to the present value of the compensation.

[63] The expert's first projection was based on average earnings for B.C. resident males with Grade 11 or 12 education who remain throughout their lives in unskilled occupations. The projected earnings net of contingencies for this group were $381,169. Adding 7% for non-wage benefits, the projection was $407,900. The second projection chosen was for B.C. resident males working in certain occupations generally described as construction trade helpers and labourers. In this group, the projection to age 65 was $420,954, which was increased by 7% for non-wage benefits to $450,400.

[64] The appellant takes the jury's award of past income loss of $85,000 and derives an average annual loss of $13,428, which, applying the multiplier of $16,629, produces a present value of $217,923. As well, he performs calculations based on the average annual earnings, respectively, for the five, eleven, and two years preceding the accident to calculate present values ranging from $190,682 to $240,645. These calculations do not take account of non-wage benefits. As well, he drew our attention to evidence from which the jury might have concluded that the respondent was unlikely to

2004 BCCA 146 (CanLII)

achieve the average level of earnings postulated by his economic expert and that he has some residual earning capacity.

[65] Further, the appellant submitted that the respondent's pre-existing disc degeneration poses a risk that should have been reflected in a reduction of this aspect of the award. For the reasons that I have already given I would reject this submission.

[66] Specifically, the appellant submits that an award of $215,000 would be appropriate as consistent with the respondent's earnings history and with the jury's award for past loss of earnings and that the jury's award of $340,000 under this head is inordinately high.

[67] The respondent referred to the evidence that he is unemployable and is unlikely to ever be employable. As well, he referred to evidence that he has earned as much as $20,000 to $25,000 annually during one period in his working history. Those annual earnings, projected with the same multiplier, would produce a present value in the order of $355,000 to $400,000, depending on the period chosen.

[68] We cannot speculate as to how the jury arrived at its award of $340,000. However, we must assume that they made

2004 BCCA 146 (CanLII)

every finding reasonably open to them in support of their award. There was evidence before them that would, if they accepted it, support an award in the amount they have assessed. I am not persuaded that it was unreasonable of the jury to accept that evidence, nor am I persuaded that the award of $340,000 is so wholly out of proportion as to require correction by this Court. I would reject this ground of appeal.

[69] In the result, I would dismiss the appeal.

“The Honourable Mr. Justice Smith”

I agree:

“The Honourable Mr. Justice Low”

I agree:

“The Honourable Mr. Justice Oppal”

2004 BCCA 146 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ciolli v. Galley,*
2011 BCCA 106

Date: 20110310
Dockets: CA037671; CA037676; CA037677

Docket: CA037671

Between:

Micheline Ciolli

Respondent
(Plaintiff)

And

James Galley

Appellant
(Defendant)

Docket: CA037676

Between:

Micheline Ciolli

Respondent
(Plaintiff)

And

BMW Canada Inc., Cobra Integrated Systems Ltd. and Scott Walter Knutsen

Appellants
(Defendants)

Docket: CA037677

Between:

Micheline Ciolli

Respondent
(Plaintiff)

And

Yvonne Bauche and Michael Andre Bauche

Appellants
(Defendants)

2011 BCCA 106 (CanLII)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson

On appeal from the Supreme Court of British Columbia, January 28, 2010
(*Ciolli v. Galley*, 2010 BCSC 115, Vancouver Registry, Docket Numbers M072274, M082554 and M084005)

Counsel for the Appellants:	A.M. Gunn, Jr. S.F. Hudson
Counsel for the Respondent:	D.S. Gray
Place and Date of Hearing:	Vancouver, British Columbia February 1, 2011
Place and Date of Judgment:	Vancouver, British Columbia March 10, 2011

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson

2011 BCCA 106 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The respondent Ms. Ciolli was injured in three motor vehicle accidents that occurred between December 2006 and April 2008. At trial, she testifed that as a result of the accidents, she experiences upper body pain 'all day every day'; she is depressed; her concentration, energy level, mood and sleep patterns have been adversely affected; and she is unable to function as the energetic and successful businesswoman she once was. These injuries were overlaid onto others she had suffered prior to the first motor vehicle accident when a bookcase fell on her at the PNE in September 2003 (the "PNE Accident"). In May 2006, she underwent surgery, intended to alleviate cervical radiculopathy resulting from a disc herniation at C5-6.

[2] Not surprisingly, then, one of the main issues at trial was causation – whether and to what extent the three car accidents had caused some or all of the plaintiff's continuing difficulties. At the time of trial, the defendants (all of whom were represented at trial by the same counsel) had admitted liability, leaving in addition to causation the issues of quantum assessment under the usual heads of damage (except past income loss, for which no claim was made).

[3] At the end of a six-day trial in the Supreme Court of British Columbia, a jury made the following awards to the plaintiff:

Non-pecuniary loss	$6,500,000.00
Loss of future income earning capacity	$5,600,000.00
Cost of future care	$335,000.00
Special damages	$16,000.00
TOTAL	$12,451,000.00

The jury attributed 5% of these damages to the first accident, 55% to the second and 40% to the third. The award for non-pecuniary loss – which we are told may be the largest assessment of damages for such loss in Canadian history – was later reduced to $327,000 after the jury confirmed that it had intended to award the

2011 BCCA 106 (CanLII)

plaintiff the 'rough upper limit' for such loss. However, the trial judge declined a defence motion to declare a mistrial, which motion was brought on the basis that there was no evidence to support the jury's findings.

[4] On the appeal, the defendants submitted that the trial judge erred in dismissing the mistrial application and in failing to give an even-handed and fair summary of the evidence to the jury, and that the jury's award was without foundation or wholly out of proportion to the plaintiff's losses. At the end of the appeal hearing, we told counsel that the appeal was allowed and a new trial ordered, with reasons to follow.

2011 BCCA 106 (CanLII)

Factual Background

[5] I do not intend to review the evidence at length, but will provide some salient features. The plaintiff was 42 years old at the time of trial. She was married and had five children. Until 1999, she had been a successful real estate agent but in 1999 she and her husband had bought a "sexual health and wellness company", a successful enterprise from which Ms. Ciolli withdrew between $250,000 and $350,000 each year – an amount that she, as a status Indian, received free of income tax. The company experienced significant annual growth until 2003 and had developed an international distribution network, thanks in large part to Ms. Ciolli's energy and hard work.

[6] In September 2003, Ms. Ciolli was hospitalized as a result of the PNE Accident. She was diagnosed as having sustained a mild concussion and soft-tissue injuries to her head and neck, and experienced symptoms of fatigue, headaches, nausea, and nervousness. On some days, she was unable to work because of the pain. Eventually, the disc herniation was discovered and as mentioned earlier, she underwent surgery in May 2006. She testified that although it helped in the short term, some pain in her neck, shoulders and right arm continued at a level she described as 4 or 5 out of 10. However, she also testified that she had felt her condition had been improving prior to the car accidents. Plaintiff's counsel

acknowledged at trial that the effects of the PNE Accident constituted a “pre-existing condition”, and the defendants mounted a “crumbling skull” defence.

[7] Following the first car accident in December 2006, Ms. Ciolli sued the Bauche defendants for damages, pleading that the accident had exacerbated or aggravated her previous injuries. At trial, she said she had had some inflammation in her neck and a headache, but had not sought medical assistance in connection with this accident and returned to work on a part-time basis in January 2007.

[8] The second car accident took place in March 2007. This time Ms. Ciolli did consult her family physician. She was diagnosed with soft tissue injuries to her neck and back, and was advised to apply ice and heat and to obtain physiotherapy. She again took time off work. She testified that she experienced extreme pain in her neck at and below the site of her pre-existing injury, and muscle pain, deep nerve pain, and migraine headaches. She estimated her pain level as at 9 to 10 out of 10 and felt that this incident had been a “major turning point”. She was able to work only sporadically, stopped going on sales calls and was afraid to drive. Her doctor prescribed anti-depressants and increased her pain medications.

[9] The third accident took place in April 2008. Again Ms. Ciolli was diagnosed with further soft tissue injuries to the neck. She testified that her pain level has remained at 7 or 8 out of 10 and that her condition has essentially plateaued – a conclusion the defence acknowledges is supported by the medical evidence. As noted above, the plaintiff says she continues to experience pain every day from the top of her neck to the bottom of her tailbone, has great difficulty sleeping, and is unable to function effectively in the business she and her husband own. Its revenues have decreased and the two have discussed selling the company.

[10] The defence conceded that the medical evidence indicates it is unlikely Ms. Ciolli’s condition will improve. Aside from ongoing therapies that provide only temporary relief, there is no planned or recommended course of care for the long-term other than attendance at a chronic pain clinic. At the time of trial, the plaintiff was taking an anti-depressant, 8-12 Advils daily, and Naproxin as needed.

2011 BCCA 106 (CanLII)

Submissions to Jury and Trial Judge's Charge

[11] In their respective submissions to the jury, counsel for the plaintiff and the defendants reviewed the evidence, particularly the medical evidence, fairly briefly. Near the end of his submissions, counsel for the defendants said this:

> Let me say a little bit about damages. There are several heads of damages, as lawyers call them, that you'll be asked to consider. One is called general damages, and that's pick a number. There's no way of calculating it. You just pick a number for pain and suffering and loss of enjoyment of life, is what it's called, and it's for you to decide what the right number is. Regrettably, you're not given any direction on these things because I'm not entitled to give you a number and the judge won't give you a number. You choose a number, what you think the right number is, to compensate her for the first accident if you think that something happened. Second accident and third accident.
>
> You're entitled to consider whether they aggravated each other or aggravated the PNE accident, but the general damages is this notional number for pain. <u>You could give somebody five million dollars for pain, and of course, it doesn't have any effect on the pain. It's just a number that is some kind of solace for that</u>. [My emphasis.]

[12] The trial judge then gave her charge to the jury, consisting of a review of the evidence (which review was evidently not transcribed and has not been provided to us), and an explanation of the jury's tasks. Although she mentioned the issue of causation, it is fair to say that her many references to the damages to which Ms. Ciolli was "entitled" may well have given the jury the impression that their only function was to compensate the plaintiff for all the injuries she had described in her testimony. For example, at para. 38 of this part of her charge, the trial judge said this:

> It is not her loss of earnings, but Ms. Ciolli's impairment and loss of earning capacity which entitles her to damages because a capital asset has been lost. Even if Ms. Ciolli is able to earn as much as she could have earned if she had not been injured, she is entitled to compensation for the impairment. She is entitled to it because, for the rest of her comparatively young life, some work will be closed to her and it is impossible to say that over her working life the impairment will not harm her income earning capacity.

and at para. 40:

> How do you determine the extent of the loss or damage? These are hypothetical events or future events. As long as you find based on all of the

2011 BCCA 106 (CanLII)

> evidence, that there is a real or substantial possibility that her capacity to earn income in the future will be affected, she must be compensated.

(I note that the repeated references to 'entitlement' in the face of a substantive defence (in this case, causation) were also a ground on which this court allowed the appeal in *Sobolik v. Waters* 2010 BCCA 523; see paras. 19 and 33.)

[13] In connection with the claimed loss of income-earning capacity, the jury was not given any instruction – nor was there any evidence – concerning the calculation of the present value of future losses; nor concerning how the fact that future events are contingencies rather than certainties was to be reflected in the assessment of damages. In this case, as in *Sobolik*:

> ... the substance of the charge needed to convey to the jury that: the burden of proof for future events was proof of a substantial possibility; and that it was for the jury to decide if there was a substantial possibility that [the plaintiff's] capacity to earn income in the future will be affected. The jurors in our view could not help but be confused by the repeated instructions that [the plaintiff] was entitled to damages for loss of earning capacity. [*Supra*, at para. 33.]

[14] An exhibit, Exhibit 4, provided to the jury purported to contain details of Ms. Ciolli's special damages but was simply a series of receipts dating from the PNE Accident and totalling $18,113.92. No attempt was made to allocate them between the PNE Accident and the car accidents; some items appeared more than once; and some items – e.g., the cost of topsoil for the plaintiff's yard – were clearly not compensable.

[15] Following the trial judge's charge, counsel made further submissions to the trial judge in the absence of the jury. The defence objected, among other things, that if the trial judge was going to put the plaintiff's case to the jury, the court should also put the defence case, and do so "in an even-handed sort of way". The trial judge agreed to "touch on" the matters he had raised, other than mitigation, and then instructed the jury again as to the theory of each side. She told them that the defence theory was that the first car accident had caused the plaintiff no damage, and that the complaints arising from the second and third car accidents had been

2011 BCCA 106 (CanLII)

made worse because the plaintiff had fallen on a stair the day before the second car accident.

[16] The trial judge also noted that some of the special damages referred to in Exhibit 4 related to the PNE Accident and that the jury was "going to have to review all of these receipts at Exhibit 4 and [the plaintiff] is only to be compensated for those out-of-pocket expenses that relate to the motor vehicle accidents."

[17] In connection with both special damages and future costs of care, she continued:

> When I touched on special damages, the out-of-pocket expenses, counsel said that I said she will have to incur them for the rest of her life. And if I said that, I mean that in assessing an award for special damages, as well as future costs of care, you can only compensate her for those damages that you determine arose as a result of the car accidents. You may determine that some of these items were incurred as a result of the PNE Accident, or that she may have problems in the future, or incur costs in the future as a result of that PNE accident.
>
> So in a roundabout way I am reminding you that your assessment of damages must relate only to those damages that you find flow from the car accidents and not the PNE Accident. It could be that based on all of the evidence you might determine that she has suffered none of the damages claimed. But again I remind you that your assessment and your findings of fact must be based on a consideration of all of the evidence.

Later, she emphasized that in determining all the heads of damages, the jury was required to determine which "flow from the car accidents and not the PNE Accident."

Post-Verdict

[18] Following the announcement of the jury's initial verdict, the trial judge excused the jury in order to discuss with counsel the question of the upper limit on non-pecuniary damages. Mr. Gray for the plaintiff agreed that the $6.5 million award could not be entered, but unfortunately neither the trial judge nor counsel for either party was aware of the amount of the rough upper limit at the time. The trial judge declined defence counsel's suggestion to tell the jury that the rough upper limit was intended for "catastrophic" cases. Ultimately, she instructed them that the limit "was established to provide greater accessibility, uniformity and predictability in respect of

2011 BCCA 106 (CanLII)

non-pecuniary awards" in Canada and that it had been fixed at $100,000 in 1978 dollars by the Supreme Court of Canada. The judge put the following question to the jury:

> Did you intend by your award of general damages of $6.5 million, did you intend to award Ms. Ciolli the upper limit of damages?

The jury answered in the affirmative, and was then dismissed.

[19] The following week, the defendant in the second action, Mr. Galley, moved for a mistrial. He was supported by the other defendants, who were now represented by separate counsel. Mr. Gunn spoke on behalf of Mr. Galley. He argued that "There was not evidence to sustain this jury quantum assessment". He submitted that this was not the same as saying there was "no evidence" or that a "nil verdict" was appropriate, and referred to the decision of *Horita (Committee of) v. Graham* [1997] B.C.J. No. 2880 (S.C.). In that case, Mr. Justice Sigurdson had referred in turn to *Leblanc v. Corporation of the City of Penticton* (1981) 28 B.C.L.R. 179, where this court confirmed the right of a trial judge to reject a jury's verdict under R. 41 of the 1976 *Supreme Court Rules* where he or she concludes that there is "no evidence to support the findings of the jury; or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment." (At 189.)

[20] The trial judge concluded in the case at bar, however, that the defendants' real complaint was that the jury's award was inordinately high or wholly out of proportion to the evidence. In her analysis, unless there was "no evidence to support the jury's findings", a trial judge was unable to reject a jury's verdict, and it could not be said there was no such evidence in this case. She dismissed the motion and entered judgment for the jury's award, subject to the reduction in non-pecuniary damages to $327,000.

On Appeal

[21] As mentioned earlier, the defendants contend on appeal that the trial judge erred in refusing to grant the mistrial application and in failing to give an even-handed and fair summary of the evidence to the jury; and that the jury's awards were

2011 BCCA 106 (CanLII)

without foundation or wholly out of proportion to the plaintiff's losses. I have already noted that the trial judge's many references to the damages to which Ms. Ciolli was "entitled" may well have led the jury to be confused about the question of causation and about their duty to determine which of the plaintiff's claims, if any, were properly attributable to the car accidents and in connection with the costs of future care, which were medically justified. Fairness also required that in connection with loss of income-earning capacity and future care costs, the jury be instructed as to the need to apply a discount rate in order to assess the present value of the awards for future contingencies, and of course on the need to reduce such awards to reflect that they did represent contingencies rather than certain losses. The law is clear that a trial judge's failure to so instruct a jury constitutes error: see, e.g., *Bell v. Stubbins* (1991) 7 B.C.A.C. 177 at paras. 10-17; *Halliday et al. v. Sanrud* (1979) 15 B.C.L.R. 4 (C.A.) at 9.

[22] It is also clear that the awards for non-pecuniary damages and loss of income-earning capacity were wholly out of proportion to what was justified by the evidence before the Court. The non-pecuniary award of $327,000 would have been justified only had the plaintiff suffered a truly catastrophic injury, but the jury was not instructed to this effect. (Counsel for Ms. Ciolli rightly acknowledged before us that her injuries were not catastrophic.) With respect to loss of income-earning capacity, as Mr. Gunn submits, the sum of $5,600,000, if calculated over 23 years (i.e., until the plaintiff reaches age 65), constitutes an award of $243,478 per year. It did not reflect the fact that the award is for a contingency rather than a certain loss, nor a discount rate required to represent the present value of the loss.

[23] The foregoing errors are more than sufficient to warrant our interference with the jury's award and to order a new trial.

[24] I will deal briefly, however, with the defendants' additional submission that the trial judge erred in declining to grant a mistrial on the basis that there was "no evidence to support the jury's findings". In this regard, Mr. Gunn relies on *LeBlanc, supra*, where this court discussed the circumstances in which a trial judge may

2011 BCCA 106 (CanLII)

refuse to accept a jury's verdict. At the time, R. 41 of the 1976 *Supreme Court Rules* provided in part:

> (1) No application for judgment is necessary except where an enactment or these rules otherwise provides.
>
> (2) Where, after such redirection as the Court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment can not be pronounced on the findings, the action shall be retried.
>
> (3) Where the answers of the jury entitle either party to judgment in respect of some but not all of the claims, the Court may pronounce judgment on the claims as to which the answers are sufficient and the remaining claims shall be retried.
>
> (4) Where the jury fails to reach a verdict in accordance with the *Jury Act*, the action shall be retried.
>
> (6) If the party who required a jury trial waives his right to a retrial, the Court may pronounce such judgment on the evidence as it thinks just.

[25] Taggart J.A. for the majority discussed the predecessors of R. 41, in particular R. 39 of the 1961 *Supreme Court Rules*, which provided that "the judge shall, at or after trial, direct judgment to be entered as he shall think right." In *Skeate v. Slaters Ltd.* [1914] 2 KB 429 (C.A.), Buckley L.J. had said that under a similar rule in England, it was the duty of a trial judge who is "judicially of opinion that upon the case as a whole ... there is no case", to enter judgment for the defendant. (At 438-9.) This principle was applied, Taggart J.A. noted, in *C.N.R. v. Lancia* [1949] S.C.R. 177, where the Court ruled that since the jury had ascribed fault to an employee of the defendant which was not a fault in law, the trial judge should have "dismissed the action on the verdict rendered." Kellock J., concurring, observed:

> It is of course clear that while it is for the jury to find the facts it is the function of the court to determine whether or not there is any evidence to support the findings and also to decide whether any particular answer is in law a finding of fault or negligence ... [At 191-2.]

[26] After reviewing these authorities in *LeBlanc,* Taggart J.A. continued:

> Having read and re-read the 1976 Rules and compared them with the 1961 *Rules* and with the general principles governing trial judges in their acceptance or rejection of juries' verdicts to which I have referred above, I have reached the conclusion that <u>the new rules do not restrict the ability of a trial judge to reject the verdict of a jury but that the principles I have</u>

2011 BCCA 106 (CanLII)

> endeavoured to set out continue to have application and must be applied in conjunction with the provisions of R. 41. Thus, in my consideration of the reasons given by the trial judge for rejecting the jury's verdict, I propose to be guided by the principle that a trial judge may refuse to accept the verdict of a jury where he concludes that there is no evidence to support the findings of the jury; or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment; and to be guided by the provisions of R. 41 and especially by the provisions of subr. (2) relating to conflicting answers. [At 189; emphasis added.]

[27] The majority in *LeBlanc* concluded that although the jury might have erred in failing to award damages under two heads, it could not be said that their answers on quantum were in conflict with their answers on liability. Judgment could be entered in accordance with the verdict. Again in Taggart J.A.'s analysis:

> ... Here the jury has answered each of the questions though it appears two of them have been answered incorrectly. But the answers are clear and unequivocal and judgment can be entered in accordance with them ...
>
> Accordingly my opinion is that there is no conflict in the answers; or, if there is, it cannot be said that because of it judgment "cannot" be pronounced on the findings of the jury. I am therefore of the view that the judge erred in rejecting the jury's verdict in relation to quantum. [At 191-2.]

The majority also held that the jury's conclusions ascribing contributory negligence to the plaintiff could not be said to be unsupported by evidence and that the trial judge had erred in rejecting this part of the jury's verdict as well.

[28] At the time of the trial in the instant case, the former *Supreme Court Rules* were still in force. The wording of R. 41(2) was virtually identical to the wording under the 1976 *Rules*. Assuming (as we must) that *LeBlanc* is correct, it was therefore open to the trial judge to refuse to accept the jury's verdict if she found there was "no evidence to support the findings of the jury".

[29] Rule 41(2) has been properly invoked in British Columbia in cases like *Lancia,* where a jury has made a decision as to liability that has no support in the evidence. In *McElroy v. Embleton* (1993) 81 B.C.L.R. (2d) 328 (S.C.), for example, MacDonald J. invoked the rule where there was no evidence of negligence on the plaintiff's part but the jury had attributed 15% of the fault for the accident against her. He observed:

2011 BCCA 106 (CanLII)

> Evidence on this issue was vital if the defendant is to establish that the plaintiff was contributorily negligent. As there was no evidence before the jury on this very vital issue, I have no alternative but to refuse to accept the jury's verdict that the plaintiff was contributorily negligent. [At 336.]

(See also *Horita, supra*.)

[30] We were not referred, however, to any instance in which a trial judge had applied *LeBlanc* to a pure question of quantum, on the theory that although there was evidence at trial to support an award, there was "no evidence" or "no reasonable evidence" to support the award actually made. This theory comes perilously close, in my view, to obliterating the line between the respective functions of judge and jury and could in practice lead to trial judges refusing to enter jury awards that are inordinately high or low. That, with respect, is the function of an appellate court. In the words of Mackenzie J.A. for the Court in *Balla v. I.C.B.C.* 2001 BCCA 62:

> In my view, there are two tests for scrutiny of a jury verdict, apart from errors of law. The first is stated by Rule 41(2) of the *Rules of Court* as follows:
>
> > 41(2) Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.
>
> If "the answers are conflicting" the trial judge must direct a retrial.
>
> The second test is the *Nance* test [*Nance v. B.C. Electric Rlwy.* [1951] A.C. 601 (P.C.)], whether the sum awarded is inordinately low or inordinately high. The trial judge has jurisdiction to apply the first test, pursuant to Rule 41(2), but the only remedy available (subject to Rule 41(6)) is a retrial. The *Nance* test is a test of appellate review only and is not within the jurisdiction of the trial judge: *Leblanc v. Penticton (No. 2)* ... The trial judge may not vary the jury's award for *Nance* reasons. [At paras. 9-10; emphasis added.]

I do not find it surprising, then, that the trial judge in this case dismissed the motion for mistrial, equating it with a motion to have the verdict set aside on the basis that the jury's awards were inordinately high. It would take a very courageous trial judge to do otherwise.

2011 BCCA 106 (CanLII)

[31] Fortunately, it is not necessary to decide whether *LeBlanc* extends to pure questions of quantum such as those raised here. Given the other acknowledged defects in the jury's award, I leave the question for another day.

[32] The appeal was allowed and a retrial ordered for the reasons set forth above, – i.e., that the trial judge's summary of the evidence was not even-handed, particularly in its repeated references to the plaintiff's "entitlement" when causation was clearly at issue; that her instructions failed to provide the jury with the necessary tools for assessing present values and contingent future events; and that the awards for non-pecuniary loss, loss of income-earning capacity and future care costs were inordinately high.

Costs

[33] With respect to costs, Mr. Gray for the plaintiff says his client is not to blame for the fact the jury got "off track" in its assessment of damages, and indeed suggests that defence counsel's remarks quoted above at para. 11 may have been the culprit. Thus he seeks an order that each side bear its own costs of the appeal and that the costs of the first trial be awarded to the plaintiff in any event or be costs in the cause. In response, Mr. Gunn rejects the suggestion that trial counsel for the defence was to blame. He seeks an order that the costs of the first trial be in the discretion of the trial judge in the second trial, and that the plaintiff bear the costs of the appeal.

2011 BCCA 106 (CanLII)

[34] In my view, the fairest course is that each side bear its own costs of the appeal and that the costs of the first trial be as directed by the trial judge in the re-trial, who will at the end of the day have a better idea of the merits of the plaintiff's claims. I would so order.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Madam Justice Garson"

2011 BCCA 106 (CanLII)

CA011032
Vancouver Registry

Court of Appeal for British Columbia

1993 CanLII 1150 (BC CA)

BETWEEN:

CLIFFORD HARTNELL CORY
and MARY LOU CORY

PLAINTIFFS
(RESPONDENTS)

AND:

NORMAN DANIEL MARSH

DEFENDANT
(APPELLANT)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Wood
The Honourable Mr. Justice Gibbs

J.P. Lauener	Counsel for the Appellant
G.W. Kereluk	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia September 18, 1992
Place and Date of Judgment:	Vancouver, British Columbia January 29, 1993

Written Reasons by:
The Honourable Chief Justice McEachern (Pages 1-15, paras. 1-21)

Concurred in by:
The Honourable Mr. Justice Wood

Dissenting Reasons by:
The Honourable Mr. Justice Gibbs (Pages 16-32, paras. 22-55)

Court of Appeal for British Columbia

Clifford Hartnell Cory
and Mary Lou Cory

v.

Norman Daniel Marsh

1993 CanLII 1150 (BC CA)

Reasons for Judgment of Chief Justice McEachern

1 I have had an opportunity to read the judgment of Mr. Justice Gibbs and while I agree with what he says about the admission of fresh evidence and the reduction of the award to Mrs. Cory for the cost of future care, I regret that I find myself unable to agree with him on the question of non-pecuniary damages for both Plaintiffs.

2 As mentioned by Mr. Justice Gibbs, the Plaintiff's non-pecuniary damages were assessed at $71,250 for Mr. Cory, and $94,000 for Mrs. Cory.

3 The test for appellate review of damage awards has been stated and restated in many cases. It is based almost entirely on authorities decided many years ago. In ***McCannell v. McLean,*** [1937] S.C.R. 341 (S.C.C.), Chief Justice Duff at p. 343 said that an appellate court ought not to interfere with a jury verdict unless it is "... so plainly unreasonable and unjust as to satisfy the

Court that no jury reviewing the evidence as a whole and acting judicially could have reached it." The Chief Justice relied in his judgment on the English case of ***Mechanical and General Inventions Co. Ltd. v. Austin***, [1935] A.C. 346.

4 Notably, the ***dicta*** of Chief Justice Duff in ***McLean*** applies a test of reasonableness.

5 Later, in ***Davies v. Powell Duffryn Associated Collieries***, [1942] A.C. 601 (H.L.), Lord Wright at p. 616 also relied upon the case last mentioned. He said:

> There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case.

6 The opinion of Lord Wright in ***Davies*** introduces the concept of proportionality between the award and the circumstances of the case. This must include reference to other cases because ***a priori*** reasoning is hardly a basis for reviewing damage awards.

7 In ***Nance v. B.C. Electric*** (1951), 2 W.W.R. (N.S.) 665 (J.C.P.C.), Viscount Simon delivered what is often regarded as the ***loccus classicus*** on this question. He said, at p. 675, that an assessment of

1993 CanLII 1150 (BC CA)

damages by a trial judge should not be interfered with unless the appellate court is:

> ...satisfied either that the judge...applied a wrong principle of law... or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

8 Because of its reference to inordinately low or high awards and to wholly erroneous estimates of the damage, ***Nance*** continues the proportionality approach taken in ***Davies.*** This calls for consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases. In my view, an award is inordinately high, low, or disproportionate, if it falls substantially beyond the upper or lower range for damage awards in the same class of case.

9 This approach is supported by authority. In ***Ward v. James***, [1965] 1 All E.R. 563 (C.A.), Denning M.R. said at p. 574:

> This court can interfere with the figure awarded by a ***jury*** if it is "out of all proportion to the circumstances of the case". It can interfere with the figure awarded by a ***judge*** if it is a "wholly erroneous estimate of the damage suffered". In each case "excess implies some standards which has been exceeded"...and the only standard which this court can apply is to take the conventional figure awarded in comparable cases and see how far the award is above or below it.

1993 CanLII 1150 (BC CA)

10 The same view was expressed by this Court in ***Bisson v. Corporation of Powell River*** (1968), 62 W.W.R. 707 where Bull J.A. said at pp. 721-2:

> Damages cannot be treated as excessive merely because they are large, and "Excess implies some standard which has been exceeded:" ... Relative to what standards are pertinent, the language of Pearce L.J. in ***Morey v. Woodfield (No. 2)***, [1963] 3 All E.R. 533 (C.A.) ... is very apt:
>
> > "What standard then is to be used in measuring excess? Morris, L.J. in ***Scott v. Musial*** [1959] 2 QB 429, 438, [1959] 3 WLR 437, [1959] 3 All ER 193 (C.A.), pointed out that in cases which are comparable but which are decided by different judges, a certain pattern or level of awards of damages may emerge. He also said [1959] 2 QB 429, 438: 'If, however, an award of a jury does not conform to such pattern, that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges. The jury will not necessarily have knowledge of any pattern or level which judges have thought to be appropriate, and the jury are not bound by any such pattern or level.' Nevertheless, as he pointed out subsequently in that case, ***ibid***., p. 439, it was inevitable that the Court of Appeal, as part of the process of deciding when a verdict was out of all proportion tot he facts of the case, would formulate their own views as to the proper amount. In formulating a view, the court 'has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind,' ***per*** Ormerod, L.J. in the same case, ***ibid***., p. 442, 443."

11 Further, in ***Anderson v. Carmichael***, V000219, Victoria Registry, dated November 20, 1987 (B.C.C.A.) Macfarlane J.A. compared the award with other cases which he found were not entirely comparable but nevertheless concluded that the impugned award was indeed inordinately high.

1993 CanLII 1150 (BC CA)

12 While all cases are different, and it is impossible to find cases with completely comparable facts and circumstances, it is much easier today than it was at the time of *Nance* in 1951 to ascertain the range of damages for various kinds of cases. Because there are so many more cases it is easier to determine whether a particular award is inordinately or disproportionately high or low.

13 I have examined a great many decisions decided in our Courts in addition to those cited by counsel. They are largely cases of moderate soft tissue injuries to persons in the age group of these plaintiffs, but with continuing complaints, or other difficulties. In some of them the ongoing problems endured by victims of motor vehicle accidents include depression and other psychological problems. I shall set out a brief sampling of these cases, which are only a few of the many I have considered:

I. Cases Analogous to Mr. Cory.

1. ***Steenblok v. Funk***, a decision of Wong J., June 10, 1988, Vancouver Registry No. B851214 B.C.S.C.

Forty-seven year old raker on a paving crew, suffered soft tissue injury. Non-pecuniary damages: $35,000.

1993 CanLII 1150 (BC CA)

2. ***Grimard v. Todd***, a decision of Murray J., October 6, 1988, Vancouver Registry No. B871057 B.C.S.C.

Fifty-three year old male supervisor of a construction industry suffered soft tissue injury in neck. Pre-existing condition exacerbated. Chronic pain and unable to work full time. Non-pecuniary damages: $19,000.

3. ***Pesonen v. Melnyk***, a decision of MacKinnon J., February 12, 1990, New Westminster Registry No. C870233 B.C.S.C.

Fifty-six year old carpenter suffered soft tissue injury exacerbating previous condition of degenerative arthritis. Non-pecuniary damages: $20,000.

1993 CanLII 1150 (BC CA)

4. ***Burns v. Bellefleur***, a decision of Cowan J., May 29, 1991, Courtenay Registry No. 880162 B.C.S.C.

Forty-six year old male plumber suffered moderate whiplash. Resulting stress and anxiety. Likely able to continue employment. Non-pecuniary damages: $25,000.

1993 CanLII 1150 (BC CA)

II. Cases Analogous to Mrs. Cory.

1. ***Gill v. Letual***, a decision of Anderson J., February 26, 1991, Vancouver Registry No. B892501 B.C.S.C.

Fifty-three year old woman suffered whiplash injury. Pain in neck, shoulder and back. Psychology affected by accident. Pre-existing degenerative disc disease. Plaintiff unable to care for grandchildren and household. Non-pecuniary damages: $25,000.

2. ***Quick v. Nicholls***, a decision of Gow J., June 18, 1990, Victoria No. 89\166, (B.C.S.C).

Female, fifty years, suffered mild to moderate whiplash. Significant effect on activities, depression and daily pain. Non-pecuniary damages $25,000.

3. ***Hagen v. Andreas***, a decision of Leggatt J., October 28, 1991, New Westminster Registry No. C901167 B.C.S.C.

Forty year old female plaintiff, exceptionally active prior to accident. In accident she suffered moderate to severe back injury. No prior history of disease or complaint. Unable to do normal activities, ongoing pain, necessity for retraining. General damages $35,000.

4. ***Ferguson v. Petropoulos***, A decision of Macdonell J. Feb. 26, 1987, Victoria Reg. 860385 (B.C.S.C.).

Fifty-six year old female labourer suffered injury causing continuing pain in head, neck, back and shoulders. Unable to continue working. Non-pecuniary damages: $15,000.

5. ***Connors v. Riley***, a decision of MacKinnon J., November 2, 1989, Vancouver Registry No. B863076 B.C.S.C.

Forty-seven year old female injured in neck and knee. Chronic and permanent neck problems. Difficulties working. Non-pecuniary damages: $20,000.

6. ***Lowy v. Spencer***, a decision of Mackenzie J., December 7, 1990, Vancouver Registry No. B883909.

1993 CanLII 1150 (BC CA)

Fifty-six year old teacher suffered headache, neck, back and shoulder pains. Sleeplessness, nausea and anxiety. Non-pecuniary damages: $20,000.

7. ***Strother v. Low***, October 5, 1990, CA010526 (B.C.C.A.).

Forty-five year old female real estate agent suffered moderate whiplash. Unable to concentrate, loss of memory and lower back pain. Non-pecuniary damages: $30,000.

14 These cases suggest a range for the kind of non-pecuniary damages suffered by these Plaintiffs of from $20,000 to $40,000.

15 It next becomes necessary to consider whether there are any circumstances why these Plaintiff's damages should be assessed so far above the range established by the cases. There is much room for disagreement about the nature and effect of the injuries suffered by each of the Plaintiffs. As is so often noticed in personal injury cases, there is evidence suggesting that the Plaintiffs exaggerated and the Defendant minimized the Plaintiffs' injuries. I assume the jury considered each of the injuries described in the evidence and reached conclusions favourable to the Plaintiffs even though it is apparent, and would have been apparent to any jury acting reasonably, that there was much overlap both between various heads of injury, and between the pre and post-

1993 CanLII 1150 (BC CA)

accident medical conditions of the Plaintiffs. Making reasonable allowances for the favourable view taken by the jury, it cannot reasonably be suggested that these Plaintiffs suffered injuries which would justify awards substantially in excess of the range just suggested.

16 I say this because these Plaintiffs were not hospitalized except for treatment or investigation long after the accident. They have continued to function both in the discharge of their farming, home and social pursuits, admittedly with some difficulty and discomfort, and they retained a substantial although diminished capacity both for useful pursuits and for the enjoyment of their lives.

17 I demonstrate this with some random references to the evidence:

1. While the accident in this case seems to have been a severe one, the Plaintiffs were able to continue on to a restaurant as they had planned for that evening although Mrs. Cory says she was in great discomfort. They still get dressed up and go out for social dinners although perhaps not as frequently as before.

2. Mrs. Cory saw her physician the next day, but Mr. Cory did not consult a physician until four days later. They both

1993 CanLII 1150 (BC CA)

1993 CanLII 1150 (BC CA)

complained of generalized discomfort, Mrs. Cory probably worse than her husband, as she was diagnosed as having suffered some concussion which, on the medical evidence, is highly doubtful.

3. The Plaintiffs owned a camper and left on a six weeks vacation to Palm Springs less than a month after the accident. The evidence does not suggest they required medical attention while they were away. They have continued to take a winter vacation, driving in some years and flying in others. They drove to Palm Springs in the year of the trial. Mr. Cory drove a car in a local parade in 1986. Mrs. Cory has continued to drive although less than before, but the cause of her driving discomfort is said to be psychological rather than physical.

4. Mr. Cory, who was 50 years of age, was not in good health prior to the accident. His pre-accident complaints included knee and back complaints, Meniere's disease, sleeplessness, and a fairly serious tick or involuntary muscle movement in his neck, headaches, rheumatism, peptic ulcer, hypertension, and high blood pressure. He agreed his knee injury cleared up in one week. At his examination for discovery in February, 1987 he said his continuing complaints were "mostly my neck". While his counsel laid great stress on his facial tick or twitch, he said he is not usually aware when this occurs, and his neurologist reported in December,

1993 CanLII 1150 (BC CA)

1987 that Mr. Cory was not aware of any facial twitching or memory loss caused by the accident.

5. Mr. Cory admitted he is able to keep the farm accounts without difficulty. As a farmer he rated himself 8 or 9 out of 10 before the accident, but still 5 after the accident. 1988 was a better year financially than before the accident, and he has purchased some new equipment and he had the entire 130 acres of his farm under cultivation at the time of the trial. He has phased the farm out of growing hay and converted it to cash crops with a U-pick stand which both he and Mrs. Cory operate with assistance from their family as required. Mrs. Cory has been seen driving a tractor and lifting heavy pails of strawberries. No extra help was hired on the farm until one year after the accident.

6. The Plaintiffs listed their farm for sale two or three months before the trial for $2.5 million subject to obtaining a long term lease back of his home and 15 acres so they could continue to do some farming. Mr. Cory said he does not really intend to sell his farm.

7. Mrs. Cory was 48 years of age at the time of the accident. She attended her family physician regularly for the first eighteen months after the accident, and then changed physicians. Her new doctor, Dr. Emery, diagnosed her in July 1987

as having soft tissue injuries to her cervical and thoracic spine, fractured right 6th and 7th ribs, and a post-concussion syndrome. She had a myelogram done in July, 1987 which disclosed some narrowing at the C 5-6 level. At about the same time, the Defendant's physician diagnosed Mrs. Cory as having a relatively minor soft tissue injury to the neck, and observed no significant objective signs substantiating her continued subjective complaints. A prognosis was given that she should not be troubled by these complaints in the future.

8. In February, 1988, Mrs. Cory was seen by a neurologist who reported to the Plaintiffs' solicitor. This physician thought she was going to make a significant if not a full recovery from her muscular-skeletal injuries. His conclusions about the cause of her alleged personality change and depression are unhelpful and vague. He thought her complaints about numbness in her arm could not be attributed to the accident.

9. In April, 1988, Mrs. Cory was examined by Dr. Koehler, a rheumatologist, who concluded that the degenerative arthritis in her lumbar, cervical and dorsal spine predated the accident, but he did not rule out continuing discomfort and disability to some degree in the future.

1993 CanLII 1150 (BC CA)

1993 CanLII 1150 (BC CA)

10. There was uncertain evidence about Mrs. Cory's anxiety and memory loss syndrome. Dr. Vallence, a psychiatrist who saw her in March 1989, concluded there was no evidence that she suffered a head injury in the accident. He thought depression was the principal cause of her difficulties. Dr. Walinsky, on the other hand, painted a much more serious picture of her psychological condition. Notably, however, he did not seek to attribute her alleged head injury to the accident, although he postulated, that in the absence of evidence of a blow to the head, "...rapid acceleration\deceleration can produce a brain trauma with a symptom picture similar to what Mrs. Cory presents."

11. While Mrs. Cory complained at trial of severe memory loss, she still does most of the farm accounting.

18 In reviewing the evidence given at this seven day trial, it is impossible to mention all of the facts which may have affected the collective mind of the jury. It is necessary to assume that the jury concluded that these Plaintiffs suffered and will continue to suffer considerable discomfort and disability, but the jury would not have been acting reasonably and judiciously if it decided that they did not have a continued capacity for useful, enjoyable lives.

19 Making all proper allowances for the particular circumstances, reasonable proportionality requires that their damages be assessed

at a much closer figure to the range I have mentioned than to the much larger amounts awarded by the jury. It follows, in my judgment, that the amounts awarded were inordinately high. It will be reasonable to increase Mrs. Cory's damages above the top of the range because of the unusual and uncertain nature of her injuries. I would allow the appeal and reduce her non-pecuniary damages to $50,000.

20 Because of his pre-accident medical condition, and his less serious injuries, I do not believe Mr. Cory's damages should be assessed even to the top end of the range. If it were not for the favourable view taken by the jury, I would assess his damages at a much lower figure. I would, however, allow the appeal in his case by reducing his non-pecuniary damages to $40,000.

21 Otherwise, I would dispose of this appeal in the manner directed by Mr. Justice Gibbs.

"The Honourable Chief Justice McEachern"

I AGREE: The Honourable Mr. Justice Wood

1993 CanLII 1150 (BC CA)

Dissenting Reasons for Judgment of The Honourable Mr. Justice Gibbs:

22 In this appeal we are asked to reduce an award made by a jury to Mr. and Mrs. Cory to compensate for the consequences of injuries sustained in a motor vehicle collision in which they were the innocent victims.

23 The jury assessed the compensable damages to Mrs. Cory at a total of $165,484 and to Mr. Cory at a total of $98,643. In each case the damages were itemized under five separate heads:

MARY LOU CORY	
General damages for pain and suffering and loss of amenities of life	$ 94,000.00
General damages for past loss of income	$ 6,000.00
General damages for future loss of earnings	$ 22,575.00
General damages for future costs or expenses	$ 41,500.00
Special damages for expenses incurred to date of trial	$ 1,409.00
TOTAL AWARD TO MARY LOU CORY	$165,484.00
CLIFFORD HARTNELL CORY	
General damages for pain, suffering and loss of amenities of life	$ 71,250.00
General damages for past loss of income	$ 4,980.00
General damages for future loss of earnings	$ 21,000.00
General damages for future costs or expenses	$ 950.00
Special damages for expenses incurred to date of trial	$ 463.00
TOTAL AWARD TO CLIFFORD HARTNELL CORY	$ 98,643.00
TOTAL AWARD	$264,127.00

1993 CanLII 1150 (BC CA)

24 Mr. Marsh challenged each head of each award, except the respective special damages heads, on the ground that: "There was no evidence upon which to base such an award or, alternatively, on the evidence the award was so inordinately high as to be a wholly erroneous estimate of the damage." He also alleged errors in the charge by the trial judge to the jury "with respect to the calculation of future costs and earnings".

25 We made it known to counsel during argument that we were satisfied that there was evidence to support an award under each head, that we were satisfied that there were no errors in the charge to the jury on future costs and earnings, and that with the possible exception of the pain and suffering and loss of amenities head (non-pecuniary damages) the awards could not be said to be "so inordinately high as to be a wholly erroneous estimate of the damage".

26 Subject to one qualification, therefore, the only issue remaining to be resolved is whether the non-pecuniary award to each of Mr. Cory and Mrs. Cory is so out of proportion that it calls for intervention by the court. The qualification is as to the future costs and earnings heads of award to Mrs. Cory. She died on November 22, 1989, a little over five months after the jury delivered the verdict. We do not know whether there was any causative connection between the injuries sustained by Mrs. Cory

1993 CanLII 1150 (BC CA)

and her death at the relatively early age of 52 years. But we do know that the life expectancy and employment expectancy foundations for the jury awards of $41,500 and $22,575 respectively now have no basis in reality.

27 At the commencement of argument counsel for Mr. Marsh applied for leave to introduce as fresh evidence the fact of Mrs. Cory's death. The supporting affidavit confirmed that counsel intended to rely upon that evidence in support of a submission that the court should reduce the future costs and future earnings awards to Mrs. Cory. It is clear from the authorities to which counsel referred us that the court has a discretion to receive the fresh evidence and that the discretion is to be exercised by balancing the competing considerations of the public interest in the finality of litigation on the one hand and, on the other hand, the affront to common sense involved in the court shutting its eyes to a fact which falsifies the assessment: ***Mercer et al. v. Sijan et al.*** (1976), 72 D.L.R. (3d) 464 (Ont.C.A.); ***Rayner v. Knickle and Kingston*** (1991), 274 A.P.R. 214 (P.E.I.C.A.); ***Maitland v. Drozda*** (1983), 3 W.W.R. 193 (Sask.C.A.).

28 Those authorities also establish conditions which must be satisfied before considering whether to exercise the discretion:

1993 CanLII 1150 (BC CA)

1. That the evidence was not discoverable by reasonable diligence before the end of the trial.

1993 CanLII 1150 (BC CA)

2. That the evidence is wholly credible.

3. That the evidence will be practically conclusive of an issue before the court.

29 The conditions are met in this case: the evidence did not exist until just over five months after the trial; the evidence consists of an uncontested affidavit and of a xerox copy of the death certificate; the evidence will be practically conclusive on the issue of reduction or no reduction in the awards for future costs and future earnings for Mrs. Cory.

30 I would exercise the discretion of the court in this case in favour of receiving the fresh evidence. There is no violation of the public interest in finality in doing so; none of the heads of award to either Mrs. or Mr. Cory with be final in terms of dollar amount until the judgment of this Court has been handed down and a further appeal refused, exhausted, or barred by the effluxion of time. On the other hand, there would be a gross affront to common sense if the evidence were refused. Had the jury had the divine prescience to predict the death of Mrs. Cory within about five months they could not possibly have awarded the sums they did in respect of future events predicated upon statistical averages. The fresh evidence "falsifies" the assessment.

1993 CanLII 1150 (BC CA)

31 The consequence of receiving the fresh evidence is that, in my opinion, the combined award of $64,075 for the two heads at issue cannot stand. We do not know the process of reasoning which led the jury to that total but we can, I think, safely conclude that the award included some front end loading in the sense that there would be significant asset expenditures for future cost purposes in the initial months, and in the sense that employment income would likely be higher in the months and years immediately following the award tapering off towards the end of the employment expectancy years. In my opinion, a jury having before it the evidence which we have could have awarded up to $10,000. Accordingly, I would allow the appeal on the future costs and future earnings awards to Mrs. Cory and reduce the total award of $64,075 to $10,000 without apportionment as between the two heads.

32 The challenge to the non-pecuniary awards of $71,250 and $94,000 respectively to Mr. and Mrs. Cory is quite a different matter. Because of the way it was put before us, the fresh evidence has no impact on those awards. It was tendered, as specified in the supporting affidavit, as having relevance to "the award of the jury for damages for future loss of earnings...and for future costs and expenses..." for Mrs. Cory. We address the non-pecuniary issue therefore having before us the same record as was before the jury, although our record is in the form of the inanimate, coldly impersonal, printed page whereas the jury had

1993 CanLII 1150 (BC CA)

1993 CanLII 1150 (BC CA)

under scrutiny an animated, nine day, passing parade of real, live people.

33 A finding of appropriate compensation or, as it is sometimes referred to, solace for pain, suffering and loss of enjoyment of life is a finding of fact. We are enjoined, as an appellate court, by a long line of eminent authority, against interfering with a finding of fact made in the court below unless palpable and overriding error is shown. Similarly, we are enjoined by an equally eminent, long line of authority against interfering with an assessment of damages by a trial judge unless we are "satisfied either that the judge...applied a wrong principle of law...or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage": Viscount Simon at p. 675 of ***Nance v. B.C. Electric*** (1951), 2 W.W.R. (N.S.) 665 (P.C.).

34 However, when the assessment is made by a jury the disparity between the award made and the award which could properly have been made must be wider than where the award is made by a judge alone to justify alteration by an appellate court. In the case of a jury award the assessment must be "out of all proportion". See Lord Wright at p. 616 of ***Davies v. Powell Duffryn Associated Collieries*** (1942), A.C. 601 (H.L.) where he discusses generally the limits on interference

by an appellate court with damages assessments and propounds the "out of all proportion" threshold for a jury award:

> ...An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: ***Mechanical and General Inventions Co. Ltd. v. Austin*** (1935), A.C. 346.
>
> (Emphasis added.)

35 The "out of all proportion" test for a jury assessment was adopted by Viscount Simon at p. 675 of ***Nance v. B.C. Electric***:

> ...when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of proportion" (per Lord Wright, ***Davies v. Powell Duffryn Associated Collieries, Ltd,*** at p. 616).

1993 CanLII 1150 (BC CA)

1993 CanLII 1150 (BC CA)

36 Our review of the jury award for non-pecuniary damages therefore must be undertaken within the limits imposed by these authorities. Having concluded that there was evidence to support a non-pecuniary award at some level, we are further limited to determining whether the awards which were made were, in the words of Lord Wright in ***Davies***, "out of all proportion to the circumstances of the case." And in making that determination we must guard against usurping the role of the jury as trier of fact, including the fact of appropriate solace, by some intuitive selection of an arbitrary lesser sum.

37 It is easy to conjure up a hypothetical case where an extreme award would shock the conscience, would be so outrageously large, considering the nature and extent of the injuries sustained, as to be out of all proportion. But this is not such a case.

38 Mr. and Mrs. Cory were farmers. More accurately, they were partners in a farming operation in the true sense of partnership in that they shared in the field and shop and animal husbandry tasks. They shared in the responsibilities and the rewards. They shared the unique bond between the land and those who do their duty by the land. They were bound to conform to the inexorable annual timetable of those whose livelihood is tied to the seasonal rhythms of nature.

1993 CanLII 1150 (BC CA)

39 The Cory farm is located in the Municipality of Delta, about six miles from where the collision which gave rise to these proceedings occurred. Farming had been the Cory ambition and the Cory dream from the time they were married in 1956. Each worked in non-farming occupations until they were in a position to acquire a dairy farm in 1976. They sold the dairy farm in 1982 and purchased the farm they were operating at the time of the collision, and which Mr. Cory may still be operating. It is, or was, a mixed farm with beef animals, hay, corn, vegetables and fruit, and, as well as managing their own farm, the Corys did custom work for other farmers from time to time. The farm is 130 acres in size but as a rule the Corys rented additional acreage so that they actually farmed 200 to 250 acres. Each of Mr. and Mrs. Cory and their son John and daughters-in-law Janet and Melanie gave evidence as to the details of the farming operation and the multitude of tasks associated with it.

40 At the time of the collision Mr. Cory was 49 years old and Mrs. Cory 48. They were in their one-ton farm truck on 120th Street, in Delta. Mr. Cory was in the driver's seat and Mrs. Cory in the passenger seat. The truck was stationary. They were waiting for a break in the traffic to turn left into restaurant premises. It was December 6, 1985, at about 7:00 o'clock in the evening.

41 With only an instant of warning Mr. Marsh's vehicle, estimated by witnesses to be travelling at 50 mph or more, collided with the left front corner of the Cory farm truck. The impact drove the truck backwards ten to fifteen feet even though Mr. Cory was pressing on the brake pedal at the time. The left front of the truck was crushed, the cab driven back against the deck and the frame twisted. Both of the Corys had their seat belts fastened but both sustained injuries, Mrs. Cory more seriously than Mr. Cory, no doubt because Mr. Cory was able in some degree to brace himself by his grasp on the steering wheel and his foot on the brake pedal. Also he was able to see that there would be a collision a split second before it happened.

42 At trial, some three and one-half years after the collision, there was the usual plethora of medical evidence including inconsistent opinion evidence on the nature and extent of the injuries and the pain and suffering associated therewith and the likely long term effects. The jury was directed on how to deal with the evidence:

> You, on the other hand, are the sole judges of the evidence and the facts which arise from the evidence. Your findings of fact must be based only on the evidence that you have heard and seen in this courtroom. Evidence becomes fact when you decide that a particular piece of evidence is more probably true than not.
>
> You may accept or reject all or any part of the evidence of any witness, and it is for you to decide what weight you will attach to the evidence of any witness. It is for you to decide what evidence you will accept as

1993 CanLII 1150 (BC CA)

> truthful, accurate, and reliable, and what evidence you are going to reject. It is for you to say whether or not a witness has exaggerated or minimized his or her evidence.
>
> It is your recollection of the evidence and your view of the evidence which matters. What counsel have said and what I may say about the evidence is said only for the purpose of assisting you but not to replace your function.

The trial judge reviewed the evidence carefully for the jury with appropriate cautions from time to time. She explained the approach to take in assessing credibility and referred to the use of common sense:

> In deciding on the weight -- which is really the significant -- to attach to the evidence of a witness, you might consider the following questions:
>
> Firstly, how did the witness appear to you when he or she was giving evidence? Was he or she straightforward and responsive to questions, or was he or she evasive or defensive or argumentative with counsel? Is the evidence of the witness reasonable and consistent? Does it fit together reasonably with the rest of the evidence? Is the witness impartial, or does he or she have an interest in the outcome of this case? Now, of course, this question really only applies to witnesses other than Mr. and Mrs. Cory since they obviously and naturally have an interest in the outcome of the case.
>
> Remember there are no universal tests of credibility or reliability that can be applied to every witness. Bear in mind the possibility that a witness may be completely honest and yet quite wrong. There is a human tendency to rationalize events and to believe that things happened in a way which, for some reason, one wants to believe that they happened. People may lie, but they may also tell untruths in which they honestly believe. Remember that no one can recall everything, and everyone makes mistakes.
>
> Most of the tests of credibility or reliability are tests which, either consciously or unconsciously, we apply in ordinary life in deciding whether we can safely rely on things which others have said concerning

1993 CanLII 1150 (BC CA)

> important matters. It is precisely that same common sense approach which you are now required to bring to your task as jurors in this trial.

And, in the course of dealing with the evidence, the trial judge made a point of emphasizing the role of the jury and the duty to be impartial:

> Remember also that for each of these categories of damages, you must consider the effect on Mr. and Mrs. Cory separately. They are separate individuals and have been affected by the accident in different ways and to varying degrees. Approach your task by dealing firstly with one -- and the question sheet encourages you to do this -- and then with the other.
>
> They each have an individual entitlement to an assessment of damages, and you are equally qualified to determine the amount of those damages as anyone else, and I say that with total sincerity. The whole point of a jury trial is to have you bring to your task your views as members of the community that are participating in the real world out there and are to bring those real world values into the courtroom.
>
> Now, what you're not to do, though, is you're not to put yourself in the shoes of either the plaintiffs or the defendant. That's not your job here. And I think there was perhaps a suggestion one way or the other that maybe that was a good idea, and I assure you that it isn't. Because you are impartial, you are judges, and you are to reach your decision on the evidence in an impartial way and in the way that is fair to all.

43 There was evidence upon which the jury, conscientiously following the trial judge's directions, could find that each of Mr. and Mrs. Cory was entitled to a substantial award for solace under the non-pecuniary head.

1993 CanLII 1150 (BC CA)

44 It was open to the jury, to conclude, on the evidence, that Mrs. Cory suffered, and to some extent continued to suffer at the time of the trial: headaches, back, shoulder, neck and hip pain; strained and scarred muscles, cervical disc damage, fractured ribs, post concussion syndrome; changes in temperament and personality; and deficits in memory, concentration, problem solving ability, and loss of intellectual capacity. It was open to the jury to conclude that the pain and suffering would persist into the future and would have a substantially adverse impact on Mrs. Cory's customary pre-accident activities and upon her continued enjoyment of life.

45 It was open to the jury to conclude, on the evidence, that Mr. Cory suffered, and to some extent continued to suffer at the time of trial: headaches, shoulder, neck, back, hip, leg, stomach and chest pains; cervical strain, lumbar, chest wall, left elbow and right knee strain; severe facial tics or spasms and exacerbation of previously existing shoulder and neck tic or spasm; and post concussion syndrome manifested by depression, decreased motivation, emotional lability, tiredness, forgetfulness, decreased ability to concentrate and decreased libido. It was open to the jury to conclude that the pain and suffering would presist into the future and would have a substantially adverse impact on Mr. Cory's customary pre-accident activities and upon his enjoyment of life.

1993 CanLII 1150 (BC CA)

46 It was open to the jury to conclude, on the evidence of Mr. and Mrs. Cory and the family members, that Mr. and Mrs. Cory were so seriously inhibited by their injuries and the long-term effects thereof that they could no longer perform the numerous tasks associated with their farming operation. There was evidence that they tried to cope by changing the mix and reducing the scope but that they were ultimately led to listing the farm for sale intending only to retain about 15 acres around the farm buildings so as to maintain a modest link with the land.

47 It was open to the jury to conclude that Mr. and Mrs. Cory were deprived of a lifestyle which combined the benefits of a livelihood with the ongoing rewards of pleasure and pride which accrue to those who work in constant and intimate communication with nature. Mr. Cory said that if it had not been for the accident they would have continued farming in the same manner and on the same scale to age 65 or 70.

48 In the face of all of this we are compelled, in my opinion, to ask ourselves what grounds exist for interfering with the application by the jury of, to paraphrase the trial judge, the real world values to the case which unfolded in the courtroom. I can find none.

1993 CanLII 1150 (BC CA)

1993 CanLII 1150 (BC CA)

49 The non-pecuniary awards are not so large as obviously to be, on their face, in the words of Lord Wright in ***Davies***, "out of all proportion to the circumstances of the case". We were given nothing else as a standard against which to measure the disparity, if there is a disparity. The four cases put before us by counsel for Mr. Marsh as comparables are not, on the facts, true comparables. And, in any event, even true comparables cannot be said to be more than rough guides.

50 In ***Smyth v. Szep*** (1992), 63 B.C.L.R. (2d) 52 (dissenting on a different point), at p. 73 I referred to the use of comparables and to the duty to assess non-pecuniary damages on a functional basis:

> Moreover, comparable cases can never be more than helpful guides. Since ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, [1982] 1 W.W.R. 433, 34 B.C.L.R. 273, 19 C.C.L.T. 1, 129 D.L.R. (3d) 263, 39 N.R. 361, if not before, the law has been clear that ultimately the appropriate solace for a plaintiff's pain and suffering is to be determined by the functional approach. The trial judge is to assess damages for that plaintiff based upon that plaintiff's injuries and that plaintiff's pain and suffering and taking into account all of the factors unique to the circumstances of that plaintiff.

51 The most obvious inutility of awards by trial judges as comparisons in this case is that the comparables do not meet the requirements of the functional approach. They do not take into account the factors unique to the circumstances of the Corys which the jury must have taken into account. There can be no real

comparison between the nature and extent of the pain and suffering the farmer is compelled to endure while continuing to perform the tasks demanded of him by the natural progression of the seasons and the pain and suffering from injuries which a plant or office or other salaried worker is able to cosset by unpenalized inactivity while the healing process is at work.

52 As well, comparables suffer from two other shortcomings. Firstly, reliance by a trial judge on awards made by other trial judges of co-ordinate jurisdiction tends to perpetuate an element of circularity. Secondly, imposing trial judge awards as an appropriate measure of resasonableness negates the very purpose of a jury, to bring into the courtroom the standards and the common sense of the community.

53 I am not persuaded that the jury in this case did otherwise than conscientiously assess non-pecuniary damages impartially, as directed by the trial judge, and by the application of the standards and common sense of the community. In my opinion, it is not open to us to rest a finding that the jury assessment was out of all proportion upon the foundation of a few selected excerpts from the evidence led during a nine day jury trial.

54 Given the record which we have, and given the limits imposed by the authorities referred to earlier, this appeal is, in essence,

1993 CanLII 1150 (BC CA)

a plea to each member of the panel to give effect to subjective impressions based upon nothing. I am not prepared to give relief to an appellant on such ephemeral grounds.

55 I would allow the appeal only to the extent of reducing the total of $64,075 for the combined awards for future costs and future loss of earnings for Mrs. Cory to $10,000. As the reduction is about 20 percent of the total of the awards to Mr. and Mrs. Cory I would award the appellant 20 percent of the taxed costs of the appeal.

"The Honourable Mr. Justice Gibbs"

1993 CanLII 1150 (BC CA)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Daleh v. Schroeder*
2019 BCSC 1179

Date: 20190621
Docket: M177540
Registry: New Westminster

Between:

Inderjeet Daleh

Plaintiff

And

Nathan L. Schroeder and Andrew T. Haynes

Defendant

Docket: M194167
Registry: New Westminster

Between:

Inderjeet Daleh

Plaintiff

And

Corey McDonnell

Defendant

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

2019 BCSC 1179 (CanLII)

Counsel for the Plaintiff:	P. Formby
Counsel for the Defendants:	M. Plummer J. Grange
Place and Dates of Trial:	New Westminster, B.C. June 3-7, 10-14, 17-20, 2019
Place and Date of Judgment:	New Westminster, B.C. June 21, 2019

2019 BCSC 1179 (CanLII)

I. INTRODUCTION

[1] The plaintiff was involved in two motor vehicle accidents. Liability is admitted for both.

[2] The key issue at trial was the extent to which the plaintiff's inability to become a chartered professional accountant ("CPA") could be attributed to the accidents.

II. BACKGROUND

[3] The plaintiff was born February 30, 1990 and is presently 29 years old. She lives with her parents in Burnaby.

A. Pre-Accident History

[4] The plaintiff struggled academically prior to the accidents. She had below average marks in high school. In Grade 12 she failed two classes and her other marks ranged from C- to B. In Grade 11 Math she received a mark of only 54%, and she did not take Grade 12 math. The plaintiff attended Langara College in 2008-2009, where she had difficulty, and ended up on academic probation by the end of the year. In 2011, she transferred into the accounting diploma program at the British Columbia Institute of Technology ("BCIT"). Upon entry, her long term goal was to complete the diploma program, then take the accounting degree program, and finally pursue a Chartered Professional Accountant designation. Her own projection was that, absent the accidents, she would have completed her diploma in 2015, and commenced the CPA program by 2017. As it turned out, she only obtained her diploma in 2019.

[5] By the time of her first accident on February 24, 2014, she had completed 20 of the diploma's required 30-32 courses. Her marks were poor, with her term averages varying between 34% and 69%. In the fall of 2012 she reduced her course load dramatically to an average of three courses per term, exiting the full-time program for the part-time program. However, the reduced load did not result in a corresponding benefit to her grades. She continued to fail a number of courses. She was concerned about her marks, but says the school encouraged her to keep going.

2019 BCSC 1179 (CanLII)

She claims her marks were improving as she applied herself more, but her transcript does not support this assertion.

[6] In terms of pre-accident employment, in 2010 and 2011, the plaintiff did office work for a company called WK Consulting. In February 2013, she started working full-time at a radio station owned by I.T. Productions Ltd. ("IT Productions") doing general office work. She attended her BCIT courses in the evenings. She was still working for IT Productions at the time of her first accident.

[7] The plaintiff's reported earnings over the material period are as follows:

2011	$14,501
2012	$5,202
2013	$17,735
2014	$18,974
2015	$8,061
2016	$20,479
2017	$30,073
2018	$14,557

[8] Before her first accident, the plaintiff was heavily involved in caring for her family. She lived at home. She did the housecleaning, laundry and grocery shopping, and assisted her mother with meal preparation. Her mother has serious health difficulties including multiple sclerosis, depression and dementia. The plaintiff's role increased as her mother's condition worsened, particularly after 2010. She would take her mother to medical appointments. Her brother had a drug problem, and did not help out around the house. He was in and out of the family home.

[9] The plaintiff also assisted her aunt as her uncle had suffered a brain injury. She would take her to appointments and babysit her child. She also went to Kelowna about five times a year to provide support for a cousin with children who had breast cancer.

2019 BCSC 1179 (CanLII)

[10] In terms of other activities, the plaintiff participated in hot yoga a few times a month, and did some limited snowboarding and hiking. She ran or jogged once or twice a week.

B. The First Accident

[11] On February 24, 2014, the plaintiff was on Highway 99 in Richmond, B.C. She was stopped in traffic on an overpass with her left arm crooked into her neck. She was then rear-ended by a car driven by the defendant Nathan Schroeder. His smaller vehicle pushed under her taller SUV vehicle, which is to be expected, although the plaintiff sought to make much of this. Her vehicle was pushed forward such that she hit the car in front of her. She hit her left shoulder on the side of the car. Her left knee hit the dashboard. She is not sure if she hit her head. Her evidence on this point swung wildly throughout her testimony, as discussed further below. She did not lose consciousness.

[12] The plaintiff went to the hospital, but was released the same day with a recommendation to rest and take Tylenol.

C. Post First Accident

[13] She returned to full-time work approximately 10 days after the first accident. She took a medical leave from BCIT, returning only in the fall of 2014. She suffered pain in her neck and upper back, and from headaches. She also had knee and hip pain, which resolved over time. She was not able to keep up with her chores. She was not able to assist her aunt or cousin as she had done previously. She cut down her social and physical activities. She tried snowboarding in the winter of 2015, but found it too difficult to get back up if she fell.

[14] In terms of treatment, her general practitioner prescribed physiotherapy, which she was still attending by the time of her second accident. She also received massage therapy, active rehabilitation and chiropractic treatments.

[15] In terms of her employment, the plaintiff stopped working at IT Productions in October 2014. She then went on employment insurance until she began work for

2019 BCSC 1179 (CanLII)

Pacific Coast Heating in September 2015 performing office manager- and bookkeeping- type services. She worked there full-time up to the second accident.

[16] In terms of schooling, once she returned to BCIT she continued to take an average of two to three courses per term. Her marks continued to be low, with the average term marks varying between 37-67%, notwithstanding that school did provide accommodations for her injuries, and she was taking several courses for the second or third time.

[17] By the time of her second accident on May 16, 2016, she was feeling some physical improvement. She was attempting to do more chores around the house.

D. Second Accident

[18] The plaintiff's version of the second accident is as follows. She was walking across a crosswalk on a ramp onto Byrne Road when she was hit by the defendant Corey McDonnell's vehicle. She estimates that he was travelling about 15-20 kilometres per hour. There was a mild incline coming down to the crosswalk. The vehicle hit her legs and she says that she was lifted up off her feet onto the hood of the defendant's car. She initially suggested that she hit her head on the hood, although her evidence was extremely variable on this issue. She saw that the driver was looking back over his shoulder to check for oncoming traffic as he merged onto Byrne Road. She then says she came off the hood and ended up landing on her right side out of the crosswalk. She felt like she was flying. She tried to stand up but was in excruciating pain, so she let out a loud scream before she collapsed again. There were bystanders who came to care for her, and either a man or a woman told her she had hit her head. She was taken to hospital by ambulance, but discharged the same day.

[19] The defence called an independent witness, Rui Costa, who cast substantial doubt on the plaintiff's evidence. Mr. Costa testified that he was turning left at the same intersection, and was stopped across two lanes parallel to the plaintiff's direction of travel. He saw her out his driver's side window perhaps a second or two, or a "flash", before the impact. He said that Mr. McDonnell's vehicle was going very

2019 BCSC 1179 (CanLII)

slowly as it sought to merge into the moving traffic, perhaps five kilometres per hour, and that the impact would better be described as a “nudge”. Mr. Costa was familiar with the area and said that when traffic is going west down Byrne Road on a green light, it is not possible for the merging lane to drive quickly given the heavy flow of traffic. He did not see the plaintiff come up onto the defendant’s hood, nor did he see her become airborne at any point. He said that after she was struck she spun and went down, and immediately popped back up. He did not hear any scream. He did not hear any witness say that she had hit her head. He got out of his car and came across the traffic to check on her. Another witness told her to go lay back down, and she did. She lay there until the ambulance arrived.

2019 BCSC 1179 (CanLII)

[20] Although Mr. Costa was clearly agitated about having to testify, this seems to have been driven by the fact that he felt that earlier contact from plaintiff’s counsel and the plaintiff’s investigator was inappropriate. He felt they were trying to improperly pressure him to agree to a version of events that was not accurate. At the end of the day, I find that Mr. Costa has no interest in the dispute, and that his evidence remained generally consistent notwithstanding an aggressive cross-examination, which is more than can be said about the plaintiff’s evidence, which twisted and turned throughout. That said, I accept that no lay witness is likely going to be able to distinguish between 5 and 15 kilometres per hour. Suffice to say that I find that the version of events from Mr. Costa was generally more accurate than that offered by the plaintiff. However, at the end of the day, the substance of this case turns on the nature of the injuries.

[21] RCMP Constable Brennen Ekelund arrived after the other first responders. He testified that the plaintiff was on her feet when he arrived, but I do not place particular weight on this given that his recollection of the particulars of this incident was foggy. He did not note any head injury, which he says would normally be reported if observed. He did not note any material vehicle damage on the driver’s car.

E. Post Second Accident

[22] The plaintiff missed a couple of weeks of work, but again returned full-time. Unlike the first accident though, she did not withdraw from her BCIT courses.

[23] She says that her prior neck and back problems were aggravated by the second accident. She also developed right hip and knee pain.

[24] The plaintiff was dismissed by Pacific Coast Heating in December 2016. She says she was let go because she did not want to drive to work in a snowstorm. Her employer, Housang Brahmand, testified otherwise. He said that when the plaintiff called worried about coming to work in the snow, he offered to pay for a taxi, but she declined the offer. He described her as a poor employee. She was often late for work, or she failed to show up at all. She would not give early verbal notice that she was going to miss work – she would just text him to say she was not coming in. She did not properly process permit applications. She never mentioned having an injury. Mr. Brahmand did not notice a change in her performance after the date of the second accident. She studied for her BCIT courses during work hours. He said he would "close down rather than rehire her".

[25] The plaintiff worked for Canadian Linen & Uniform Service as a Temporary Sales Operations Coordinator from January 2017 to May 2017. She says she stopped working there because it was too demanding.

[26] In May 2017, the plaintiff started working nearly full-time for Safari Diamond Bits doing bookkeeping. The only reason she was not working full-time was that she asked for two half-days off for school. She was being trained to take over as office manager. She was let go in or about June 2017. This was triggered by a serious $30,000 error. This was not a math calculation error, but a failure to put in the right price from the price list. The plaintiff claims that her concentration level was affected by her pain from the accident. However, it is notable that the owner of the company, Matthew Safari, testified that (1) she initially denied that the error was hers until confronted with unassailable documentary evidence, (2) she had chronic attendance issues, including leaving work or staying home from work without advance notice

2019 BCSC 1179 (CanLII)

and approval, (3) she told conflicting stories to various persons in the company about her absences, and (4) the plaintiff never disclosed any injury, nor did she seek any accommodations for any injury. Mr. Safari indicated that he would have done everything possible to accommodate any legitimate difficulty. He said he did not fire her earlier because he believed everyone deserved a chance. I found Mr. Safari to be an impressive and forthright witness. The fact that someone with his level of empathy would find the plaintiff impossible to work with carries substantial weight.

[27] As discussed further below, in September 2017, a psychiatrist, Dr. Muir, diagnosed Major Depressive Disorder and recommended anti-depressant medication. The plaintiff declined to follow this recommendation. She has an aversion to these drugs. She has concerns about whether they would affect her clarity. Her mother takes them and she does not like the effect they seem to have on her. She stated that she is also concerned about her brother's drug addiction problems.

[28] Beginning in September 2017, the plaintiff started working for Blue Moon Plumbing. This was a part-time position at three days per week. She was let go by December 2017. She claimed this was in part due to the fact that she was not mingling with the other employees. However, her employer, Ms. Trozzo, testified to the contrary – that her dismissal was in fact due to a lack of punctuality, data entry errors, excessive absences for school work, poor message taking from clients, and poor communication about departure times with other employees, resulting in a lack of coverage on phones. Ms. Trozzo said there was no requirement for her employees to mingle. Ms. Trozzo described the plaintiff as "a terrible employee".

[29] In July 2018, the plaintiff started working for the Girl Guides of Canada doing bookkeeping. This was a part-time position. Due to staffing shortages, the plaintiff was asked to increase to 28 hours per week. In January 2019, the plaintiff asked to reduce that back down to 21 hours per week. She has found this change to be beneficial in terms of having sufficient energy to spend time with her husband. She says the higher level of hours exhausted her. She also has more time to attend her

2019 BCSC 1179 (CanLII)

treatments now, and spends less time in traffic. Her employer is supportive, has provided some ergonomic equipment, and allows her to take breaks for stretching.

[30] By 2018, the plaintiff had completed the courses required for her accounting program and she says she obtained her diploma in 2019. Her overall grade in the program was 53%.

[31] The plaintiff continues to have neck, upper back and shoulder pain through to the present. She has some swelling around her neck that, according to the medical records, ebbs and flows. From my own observation, such swelling was not particularly noticeable. Her knees hurt occasionally. Her sleep is interrupted. She says she has difficulty concentrating and says she has lost strength and energy.

[32] She says that she continues to have anxiety, particularly around driving. However, she has continued to drive long distances to see her now-husband, and for work.

[33] She has been undertaking physiotherapy, massage therapy, and active rehabilitation therapy, which help somewhat. She is also receiving psychotherapy to address her anxieties and sleep disturbances. She takes medical marijuana to help manage her pain.

[34] The plaintiff is able to care for herself, but she says that her capacity to do housework has diminished significantly. The plaintiff's father has assumed most of the plaintiff's previous responsibilities. The plaintiff is only able to wash her own dishes and do her own laundry, along with some light cleaning. Heavy housekeeping aggravates her upper body difficulties and causes headaches. It is difficult for her to drive her mother to appointments, as her mother needs support entering and exiting the vehicle. As such, her father has assumed most of the driving responsibilities for her mother.

[35] The plaintiff's evidence as to her limitations was supported by evidence from her father and husband. They also noted that her mood has been poor since the accidents. She spends a great deal of time just lying on the couch. She goes to bed

2019 BCSC 1179 (CanLII)

early. That said, the plaintiff has generally been able to maintain her family relationships.

[36] In September 2018, the plaintiff married her husband in a civil ceremony in Las Vegas, and they intend to have a religious ceremony this summer.

[37] The plaintiff has been able to return to a gentle form of yoga. She has been able to take walks with her husband and friend. She has not otherwise returned to her recreational activities.

F. Future Plans

[38] The plaintiff would still like to be a CPA. However, her marks are not high enough to enter BCIT's degree program, which requires a 70% average. It was suggested to her by BCIT that she could perhaps consider other schools, but the plaintiff has not taken steps to apply for programs. She says she has done some internet research.

[39] In terms of her home life, her plan is to move into her husband's home after their upcoming religious wedding ceremony. Her husband lives with his mother, two grandparents, and an adopted brother. There was an expectation that she would provide assistance to her mother-in-law with the household chores and with driving the grandparents. This was confirmed by her husband and her mother-in-law. Her mother-in-law did agree, however, that absent the accident she would still have expected her son to do some housework and driving, and that she would continue to cook and clean as much as she could as well. The plaintiff feels responsible to also continue to care for her own mother. The plaintiff is concerned that she will not be able to fulfil these duties. She is also concerned about her ability to carry and care for any children.

2019 BCSC 1179 (CanLII)

III. MEDICAL AND EMPLOYMENT EVIDENCE

A. Experts, Medical Practitioners, and Employment Witnesses Called by the Plaintiff

Dr. Shuckett

[40] Dr. Shuckett is a rheumatologist. She saw the plaintiff once in August 2017 for the purposes of a medical-legal report.

[41] She found some limited range of motion in the plaintiff's neck at that time. She noted muscle spasms in the upper back and left shoulder area. The plaintiff also complained of localized pain in these areas. There was no evidence of lack of effort.

[42] Dr. Shuckett concluded that the plaintiff had sustained the following injuries as a result of the accidents: myofascial pain syndrome in the neck and shoulder girdle, medial scapular and thoracic spine pain, a right hip girdle and sacroiliac ligament strain, headaches, and some findings of impingement of her right shoulder. She opined that the plaintiff's difficulties in maintaining employment and taking classes were consistent with the effects of the accidents she observed.

[43] As to prognosis, Dr. Shuckett testified that given that it was more than two years post-accident, she did not foresee much improvement. She indicated that the plaintiff probably needed some accommodations at school or work. She stated, "[i]n the future, if she has a sedentary job, which it sounds like she may well be looking toward if she is thinking of accounting, she will need an understanding boss who lets her build in stretch breaks."

[44] As to future costs and treatment, she said that the plaintiff may require a sit/stand desk, a gym membership, and counselling. She stated that intermuscular stimulation "might be indicated" and could be obtained from a physiotherapist, or alternatively, acupuncture. She said that a pain clinic is "another possible modality of treatment".

2019 BCSC 1179 (CanLII)

[45] In cross-examination, Dr. Shuckett agreed that anti-depressant medication can be beneficial, and that it is sometimes reasonable to at least attempt a trial run if the patient is willing.

Dr. Hershler

[46] Dr. Hershler is a physical medicine and rehabilitation specialist. In his report dated May 26, 2016, he found that the plaintiff's movements of her spine were fluid, pain free and attained full range. He also noted that she had full shoulder movement. The plaintiff did withdraw and verbally indicate pain at trigger points on her neck, across the shoulders and down the spine. He said that the trigger point response could be treated as objective since it is more in the nature of a reflex. He did not see any spasms.

[47] Dr. Hershler concluded that the plaintiff had suffered widespread soft tissue injuries, including a likely sustained bruise to the left calcaneus. He concluded that the pain and stiffness she was suffering was caused by the accidents, with the second accident aggravating the first. He also found that there was a history of concussion symptoms. My concerns about the reliability of this latter conclusion in light of the plaintiff's inconsistent reporting about head injuries are discussed below.

[48] In terms of a prognosis, Dr. Hershler indicated that she would "probably remain symptomatic for at least another one-to-two years, if not longer". He said that she was not capable of doing physical labour tasks at that time.

[49] He recommended that she continue with physiotherapy three times a week over the following six months, and then that treatments could be reduced. He also recommended a home based exercise program. He said she would benefit from an intellectual challenge and thus suggested that she continue her studies, with appropriate accommodations.

[50] In a January 17, 2018 follow-up report based on a January 10, 2018 assessment, Dr. Hershler found that the plaintiff's knee and ankle pains had resolved, but she had developed intermittent pain in her right lower back. She

2019 BCSC 1179 (CanLII)

continued to complain of burning pain in her upper back, spreading to her neck and shoulders. She also continued to have headaches. Dr. Hershler's diagnosis did not change, but he testified that she reported no further problems in her thought processes at the time of his second report. In terms of prognosis, he concluded that the plaintiff would remain symptomatic for at least a further two years, if not longer.

[51] In terms of work capacity, he recommended that the plaintiff seek part-time (50%-75%) employment, and that she continue studying.

[52] In terms of treatment, he recommended that she:

a) continue with physiotherapy and massage therapy on a weekly basis for at least one year, and then on a monthly basis for a further year;

b) work with a kinesiologist once a week for a year; and

c) take medical cannabis daily.

[53] In a final November 18, 2018 report based on a November 14, 2018 assessment, Dr. Hershler concluded that given the lack of change in her symptoms, "it is unlikely that Ms. Daleh will experience full resolution of her symptoms in the foreseeable future. It is [more] likely than not that she will have to deal with ongoing symptoms permanently." He recommended the following treatments:

a) kinesiologist visits once a week for a year;

b) massage therapy once a month;

c) trigger point injections; and

d) medical cannabis daily.

Dr. Parhar

[54] Dr. Parhar was the plaintiff's primary treating physician in relation to the accidents. In his expert report dated January 5, 2016, prior to the second accident,

2019 BCSC 1179 (CanLII)

he found that she had no low back pain or left shoulder pain. He thought her injuries had plateaued. He suggested that she consider anti-depressants or counselling.

[55] In his further report dated April 8, 2018, he diagnosed musculoligamentous injuries of the spine, left shoulder muscle strain, muscle tension headaches, sleep disturbance, and depressed mood. He concluded that the second accident caused additional bruising and contusions, wrist and elbow strains, and anxiety. At the time of his second report, he found that the left shoulder muscle strain, bruises and strains were no longer symptomatic, and should not be problematic for the future. The lumbar injuries had recurred in the second accident, and were still creating problems in 2018, as were her neck and knee pain. Her headaches were also continuing. He noted that treatment had been unsuccessful. He found that these problems were more likely than not permanent. He also found that her depressed mood and anxiety would likely continue for the foreseeable future.

[56] In terms of work, he found that she was partially disabled from returning to administrative-type work, and that this was likely permanent. He found that she would benefit from an ergonomic workstation, and ergonomic seating for home and her vehicle.

[57] He opined that the plaintiff requires assistance with household chores and seasonal cleaning. He suggested that there was no need for further physiotherapy since it was not providing any assistance.

Dr. Du-Fay Der

[58] Dr. Der is the plaintiff's treating psychologist. He concluded that she suffered Post-Traumatic Stress Disorder ("PTSD") as a result of the first and second accidents. This diagnosis relied on reports of:

a) the first accident being "so severe" that the front of that vehicle went under the rear of her SUV and "the sound of the collision [being] like a bomb went off";

2019 BCSC 1179 (CanLII)

b) a very dramatic injury in the second accident with her flying at least 10 feet away, and screaming while she was in the air.

[59] In cross examination, he conceded that a less serious accident could affect his opinion. I have concluded that neither of these descriptions above was supported by the evidence at trial, as discussed further below. The PTSD diagnosis was not made by any other expert. As noted below, I reject it given the lack of support in the factual record or other expert evidence.

[60] Dr. Der reported on May 17, 2018 that the plaintiff was seeing improvement after 23 sessions of counselling, but that she still has anxiety and fears in traffic. However, he was unaware of the extent to which she was driving throughout the material period. He said he would have wanted to know that fact.

[61] Dr. Der assumed that the plaintiff was already taking anti-depressants.

[62] In a follow-up report dated November 26, 2018, he reported further improvement in her generalized anxiety and her anxiety while driving. She was also sleeping better, but still has trouble falling asleep. Dr. Der still recommended a further 10-12 sessions of psychotherapy. He expects further improvement as a result.

Dr. Darcy Muir

[63] Dr. Muir is a psychiatrist. He saw the plaintiff once on September 9, 2017. He concluded that she suffered from Major Depressive Disorder in the moderate range, and Generalized Anxiety Disorder in the severe range, caused by the first accident and exacerbated by the second.

[64] He opined that, based on the plaintiff's reporting, she sustained a mild traumatic brain injury in the second accident, but that it "has likely resolved and there is no need for further intervention in regards to that". He said that any problems in this regard probably resolved in "days to weeks". As noted below, the plaintiff is no longer advancing a claim on the basis of mild traumatic brain injury.

2019 BCSC 1179 (CanLII)

[65] Dr. Muir recommended anti-depressants and sleep medication. Given her reluctance to take medications, he also recommended a referral to a psychiatrist to oversee the pharmacologic part of her therapy. He stated, "[t]his may also help in reassuring her and educating her about the risks and benefits of these medications, given her bias against them." He stated that 15-20 sessions of cognitive therapy would be the gold standard. He stated that the cost for these were typically approximately $180 per session. He concluded that she could taper her anti-depressant medication once she has had a year in full remission.

[66] In terms of a prognosis, he concluded that "with treatment, the expectation would be gradual improvement and remission of her symptoms", he felt her conditions were "very treatable".

Dr. Dean Powers

[67] Dr. Powers is a vocational rehabilitation specialist. He found that the plaintiff placed in the severe anxiety range on the Beck Anxiety Inventory and in the moderate depression range on the Beck Depression Inventory-II. His testing showed that her math calculation skills were limited. She was otherwise generally average for her age and grade level.

[68] Mr. Powers concluded that the plaintiff will have few vocational opportunities until she experiences improvements in her symptoms. He opined that she suffered a significant setback in her career plan due to injuries from the accidents. He found her ability to be productive as a CPA was questionable at present. In terms of her pre-accident condition, his report stated as follows:

> … I question whether Ms. Daleh has the numerical ability to examine accounting records, prepare financial statements, auditing and maintain accounting system/tax reports without making errors. Her lack of training and education standing will interfere with these professional obligations.
>
> …
>
> Based on Ms. Daleh's post-morbid functional limitations and in light of the vocational test scores, alternative occupations to that of CPA are likely advised.
>
> … In my opinion, Ms. Daleh's ability to work competitively has been compromised and the range of job opportunities available to Ms. Daleh has

2019 BCSC 1179 (CanLII)

> been greatly reduced to a supportive clerical role with limited hours including suitable worksite accommodations.
>
> …
>
> …In my opinion, she is not competitively employable and/or competitively employed at the present time and likely to remain at a disadvantage compared to her non-disabled peers in terms of securing and maintaining similar work in the…labour market.

[69] In his testimony, Dr. Powers sought to clarify this evidence to confirm his view that he felt she could have reached the CPA level based on her pre-accident condition, given her stronger scores in non-mathematical areas, and the ability to use technological tools to assist with the mathematics. That said, he suggested he would not have recommended accounting to her had he been her guidance counsellor.

[70] Dr. Powers did not have the benefit of her high school or Langara College transcripts when he prepared his report. He accepted that it would have been relevant to his assessment if the plaintiff had been terminated from her various positions for reasons other than the accident. He was unaware of the fact that the plaintiff should not have been allowed to proceed as she did in her diploma course because of poor grades on the basic accounting courses. He accepted the plaintiff's statement that her marks went down as a result of the accidents without performing his own analysis of the transcript. All these factors reduce the weight that can be applied to his opinion.

[71] Dr. Powers reported that the median salary in B.C. for accounting technicians, bookkeepers and clerks is $41,712-$42,755, and for administrative assistants is $45,883.

Jessica Ditson

[72] Ms. Ditson is an occupational therapist who performed a functional work capacity report and recommended an array of future cost of care items.

[73] Ms. Ditson concluded that the plaintiff had no observed functional limitations with casual sitting. She demonstrated the ability to perform work up to a sedentary

2019 BCSC 1179 (CanLII)

strength requirement (which includes accounting). However, if she was required to sit in combination with sustained or repetitive position of the neck and upper back, she is better suited to limit such work to an occasional basis. This conclusion was not based on poor results on any specific tests, but rather on the fact that the plaintiff's performance degraded over the course of the day. She also found some limitations in reaching out or overhead, or crouching, particularly if combined with sustained positioning of the neck and upper back.

[74] In terms of employment, she concluded that "her overall ability to compete for work in an open job market is reduced due to her ongoing physical and functional limitations related to her neck and upper back." She suggested that the plaintiff should work a maximum of 25 hours per week in total work or schooling, or about 70% of a 35-hour per week full-time position.

[75] In terms of future treatment, she costed out the following recommendations:

a) Housekeeping: She recommended six hours of assistance per week with household cleaning at an annual cost of $9,009-$9,664;

b) Seasonal Cleaning: She recommended seasonal cleaning with an annual cost of $372;

c) Physiotherapy: Ms. Ditson noted the variety of medical recommendations, but costed each: (1) Dr. Hershler: $3,380 for first year, and $780 for second year (2) Dr. Parhar: $0 (as he recommended discontinuing same);

d) Massage Therapy: Based on Dr. Hershler, she costed $6,606 for the first year and $1,386 for the following year. Given the potential for future flare ups, she costed $390 to $1,386 per year thereafter;

e) Kinesiology: Based on Dr. Hershler and Dr. Parhar's recommendations, she costed $3,380-$3,549 for Dr. Hershler's program and $390-$546 for Dr. Parhar's;

f) Gym Pass: Based on Dr. Shuckett's recommendation, she costed $421.10 annually, falling to $317.52 at age 65;

g) Yoga: Based on Dr. Parhar's recommendation, she costed $278.15;

2019 BCSC 1179 (CanLII)

h) Psychology: Based on Dr. Muir's recommendation, she costed $2,700 to $4,000 for the first block of 15-20 sessions. An additional 10 sessions would add $1,800-$2,000.

i) Medication: Based on Dr. Shuckett's and Dr. Parhar's recommendations, she costed various medications at individual annual costs from $12.48 to $3,197.40 depending on whether generics were used. He recommended 14 sessions for the first year, 8-10 sessions for a further period of 3-6 months. He estimated the cost at $45-$65 per hour, and a 25% contingency for travel.

j) Ergonomics: Based on Dr. Parhar and Dr. Shuckett's recommendations, she costed an adjustable chair, keyboard tray, slant board, and a monitor stand from $41.99 to $990 on replacement scheduled between 3 and 15 years. She also costed ergonomic assessments at $235-$470. She noted that the necessity for this would depend on whether her employer already provided such services and equipment. She recommended a supportive neck pillow with a differential cost of $50-$80 every two to three years;

k) Medical Cannabis: Based on Dr. Hershler's recommendation, she costed the annual cost of dry cannabis at $9,165.15 or capsules at $489.10, plus taxes.

Robert Carson

[76] Mr. Carson is an economist who provided data allowing for the projection of the present value of any income loss and the cost of future care. In particular, he found lifetime average annual earnings for a CPA of $120,370, and $65,190 for a financial auditor and accountant with a university certificate below a bachelor level. He was not sure if the plaintiff's diploma from BCIT would qualify as such a university certificate.

Other Witnesses

[77] The plaintiff's treating physiotherapist, massage therapist, and kinesiologist were called to confirm the extent and nature of their treatment. The operation manager at the plaintiff's current employer confirmed her current work situation.

2019 BCSC 1179 (CanLII)

B. Experts and Employment Witnesses Called by the Defendants

Dr. Osama Gharsaa

[78] Dr. Gharsaa, an orthopedic surgeon, examined the plaintiff in March 2018. He found no spasms or knots in her back. He identified no gait issues. The plaintiff had normal strength levels.

[79] He concluded that the plaintiff suffered a Level II whiplash associated disorder from the first accident, as well as a left knee contusion. The same diagnosis applied to the second accident, with the addition of contusions to the right hip and knee. He said that 6-12 weeks off work after each accident would have been reasonable.

[80] In terms of his examination, he noted:

> The examination today failed to identify any radiculopathy or any musculoskeletal pathology or any signs of ongoing objective orthopaedic impairment that can be attributed to the subject motor vehicle accidents apart from some discomfort with range of motion of her neck but overall she demonstrated an almost full range of motion.

[81] He concluded that her prognosis was good so long as she continues working on her active home exercise program and core stretching. He encouraged a return to her pre-accident activities. He concluded that from an orthopedic perspective, which includes an assessment of the soft tissues surrounding the bony structures, she should be able to return to her pre-accident work levels.

[82] Dr. Gharsaa found that the plaintiff did report pain on palpation. He acknowledged that the plaintiff may still be feeling pain, but that from a structural perspective, there was no objective explanation for the continuing pain. He accepts that there may be explanations outside his expertise, such as psychological and psychiatric issues, that underlay her continued pain. He did not question that she was feeling some pain. However, he felt that by giving her assurances about her physical condition, by engaging in a strengthening and stretching program, and by treating any other difficulties, she should be able to return to her pre-accident functioning, including full employment.

2019 BCSC 1179 (CanLII)

[83] Dr. Gharsaa was an impressive and straightforward witness prepared to make reasonable concessions rather than stretch beyond his expertise. I accept his evidence.

Dr. Christopher Cooke

[84] Dr. Cooke is a vocational consultant who prepared a response report to that of Dr. Powers. Dr. Cooke accepted that the plaintiff was no longer suited for work beyond the sedentary level.

[85] He found that her math computation skills were at the 8th percentile, consistent with a Grade 5.4 grade equivalent level. Her math fluency according to the Woodcock Johnson III test was at a Grade 8.2 grade equivalent. He concluded the results of the tests for mathematical proficiency suggested a generally reduced understanding of basic mathematical principles and a reduced ability for every-day, rapid math under timed conditions. Her scores in other areas were average or above-average. After a detailed review of her full educational history, he concluded that the plaintiff's ability to successfully complete the educational requirements to embark on a career as a CPA was "doubtful".

[86] He did accept that the accidents appear to have had some impact on the pace of her studies, extending her completion time for graduation. He did not provide an estimate of the delay, given that it was complicated by the fact that she continued to work rather than devote herself full time to her studies.

[87] He concluded that there were a number of potential options consistent with her abilities. These included work in the artistic community as an art gallery operator, art appraiser, and art restorer, assuming she obtained the required additional training. He also found that she could potentially work as an insurance appraiser or adjuster, again with appropriate training.

Other Witnesses

[88] Ms. Jennifer Kerr, the faculty and program head for BCIT's Bachelor of Accounting program clarified that the plaintiff moved from the full-time program to

2019 BCSC 1179 (CanLII)

the part-time program as early as the spring/summer session of 2012, almost two years before the first accident. On her review of the transcript, Ms. Kerr said the plaintiff should not even have been allowed to proceed through the diploma program as she did given that (1) she never received the mandatory 65% grade on Accounting 1 required to proceed to Accounting 2, and (2) she never received the mandatory score of 65% on Accounting 2 required to enter the higher third and fourth level courses. She confirmed that even disregarding these problems, the plaintiff still did not meet the qualifications necessary for BCIT's degree program. Ms. Kerr also indicated that calculators were generally allowed in these courses, which belied plaintiff's counsel's theme that the plaintiff's academic failings were limited to being able to do basic math by hand. Her problems were clearly more widespread. Finally, Ms. Kerr confirmed that she was qualified to get her diploma by December 2017, not in 2019 as suggested by the plaintiff. She did take courses thereafter, which had the potential to increase her grade point average.

2019 BCSC 1179 (CanLII)

IV. CREDIBILITY

[89] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[90] I find that the plaintiff had a tendency to assert propositions with confidence when she did not actually have a memory. One example of this related to whether she hit her head in either accident. She gave a variety of versions at trial including that: (1) she hit her head, (2) she did not hit her head, (3) she was not sure if she hit her head, or (4) in relation to the second accident, she assumed she hit her head because a witness at the scene told her she hit her head. The same inconsistency in reporting is found in the clinical records and in her examination for discovery transcript.

[91] Another example of the plaintiff's inconsistent testimony and reporting was the variety of evidence given at trial and to her treating physicians as to whether and how far her body was flung into the air after the second accident. With certain health professionals, she asserted that she flew 7 to 10 feet or more off the hood. This included her psychologist, Dr. Der, who diagnosed PTSD. Based on Mr. Costa's independent evidence, and her own lack of memory of any such detail at trial, I do not accept that this accurately reflects the mechanism of the accident, and I have a concern that her reports to health professionals were exaggerated, or were not based on actual first-hand recollection.

[92] She accepts that she may have reported to the hospital that the driver was going 50 kilometres per hour, as indicated in their records, but revised that downwards by more than one-half at trial.

[93] Furthermore, at trial and with certain experts, the plaintiff attributed a reduction in her course load and/or her marks to the accidents. However, her course load reduced substantially before the accidents, and did not change materially afterwards. Nor did her marks change materially after the accident. The plaintiff also attributed certain dismissals to the accidents, when other evidence, including from the employers themselves, suggests that some or all of their dismissals were due to independent factors. Most did not even know she had been injured.

[94] The plaintiff reported that she was 60% recovered from the first accident before the second accident, but notably only acknowledged this improvement

2019 BCSC 1179 (CanLII)

immediately after the second accident. Prior to the accident, she was not reporting any material improvement according to Dr. Parhar's records. This is very difficult to explain other than by assuming the plaintiff was seeking to maximize her relative injury from the second accident.

[95] She even exaggerated her time in the hospital after the second accident, telling medical professionals it was up to 6 hours, when it was in fact 3 hours and 14 minutes.

[96] As such, I find that the plaintiff tended to default to versions of events which:

a) maximized the severity of the accident and her injuries; and

b) attributed greater responsibility for her work and academic challenges to the accidents.

[97] This had an effect on her credibility and reliability, as well as reducing the weight that could be given to reports that relied on her reporting.

[98] The plaintiff sought to attribute her variation in reporting to concentration and memory problems. However, that should have lead the plaintiff to simply say she did not recall, rather than offering exaggerated reports.

[99] As a result of these concerns, I approach the evidence of the experts who relied on any subjective reporting from the plaintiff with caution: *Faizi v. Thandi*, 2019 BCSC 434 at para. 112.

[100] To be clear, however, these problems with her evidence do not change the basic fact that the plaintiff was injured in the two accidents. Even the defendants agree that the plaintiff suffered myofascial pain syndrome as a result of the accidents. It simply reduces the weight that can properly be attributed to her own testimony about her injuries and the reports that relied on her reporting.

2019 BCSC 1179 (CanLII)

V. ADVERSE INFERENCE

[101] The plaintiff asked that the court draw an adverse inference from the fact that the defendant driver in the second accident was not called as a witness. It is true that the plaintiff is restricted in speaking directly with a defendant. It is also true that this defendant was on the defendants' witness list at the outset of the trial However, I decline to draw an adverse inference given that:

a) Liability was admitted, making the issue of the precise nature of the accident less central to the case;

b) The plaintiff did not take the opportunity to discover the defendant to determine if he had evidence that would be helpful to her case, which could then have been read-in at trial: *Miles v. Kumar*, 2013 BCSC 1688 at para. 69;

c) The defendants did call a more independent witness in the person of Mr. Costa. Any evidence from the defendant would inevitably have been challenged as self-interested. The defendants could reasonably conclude that Mr. Costa's evidence gave them all they needed. Mr. Costa's evidence was "better evidence" than that from the defendant;

d) The defendants were not advancing a positive defence that needed to be proven through the defendant driver. Their position is simply that the second accident did not cause the extent of injuries alleged: *Miles* at para. 68.

VI. CAUSATION

[102] The plaintiff must prove on a balance of probabilities that her injuries would not have occurred "but for" the accident: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 24. The accident does not need to be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "*de minimis*" range: *Athey* at para. 15. I find that causation of damage is established. Notwithstanding my concerns about credibility and reliability, there was sufficient expert and third party corroboration to

2019 BCSC 1179 (CanLII)

support a claim that the plaintiff was injured in the accidents. The only question is the proper quantum level.

VII. DIVISIBILITY

[103] The defendants accepted that the damages were indivisible, and that they did not seek any effort to apportion any head of damage as between the two accidents. I agree that the damage here was indivisible: *Bradley v. Groves,* 2010 BCCA 361 at para. 20.

VIII. MITIGATION

[104] The plaintiff seeks compensation for Major Depressive Disorder. However, the defendants suggest that the plaintiff failed to mitigate her injuries by refusing to follow Dr. Muir's recommendation that the plaintiff take anti-depressant medication. I agree.

[105] The prospect of receiving anti-depressant medication was also put in play by other physicians. Dr. Parhar stated as follows:

> As already noted, with respect to Inderjeet's depressed mood, I will continue to monitor this psychological condition and consider additional treatment modalities such as antidepressant medications and/or counselling. If antidepressant medications are indicated, such as Celexa 10-20mg once daily, the medication will likely need to be continued for a minimum of four to six months.

[106] Dr. Der assumed that she was already taking such medication.

[107] No physician recommended against taking such medication.

[108] I find that, on a balance of probabilities, such medication would have made a difference to the plaintiff's course of recovery, particularly in light of Dr. Muir's recommendation: *Latuszek v. Bel-Air Taxi (1992) Limited*, 2009 BCSC 798 at para. 85.

[109] I note that the plaintiff attributed her refusal to take medication to, in part, her mother's experience with such drugs. However, her own father indicated that these anti-depressants had in fact been of assistance to her mother. She also referred to

2019 BCSC 1179 (CanLII)

concerns about her brother's addiction problems, but there was no indication that her brother was taking prescription medication under the care of a physician, as opposed to uncontrolled use of illicit substances.

[110] Although the plaintiff is receiving cognitive behavioural therapy, there is a difference between such treatment and psychiatric treatment: *Mullens v. Toor*, 2017 BCCA 384 [*Mullens (C.A.)*] at paras. 29-33, aff'ing 2016 BCSC 1645.

[111] In *Hawkins v. Espiloy*, 2014 BCSC 1804 at para. 77, the court affirmed the test for establishing a failure to mitigate:

> [77] The defendant has the burden of proving the plaintiff could have avoided all or a portion of her loss. This involves proving two elements: first, that the plaintiff acted unreasonably in not taking the step advocated by the defendant; and second, the extent, if any, to which the plaintiff's damages would have been reduced had she taken that step: *Chiu (Guardian ad litem of) v. Chiu*, 2002 BCCA 618 at para. 57. The test is a subjective/objective one, which takes into account the knowledge possessed by the plaintiff in considering the advocated step: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

See also *LaRocque v. LaRocque*, 2019 BCSC 655 at paras. 86-92.

[112] Here, the plaintiff has largely followed in her doctors' advice and has engaged in an array of treatments. But I find that her diagnosed Major Depressive Disorder is a major element of her ongoing difficulties. The plaintiff is fully entitled to refuse refuse medical treatment, but the defendants are not required to pay for the effect of such a refusal. I find that a reduction of 10% in recognition of the plaintiff's failure to mitigate is reasonable on the facts of this case: *Frayne v. Alleman*, 2006 BCSC 1988 at para. 16; *Bhatti v. Ethier*, 2018 BCSC 1779 at paras. 134-137; *Mullens v. Toor*, 2016 BCSC 1645 [*Mullens (S.C.)*], aff'd 2017 BCCA 384.

IX. DAMAGES

A. Non-Pecuniary Damages

[113] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities caused by the tortious act: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 47. The compensation awarded should

2019 BCSC 1179 (CanLII)

be fair to all parties. Fairness can be measured against awards made in comparable cases: *Beaton* at para. 51. That said, other cases serve only as a rough guide. Each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[114] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages at para. 46:

> The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

i. Plaintiff's Authorities

[115] The plaintiff presented the following authorities for the Court's assistance in relation to the appropriate pain and suffering award:

- *Howell v. Machi*, 2017 BCSC 1806: **$275,000** was awarded to a plaintiff who suffered a complicated mild traumatic brain injury with associated cognitive issues, chronic pain or a Somatic Symptom Disorder, and an aggravation of certain pre-existing conditions.

- *Felix v. Hearne*, 2011 BCSC 1236: The plaintiff was 44 years old at the time of the accident in which she sustained multiple injuries but no fractures. At the time of trial, five years later, she continued to suffer chronic neck and back pain, headaches, loss of function in her left wrist, injury to her left shoulder and ankle, continuous tinnitus,

2019 BCSC 1179 (CanLII)

disturbed balance, and significant and debilitating depressive and PTSD symptoms. She lost the ability to be self-reliant or participate in sporting activities to the same extent that she did before the accident. The court found that six years post-accident there was only a modest hope for improvement in her condition. The award for non-pecuniary damages was **$200,000**.

- *Bhatti v. Ethier,* 2018 BCSC 1779: **$200,000** was awarded to a 21-year-old female plaintiff. She had been diagnosed with mild traumatic brain injury, mild neurocognitive disorder, PTSD, and chronic pain with central sensitization. The prospects for recovery were poor, and she was not likely to recover to her pre-injury cognitive functioning or emotional condition.

- *Pearson v. Savage*, 2017 BCSC 1435: Six years post-accident, the late-20s female plaintiff still suffered from chronic soft tissue pain in her neck, upper back, posterior shoulder girdle, lower back, and left anterior knee. She also suffered disabling headaches, emotional and psychological symptoms in the form of depression, chronic anxiety resulting in uncontrollable anxiety attacks, and chronic PTSD. She slept long hours but could not have a restful sleep. She no longer enjoyed the recreational activities that she used to enjoy, and had difficulties with her ability to work. Her prognosis for recovery was guarded and the court concluded she would never become pain-free. The court awarded **$175,000**.

- *Gabor v. Boilard*, 2015 BCSC 1724: The plaintiff was in a motor vehicle accident when she was 29. The court found that she sustained a mild traumatic brain injury with its attendant psychological, behavioural and emotional symptoms, severe fatigue and cognitive deficits in the areas of attention, information processing, memory and high demand executive functioning. In addition, she endured a constellation of soft tissue injuries of diminishing frequency and intensity that left her with chronic pain, together with psychological injuries that included an Adjustment Disorder (in partial remission). Her Adjustment Disorder encompassed a cluster of adverse symptoms, including depression, anxiety, an inability to cope with stress, being easily overwhelmed, anxiety with driving and being a passenger, reduced self‑confidence and intrusive images and nightmares of the accident, some of which persisted. The court found that even if the plaintiff experienced a full remission of her Adjustment Disorder, she would never be completely free of adverse psychological and emotional symptoms; those that comprise the sequelae of her mild traumatic brain injury would likely endure. Placing particular reliance on the finding of mild traumatic brain injury, the court awarded **$200,000**, which included consideration of the plaintiff's mild incapacity to perform household tasks.

2019 BCSC 1179 (CanLII)

[116] Based on these authorities, the plaintiff suggests that an appropriate award for non-pecuniary damages would be **$200,000**.

ii. Defendants' Authorities

[117] The defendants rely on the following cases:

- *Palmer v. Ansari-Hamedani*, 2019 BCSC 114: The plaintiff was in two motor vehicle accidents, one as a pedestrian. The accidents occurred five years before trial. The female plaintiff was 28 years old at the time of trial. The court found that the plaintiff suffered mental "*fogginess*", anxiety, nausea, dizziness, balance issues, ringing in the ears, a bump to the head, and swelling and tenderness in her forearm as a result of the second accident. However, many of these injuries resolved in the months following the accident except that the neck and back pain persisted, which in turn caused occasional headaches. Her right shoulder and arm pain also continued to cause pain periodically. The court rejected that there was any cognitive deficits. The court awarded **$85,000** for non-pecuniary damages.

- *Sharma v Kandola*, 2019 BCSC 349: The plaintiff was awarded **$75,000**. Four years after the collision she continued to experience (1) pain from soft tissue injuries in her neck and left shoulder; (2) post-concussion syndrome resulting from the elbow to the head in the collision causing chronic headaches; and (3) moderate depression and anxiety. Her prognosis for full recovery was "extremely guarded".

- *Bove v. Wilson*, 2016 BCSC 1620: **$60,000** was awarded to a young woman who suffered from headaches, neck and back pain, emotional upset, and anxiety. Her prognosis was poor but she was able to continue working full-time as an administrative assistant.

- *Crevier v. Thompson,* 2015 BCSC 1552: The plaintiff, a female in her mid-20s, experienced and still suffered from some pain and limit in movement. However, the court found that the effect of those injuries upon her life and work were not as great as claimed. The court did accept that the injuries would still cause some interference in her enjoyment of life. The court awarded the sum of **$65,000** on account of non-pecuniary damages.

- *Dobbin v. Siewert,* 2013 BCSC 1153: Four years post-accident, the plaintiff, a 27-year-old female, suffered moderate soft tissue injuries to her neck, shoulders and back. Although there was insufficient evidence to support a finding that she also suffered a mild concussion, she did experience a brief period of unconsciousness immediately after the accident and vomiting for approximately one month thereafter. The

2019 BCSC 1179 (CanLII)

court accepted that she continues to suffer from pain and anxiety, and awarded non pecuniary damages of **$60,000**.

- *Hay v. Benzer,* 2014 BCSC 1522: The female plaintiff was 19 at the time of the accident. She continued to suffer ongoing pain for 5.5 years following the accidents. The court found that the pain was chronic and expected to be permanent or long lasting. The court awarded **$55,000**.

[118] Based on the foregoing, the defendants submit that the plaintiff's baseline non-pecuniary damages should be $70,000 to $90,000, before any mitigation discount.

iii. Conclusion on non-pecuniary damages

[119] Beyond the cases above, I also had regard to the recent decision in *Faizi*. In that case, the plaintiff was also involved in two accidents. The plaintiff was 20 years old at the time of her last accident, and 24 years old at trial. She sustained mostly soft tissue injuries. She had neck, back, hip and knee pain, as well as tinnitus and headaches. She had some anxiety about driving. The plaintiff did have some pre-accident history of back pain, headaches, jaw problems and depression. The court found that the accidents exacerbated her depression. She was in school full-time at the time of the accident, but the court found that she was delayed by over a year by the accidents. The plaintiff was not able to continue with her running regime. The court found that she was likely going to experience some activity-related pain in her neck, low back and knee pain in the future. The court did have certain credibility concerns arising from some video surveillance, *inter alia*. The court rejected a vocational opinion from Dr. Powers primarily on the basis that he did not have the full academic file, and that he relied excessively on what he was told by the plaintiff. The court awarded **$125,000** in non-pecuniary damages.

[120] The factors and findings most germane to determining the non-pecuniary award in the present case are as follows:

1. I have found no material pre-accident condition supporting a "crumbling skull" reduction. The plaintiff did have a number of pre-accident stressors in her life, particularly regarding her family situation, but she seems to have been functioning reasonably well.

2019 BCSC 1179 (CanLII)

2. The plaintiff suffered myofascial pain syndrome as a result of the first accident, which was improving at the time of the second accident.

3. The second accident reactivated the pain from the myofascial pain syndrome back to its earlier levels.

4. I find that the second accident did not result in the dramatic launch onto the hood of the vehicle, with the plaintiff then flying through the air thereafter. Where the evidence of the plaintiff and Mr. Costa conflict, I prefer the evidence of Mr. Costa.

5. The plaintiff suffered injuries to her right knee and hip after the second accident. However, these are no longer as symptomatic as they once were.

6. The plaintiff has suffered some mild periodic swelling in her neck region.

7. The plaintiff has near full range of motion in her neck, shoulder and upper back area, but some continuing pain and sleep difficulties.

8. I find that there is insufficient evidence to support a conclusion that she suffered from a brain injury, a concussion, or PTSD as a result of either accident. In final argument, the plaintiff disclaimed any intention to claim for a brain injury. There is no evidence of a concussion in the early hospital records, where such a diagnosis is most likely to be noted. The PTSD diagnosis by Dr. Der is undermined by my finding that the impact of the car in the second accident was more moderate than described by the plaintiff.

9. I accept that the plaintiff has suffered from a Major Depressive Disorder and some mild anxiety, both triggered by the accidents. The defendants proffered no expert evidence rebutting this diagnosis by Dr. Muir, and I accept it. This diagnosis is also consistent with the reports about her change of mood provided by her father and husband, and from her flat or periodically teary presentation in court.

10. The plaintiff was able to return to full-time work and/or part-time studies shortly after each accident. It is only with her last position that she herself reduced her hours below the work available. She is presently working at about 60% of full-time work.

11. The plaintiff's recreational activities have been restricted by the accidents, although the plaintiff was not particularly active before the accidents.

12. In terms of prognosis, I accept Dr. Gharsaa's opinion that there is no remaining orthopedic explanation for her pain. He did not uncover any

2019 BCSC 1179 (CanLII)

> objective muscle spams, which had been noted earlier in 2018 by Dr. Shuckett. As Dr. Gharsaa conceded, this does not mean that the plaintiff's ongoing pain is not real, but it did mean that with proper strength training, treatment and encouragement (all of which I have included in the future care award below) there is a reasonable potential for her to eventually be able to return to full-time work.

[121] Applying the factors above, and with the guidance from the case law, I find that the appropriate amount for non-pecuniary damages would be **$130,000**. The plaintiff's cases generally involved mild traumatic brain injury and/or PTSD, which are not present here. The defendants' cases do not involve Major Depressive Disorder, which is present here.

[122] The award compares reasonably to the *Faizi* decision, which I find to be the closest decision on its facts, although the plaintiff here did not have the extent of pre-accident issues at play in *Faizi*. On the other hand, the knee and tinnitus problems in *Faizi* were not present to the same extent here. I reduce the $130,000 figure by 10% in recognition of the mitigation concern above. This brings the final non-pecuniary figure to **$117,000**.

B. Past Loss of Income

[123] The plaintiff did miss a couple of weeks of work after each accident. Dr. Gharsaa accepted that it would have been reasonable for her to miss some weeks' time after each accident. These immediate losses were approximately $1,500. The defendants do not contest this element of the loss.

[124] Any further losses are challenging to calculate given the plaintiff's mix of school and employment since the accidents.

[125] I accept that her injuries likely delayed her ability to receive her BCIT diploma, which would have improved her job prospects at an earlier date. Specifically, her injuries likely restricted her ability to take as many classes as she otherwise may have been able to take. I am prepared to accept a one-year delay. Based on a $50,000 salary derived from a blend of the data for various diploma level accounting and administrative assistant positions provided by Dr. Powers and Mr. Carson, and

2019 BCSC 1179 (CanLII)

then deducting her actual average earnings over 2017 and 2018 of $22,315, I am prepared to make an award of $27,685 to account for the delay.

[126] These two award amounts tally to $29,185 on account of past loss of income. The necessary income tax deduction required by s. 98 of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, will need to be deducted from this figure.

[127] The plaintiff had sought an award of $110,520 under this head of damage, but this figure embedded assumptions about the plaintiff's capacity to pursue further CPA training that I have rejected for the reasons detailed in the next section.

C. Loss of Future Earning Capacity

[128] Our Court of Appeal summarized the relevant legal principles for determining future loss of earning capacity in *Grewal v. Naumann*, 2017 BCCA 158:

> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

See also *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[129] The threshold question is whether the plaintiff has established a real and substantial possibility that her income earning capacity has been impaired. If the plaintiff satisfies this burden, the court will then assess the quantum under this head of damages: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53. The defendants

2019 BCSC 1179 (CanLII)

agree that there is a real and substantial possibility that the plaintiff will suffer some future lost income capacity.

[130] An assessment of future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The 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; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[131] There are multiple approaches to the assessment of future loss of income. The capital asset approach is distinct from the "earnings approach," which involves a specific mathematical methodology, and is more appropriate when the loss is more easily measured in a pecuniary way: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64; *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81 at para. 133.

[132] Mr. Justice Kent explained the capital asset approach in *Hoy v. Williams,* 2014 BCSC 234 as follows:

> [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

[133] I find that the capital asset approach is appropriate in this case given:

a) the fact that the plaintiff had not yet embarked on her intended future career path as a CPA before the accident;

b) the fact that the plaintiff is currently employed; and

c) the uncertainty regarding the plaintiff's prognosis.

Layes v. Stevens, 2018 BCCA 415 at para. 29; *Reddy v. Staples*, 2015 BCSC 87 at para. 133.

2019 BCSC 1179 (CanLII)

[134] Where the plaintiff is young and is not settled in a specific career prior to the accident, the court may take a global approach to assessing such lost future earnings: *Layes* at para. 33; *Jurczak v. Mauro,* 2013 BCCA 507 at para. 38.

[135] The relevant considerations in assessing the impact of the plaintiff's injuries on her overall earning capability were set out in *Reddy*:

> [134] If the future loss cannot be measured in a pecuniary way, as in the case at bar, the proper approach is to assess the loss as a form of capital asset by considering the factors described in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). In that case the Court said the proper inquiry is whether:
>
> > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 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.

[136] I find that the plaintiff has met these basic requirements for a lack of capacity claim. As such, the remaining question is the appropriate amount of the award.

[137] In determining the appropriate award under this head of damage, I find there was no real and substantial possibility of the plaintiff becoming a CPA, given, *inter alia,* her poor marks in BCIT's accounting diploma program, the first of three hurdles that would have to be cleared in order to obtain the CPA designation. In particular, I rely on her very poor scores in accounting, mathematics and taxation even before the accidents. I also rely on the fact that her pre-accident marks were already well below the 70% level required for admission to the next BCIT degree stage before the first accident, let alone being suggestive of an ability to complete the degree program, pass the additional certification tests, and then successfully become a CPA. She had dug herself a hole with her pre-accident marks from which it was going to be very difficult to ever climb out.

2019 BCSC 1179 (CanLII)

[138] Plaintiff's counsel continually referred to the plaintiff's resiliency and strong effort to achieve her goal. Nothing about her transcript or her evidence supported that submission. There was no evidence of her creating study groups, doing additional work outside her courses, or seeking help from tutors. On the record before me, all the plaintiff did was retake courses in the hopes that on her second or third attempt her marks would improve. Sometimes they did, and sometimes they did not.

[139] As noted, the plaintiff in fact should not have been allowed to continue in the program at all with the marks she achieved in Accounting 1 and 2, absent retaking obtaining higher marks. The fact that she failed the basic accounting courses multiple times belies the suggestion that she could reasonably look forward to a successful career as a CPA, whether or not she could use a computer to help her address her difficulties with basic math skills. Furthermore, I find the assertion that an accountant can just plug data into a computer without understanding the underlying mathematical and accounting principles to be unrealistic. A CPA is not a glorified data entry clerk.

[140] On this issue, I find the opinion of Dr. Cooke more persuasive than that of Dr. Powers given that he engaged in a more detailed review of her full educational history.

[141] Simply put, I conclude that she has not chosen a career path that matches her skill set. One wonders about the quality of advice she has received from her educational institutions in this respect. While unfortunate, this poor advice cannot be laid at the feet of the defendants.

[142] That said, I do find that the plaintiff's residual pain means that she is, at a minimum, foreclosed from physically demanding positions. However, there is no indication that the plaintiff ever intended to pursue such positions. Her present work qualifies as sedentary.

2019 BCSC 1179 (CanLII)

[143] I also expect that most modern employers will make the accommodations required to accommodate the plaintiff's restrictions. Indeed her current employer indicated a willingness to do everything necessary to assist her in this regard. One of her other former employers, Mr. Safari, also signalled a willingness to provide accommodations to persons with limitations.

[144] I do agree that there is a material risk that the plaintiff will only be able to work at a 70% level for an extended period of time, given her ongoing Major Depressive Disorder and associated pain response. This percentage falls within the work capacity range proposed by Dr. Hershler and Ms. Ditson.

[145] I do not accept the conclusion of the experts called by the plaintiff that she will never be able to return to full-time work. These opinions were undermined to a certain extent by the plaintiff's exaggerated reports. Rather, I accept the conclusion of Dr. Gharsaa that, from an orthopedic perspective alone, the plaintiff is in a position to return to work full-time now. However, this does not mean that the plaintiff does not have ongoing restrictions in light of her pain, even if such pain does not have an orthopedic explanation. But the largely psychiatric and psychological source of her continuing pain should be more responsive to treatment and have more potential for improvement. Indeed, the psychologist, Dr. Der, testified that he was seeing continuing improvement, and Dr. Muir testified about the potential benefits of anti-depressants. I conclude that her physical and psychological injuries are intertwined, such that proper treatment of the latter should eventually improve the former given Dr. Gharsaa's findings: *Mullens (C.A.)* at para. 35.

[146] One to three years' salary is typically awarded under the so-called "*Pallos* approach", used in cases where an individual continues to work after the accident and where it is difficult to formulate a realistic mathematical probability analysis: *Manky* v. *Sheepers*, 2017 BCSC 1870 at paras. 142-143; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 191. This case does pose difficulties for a pure mathematical approach in that the plaintiff:

a) had not fully "launched" into a career before the accidents;

2019 BCSC 1179 (CanLII)

b) has been able to work both full-time and part-time jobs since the accidents; and

c) has not fully mitigated her damages by seeking appropriate psychiatric treatment.

[147] That said, given that:

a) the plaintiff is currently working part-time consistent with advice from her medical practitioners; and

b) I do accept that she is presently feeling pain preventing her from doing more at present,

I find that an award enhanced beyond the usual *Pallos* range is justified. Specifically, I find that an award of $200,000 for loss of earning capacity is reasonable. This figure represents four years of a $50,000 salary. This salary is within the range derived from the income data provided by Dr. Powers and Mr. Carson for accounting technicians, bookkeepers, clerks, administrative assistants, and auditors and accountants with a university certificate below the bachelor's level. I find that her academic training has given her sufficient skills for these positions, but that she is restricted from more lucrative and challenging positions.

[148] A further negative contingency supporting the reasonableness of this $200,000 figure is created by the plaintiff's poor work habits separate and apart from any reasonable effects of the accident. I am unable to conclude that all of her chronic tardiness, failure to properly communicate with her superiors and colleagues, and the array of reported work errors, can be laid at the feet of the accidents involving the defendants. I find that the plaintiff had these inherent flaws in her approach to work even absent the accident. Such failings would likely have impinged upon her earning ability in any event. This conclusion is supported by her academic failures prior to the accident. The plaintiff seems to have difficulty applying maximum effort to tasks set out for her, and a problem achieving or respecting the core requirements of any program or position. This is more than a "concentration

2019 BCSC 1179 (CanLII)

problem", which problem the plaintiff would seek to attribute to the accident. Rather, it would appear to be a character flaw. It takes very little concentration to get to work on time. It takes an alarm clock and access to traffic data from Google Maps. Although the plaintiff's friend, Khyati Bhupendra, said that she was a good worker at the radio station before the accident, I give Ms. Bhupendra's evidence little weight because she is a friend of the plaintiff, they only overlapped for a short period, and she was more of a peer than a superior.

[149] Cross-checking the reasonableness of this $200,000 figure against two more mathematical approaches:

a) A $50,000 award would more than accommodate a 30% reduction in her work capacity for the next three years[1], even disregarding any discount required by a more precise present value calculation. With the care support I have accepted below, I find that projecting a probable return to full-time work after three years of multidisciplinary treatment is a reasonable assumption. The $150,000 balance could be treated as a reasonable reflection of the more diffuse losses created by the general restriction in her employment options, the marginal risk of requiring additional time off beyond three years, and the potential need for early retirement;

b) Mr. Carson's present value calculation of a permanent 30% reduction in employment capacity for persons with university certificates below Bachelor's degree level is just over $400,000.[2] If her part-time rate were $2 lower, the loss would be about $475,000. I find that the negative contingencies identified above, including the potential for recovery with proper treatment and the plaintiff's heightened risk of being fired for poor performance even absent any accident, would support a 50-60% reduction to this figure, taking us down to the $200,000 level.

[1] $50,000 X 30% = $15,000. $15,000 X 3=$45,000.
[2] $1,380,290-$966,203=$414,087

2019 BCSC 1179 (CanLII)

[150] I have arrived at this $200,000 figure assuming that the plaintiff will engage in recommended drug therapy for her depression, such that no mitigation deduction is necessary.

D. Costs of Future Care and Loss of Housekeeping Capacity

[151] In *Peters v. Ortner*, 2013 BCSC 1861, Madam Justice Harris outlined the general principles to consider when assessing a plaintiff's cost of future care:

> [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
>
> [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina; Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
>
> [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
>
> [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[152] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[153] I consider the claim for housekeeping first, as it was a major feature of the trial. As noted, the plaintiff's husband and mother-in-law had great expectations for the plaintiff in terms of her provision of housekeeping assistance once she moved

2019 BCSC 1179 (CanLII)

into the new home. Furthermore, the plaintiff indicated that she felt an obligation to continue to assist her own family, rather than imposing the full load on her father as has been the case to date.

[154] In *Campbell v. Banman*, 2009 BCCA 484, and *Kim v. Lin*, 2018 BCCA 77, the court outlined the principles applicable to such a claim. I have sought to ensure that there is no duplication with the non-pecuniary award by avoiding placing material reliance on her diminished housekeeping capacity in determining the non-pecuniary award: *Kim* at paras. 30-31, 33. I note that both these decisions used $15 per hour for housekeeping assistance, at the lower end of Ms. Ditson's costs estimates.

[155] In this case, I am prepared to award a pecuniary sum for housekeeping support given the plaintiff's reduced capacity to perform such tasks. If the plaintiff is to focus (properly) on returning to full-time work, I find she is unlikely to have much time or energy left over for housework, at least over the medium term. The plaintiff's lower cost present value estimate for the future cost of housekeeping is approximately $200,000. However, no accommodation is made in this figure for potential support from her husband and mother-in-law. Even the plaintiff's mother-in-law expected that her son would continue to provide some support after the plaintiff moved in. This distinguishes this case from *Kim*, where the plaintiff's husband himself was disabled: *Kim* at para. 54.

[156] In light of:

a) this reasonably expected contribution from her husband and mother-in-law, an expectation that existed even absent the accidents, and

b) the real and substantial possibility of further recovery over time, given the lack of evidence of a mechanical or orthopedic explanation for her pain and the potential for further improvement through psychiatric and psychological treatment,

I discount the figure claimed by 60% (reasonably attributed as 30% for each factor): *Kim* at paras. 18, 54-55. This takes the appropriate award down to $80,000.

2019 BCSC 1179 (CanLII)

[157] I accept that additional physiotherapy, massage therapy, active rehabilitation, pain clinic support, and psychiatric and psychological treatment are warranted. At the lower cost estimates, these carry a present value of about $38,214.

[158] I find that the amount for ergonomic support should be reduced from the low cost $7,240 present value, claim given that employers in today's world can be already expected to provide some support, as was indicated from the employers who testified at this trial.

[159] On medication, I find it reasonable to use the lower cost generic medication in any calculation. No physician opined on the need for the higher cost versions.

[160] In terms of his recommendation for the continued use of medical marijuana, there is precedent for awards covering medical cannabis where recommended by a physician at a reasonable cost level: *Carrillo v. Deschutter*, 2018 BCSC 2134. Dr. Hershler did support the need for such medication, and I accept that opinion. Dr. Hershler did not suggest that capsules would be less preferable than other more expensive forms. As such, I would use the capsule cost, which dramatically reduces the amount to a present value of $17,144. The plaintiff agreed that the capsule cost was more reasonable.

[161] Making these appropriate adjustments, but approaching the issue globally, I find that the collective award for cost of future care and housekeeping should be $150,000. Again, this already assumes that she will engage in proper drug therapy such that no mitigation discount is required.

E. Special Damages

[162] The plaintiff seeks special damages of $26,564.70 for physiotherapy, counselling, rehabilitation services, and gym memberships. The defendants only challenge the amounts payable to Dr. Der, on the basis that his bills were paid by plaintiff's counsel. I find that this is not reason to pay the amount, particularly given the diagnosis of Major Depressive Disorder, and that Dr. Der did testify that he was achieving positive results.

2019 BCSC 1179 (CanLII)

X. SUMMARY

[163] In summary, damages are awarded as follows:

Non-pecuniary Damages	$117,000.00
Past Loss of Earnings	$29,185.00
Future Loss of Earning Capacity	$200,000.00
Cost of Future Care	$150,000.00
Special Damages	$26,564.70
TOTAL:	**$522,749.70**

2019 BCSC 1179 (CanLII)

XI. TAXES, INTEREST, AND COSTS

[164] I leave it to the parties to consider the results of this judgment and address any tax and interest implications. If they are unable to agree on these matters, the parties are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 30 days of this judgment, and the defendants responding 30 days thereafter.

[165] Absent any further submissions from the parties respecting costs, costs will follow the event and be awarded to the plaintiff to be assessed under Scale B of Appendix B to the *Supreme Court Civil Rules*. Should either party wish to apply for a different disposition of costs, that party is at liberty to make written submissions within 30 days of this judgment. The other party may respond within 30 days thereafter.

"Branch J."

_____

The Honourable Mr. Justice Branch

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Dilello v. Montgomery,***
2005 BCCA 56

Date: 20050204
Docket: CA29856

2005 BCCA 56 (CanLII)

Between:

Corinna Leigh Dilello

Respondent
(Plaintiff)

And

Clinton Roy Montgomery and
Eli Matthew Montgomery

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Southin
The Honourable Madam Justice Huddart

A.M. Gunn
R.W. Parsons — Counsel for the Appellants

F.R. Scordo — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
November 22, 2004

Place and Date of Judgment: Vancouver, British Columbia
February 4, 2005

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Huddart

Concurring Reasons by:
The Honourable Madam Justice Southin (P. 22, para. 61)

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The defendants, Clinton Roy Montgomery and Eli Matthew Montgomery, appeal from a jury's award in June 2002 of non-pecuniary damages to the plaintiff, Corinna Leigh Dilello, for injuries she sustained in a motor vehicle accident on 19 December 1999. The trial judge reduced the original jury award of $362,000 for non-pecuniary damages to $281,000 to conform to the then "present value" of the $100,000 "rough" upper limit set by the Supreme Court of Canada in 1978. The defendants now seek a further reduction in the award on the basis that $281,000 could not reasonably have been awarded by the jury on the evidence as a whole.

[2] The plaintiff cross-appeals against the jury's award of $108,800 for loss of future income earning capacity. She says the jury must have found that her future income earning capacity was impaired as a result of the accident, but that the award of $108,800 was so inordinately low as to amount to a wholly erroneous estimate of her loss.

[3] At the end of the five day trial, counsel did not request instruction to the jury on the upper limit for non-pecuniary damages, and the trial judge did not deem it necessary. In addition to the awards for non-pecuniary loss and loss of future income, the jury awarded $7,000 for past loss of income, $22,018 for cost of future care, and $575.78 in special damages.

2005 BCCA 56 (CanLII)

[4] Both parties agree that the reduced award of $281,000 for non-pecuniary damages is inordinately high. Counsel for the plaintiff says $200,000 would be an appropriate award. Counsel for the defendant says an appropriate award would be in the range of $80,000 to $130,000.

[5] The issues on appeal are whether a further reduction should be made to the already reduced award of $281,000 for non-pecuniary damages, and whether the jury's award for loss of future income earning capacity is a wholly erroneous estimate of the plaintiff's loss.

II. SUMMARY OF THE EVIDENCE

[6] Liability for the accident was admitted by the time of trial. On the award for non-pecuniary damages, the parties agree that the case for the plaintiff should be viewed on the evidence most favourable to her because the jury must have resolved any evidentiary conflicts in her favour. This summary reflects the defence concession in that respect.

A. The Accident and Injuries

[7] On 19 December 1999, when the plaintiff was age 19, she accepted a ride in a pick-up truck near Armstrong, B.C. The truck left the highway, overturned, and landed on its roof. The plaintiff was unconscious for a period of at least ten minutes. When the rescue unit arrived, she regained consciousness and was taken to hospital.

2005 BCCA 56 (CanLII)

[8] Her hospitalization was traumatic, bewildering, and frightening. She experienced panic, neck pain, numbness in her hands, and extreme pain from x-rays. On 21 December 1999 her neck was placed in a halothoracic traction brace to immobilize fractures in her spine. The brace was secured to screws in her skull. She lay in traction for a month, during which time she was required to keep still. She needed help with everything, including eating and personal care. She felt frustrated, discouraged, and hopeless.

[9] Upon her discharge from hospital on 31 January 2000, the plaintiff continued to need help with personal care, and experienced nightmares and depression. She wore the halo brace for six weeks after her discharge. It interfered with her sleep and made her return to school awkward. She still has scars where the brace was secured to her head. The plaintiff received physiotherapy and massage and followed a gym exercise program.

[10] There was evidence to support findings that the plaintiff suffered severe multiple fractures of the C2 vertebra of her neck, extending into the disk between the C2 and C3 vertebrae; fracture of the facet joint in her cervical vertebra; subtle injury to her cervical spinal cord; soft tissue neck injury extending into her back; a vestibular inner ear injury; and a mild traumatic brain injury.

[11] The plaintiff has experienced headaches daily, neck pain, emotional lability, depression, fatigue, anxiety, altered sensation in her hands, upper limb weakness, increased reflexes, scalp hypersensitivity, temperature sensation, decreased manual dexterity, cognitive deficits and memory difficulties, dizziness, and low back pain.

2005 BCCA 56 (CanLII)

Some consequences are permanent, and others may improve over time. Her vertebral joint fractures and facet joint injuries will cause degeneration within five to ten years, resulting in arthritis and increased pain that will limit her neck movement.

2005 BCCA 56 (CanLII)

B. The Plaintiff's Pre-Accident History

[12] Before the accident, the plaintiff was in excellent physical condition and enjoyed many physical activities.

[13] After Grade 7, her grades dropped and she was suspended from school for drug use and setting fire to a church. In Grade 10, as a result of being abandoned by her parents when they separated, the plaintiff quit school. She had no home and lived sometimes with friends, and, for a period, lived on the street and in a tent. Counsellors described her as struggling to meet her daily needs, having a life full of confusion, and facing unimaginable emotional pain. She worked at odd jobs and began receiving social assistance in 1997. She attended an alternative school that had an "open door" learning program. She also attended art classes at the local high school.

[14] The plaintiff returned to high school full-time in February 1999 with the intention of obtaining her Grade 12 diploma and then enrolling in college. A family (the Ritson-Bennetts) allowed her to live in their home. At school, she received A's and one B in visual arts, a B in math, and then C's and failing grades in the remainder of her courses. One art teacher described the plaintiff as her "most improved player" from Grade 8 to Grade 12. Instructors encouraged her to pursue

post-secondary education in visual arts, saying that her art work was at the second year college level.

C. Post Accident Employment, Prospects and Loss Projections

[15] The plaintiff returned to high school in February 2000, graduating in June 2000. The plaintiff was uncertain as to her vocational goals. At various times she expressed a continuing desire to go to art college, to pursue a career in computer graphics, or to teach kindergarten.

[16] The plaintiff delayed in pursing art college. She attributed this delay to several factors. She needed to upgrade her high school marks, she had never created the portfolio necessary for art school, and school was expensive. Her living conditions depressed her and contributed to her inability to get on with her plans, as did her daily pain.

[17] In 2001 and 2002, the plaintiff attempted work as a janitor, chambermaid, and mural painter. All of these jobs were too physically demanding for her.

[18] A number of experts testified at trial about her recovery and prospects for future employment. The jury had ample evidence before it from which it could conclude that the plaintiff's pain and physical limitations would restrict her to employment of a sedentary to light strength level. The experts generally agreed that she would continue to experience some limitations in movement and physical abilities, and that her psychosocial symptoms may impact on her ability to work.

2005 BCCA 56 (CanLII)

[19] Due to her youth at the time of the accident, what the plaintiff would have done but for the accident is uncertain. A vocational specialist, Dr. Wallace, said that prior to the accident the plaintiff would have been suited to jobs up to and including medium strength work, which could have yielded average annual earnings ranging from $8,600 to $18,000 (for direct entry positions) and from $12,900 to $27,700 (if she pursued post-secondary education). Several of these jobs are now beyond her ability (e.g., nanny, grocery clerk, janitor, delivery driver, and landscape labourer). Dr. Wallace said that based on her current condition the plaintiff is competitively unemployable and she would be unable to succeed in any formal post secondary educational training program because of emotional problems and pain. He was unable to draw firm conclusions about her future condition.

[20] Economist Robert Carson said the accident might cause the plaintiff to suffer future economic loss due to changes in her educational attainment, delays in completing further education, lowered earnings as a result of a mild disability, and temporary or permanent loss of capacity to obtain and maintain employment.

[21] Mr. Carson offered various calculations of the plaintiff's potential loss, including two estimates of the plaintiff's loss of future income that reflected delayed college entry and a mild disability on account of the accident. He estimated that if she was delayed in completing a one year college course, her loss of future income would be $93,300. If she was delayed in completing a two year college program, her loss would be $124,100.

2005 BCCA 56 (CanLII)

III. ANALYSIS

A. Non-Pecuniary Award

[22] This appeal is but one of many to come before this Court in recent years, where a defendant has sought to reduce a damage award made by a jury for non-pecuniary loss. Reviewing such awards has become increasingly difficult for the Court. As discussed below, the difficulty stems in large part from a fundamental mischaracterization of damage assessments.

[23] In the trilogy of cases decided by the Supreme Court of Canada in 1978, the Court imposed a rough upper limit of $100,000 as the amount to be awarded to a young adult quadriplegic for general damages for non-pecuniary losses "in cases of this nature": ***Andrews v. Grand & Toy Alberta Ltd***., [1978] 2 S.C.R. 229. See also ***Arnold v. Teno***, [1978] 2 S.C.R. 287, and ***Thornton v. Board of School Trustees of School District No. 57 (Prince George)***, [1978] 2 S.C.R. 267. That $100,000 has been inflated over the years, to its value at the time of trial of about $281,000. As Professor Cooper Stephenson observes in his text *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996) at 114, the effect of the upper limit has filtered down to awards for non-pecuniary loss generally, "and the result, is a rough tariff system for non-pecuniary awards."

[24] That observation would generally be accurate, were it not for the fact that British Columbians retain the right to a civil trial by jury: ***Jury Act***, R.S.B.C. 1996, c. 242, s. 15. In a substantial number of personal injury cases, the assessment of damages is still left to the jury. While several provinces have followed the English

2005 BCCA 56 (CanLII)

example and limited the use of civil juries to issues such as defamation, malicious prosecution, false imprisonment and a few other matters, at least in Ontario and Prince Edward Island litigants also retain a general right to trial by jury: see ***Courts of Justice Act***, R.S.O. 1990, c. C43, s. 108, and ***Jury Act***, R.S.P.E.I. 1998, c. J-5.1, s. 3.

2005 BCCA 56 (CanLII)

[25] Jury awards for non-pecuniary damages are less susceptible to objective testing than damages for future loss of income earning capacity or cost of future care. Awards under the latter two heads of damages are more easily reviewed on appeal because the courts have adopted the actuarial approach to economic losses, and the trial record usually provides an evidentiary basis against which the jury's award can be tested. However, non-pecuniary damages are influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience. Perhaps as important is the jury's subjective appreciation of the evidence describing the injuries, the plaintiff's pain, suffering, loss of amenities and disability, and the consequences of all those matters on the plaintiff's personal and economic future.

[26] In all cases, except those involving total or near total paralysis, loss of all cognitive function or other devastating physical injury, juries are not instructed on the upper limit established in the trilogy. In ***Black v. Lemon*** (1983), 48 B.C.L.R. 145 (B.C.C.A.), Macfarlane J.A. for the court said:

> [55] … A judge does not instruct a jury on questions which are academic in the circumstances. Judges endeavour to assist juries by giving them clear, relevant instructions. A judge will direct a jury on the policy with respect to a limit on non-pecuniary loss when there is a

> sense of reality to such a direction. A judge conducting a jury trial will know when an award for non-pecuniary loss may reasonably approach or exceed the limit and will warn the jury accordingly.

(See also ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674 at paras. 112-113.)

2005 BCCA 56 (CanLII)

[27] In the result, juries are not told of the upper limit in cases where the trial judge considers it unlikely that the damages will approach that limit. The jury is left to apply its own appreciation of community values and common sense to the evidence, in accord with its understanding of the law as given to it by the trial judge.

[28] In this context, recent appeals from jury awards coming before this Court have included the following:

1. ***Vaillancourt v. Molnar Estate*** (2002), 8 B.C.L.R. (4th) 260, 2002 BCCA 685, where a jury awarded $500,000 for non-pecuniary damages for injuries that included a fractured jaw, altered facial appearance, and emotional consequences, but which did not in any way equate to a “catastrophic” case such as quadrapelgia. This Court reduced the non-pecuniary damage award to $125,000.

2. ***Alden v. Spooner*** (2002), 6 B.C.L.R. (4th) 308, 2002 BCCA 592, where the jury awarded $200,000 for non-pecuniary damages for injuries including soft tissue injury of the back and neck, chronic pain syndrome (or fibromyalgia), and depression, but which permitted the plaintiff to continue running competitively. This Court did not vary the award.

3. ***Bob v. Bellerose*** (2003), 16 B.C.L.R. (4th) 56, 2003 BCCA 371, where a jury awarded $500,000 non-pecuniary damages for serious life-threatening injuries

requiring skin grafts to 16% of the plaintiff's body, involving multiple rib fractures, punctured lung, shoulder disability, post-traumatic stress and clinical depression. This Court reduced the non-pecuniary award to $200,000 plus $75,000 in aggravated damages.

4. ***White v. Gait*** (2004), 244 D.L.R. (4th) 347, 2004 BCCA 517, where the jury awarded $197,000 for non-pecuniary damages for injuries including a "mild traumatic brain injury" with impaired balance, migraine headaches, and memory impairment, as well as soft tissue injury and depression. This Court reduced the non-pecuniary award to $115,000.

5. ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146, where the jury awarded $225,000 for non-pecuniary damages for injuries which included a fractured neck and permanent spinal cord injury with significant consequent physical impairment (though these injuries fell well short of quadriplegia). This Court affirmed the award of $225,000.

6. ***Giang v. Clayton***, 2005 BCCA 54, where the jury awarded $216,000 for non-pecuniary damages for a significant soft tissue neck injury resulting in chronic pain, as well as $217,680 for future loss of income and $24,971 for cost of future care. This Court reduced the total damages to a global amount for general damages of $225,000.

7. The current case decided at trial in 2002 where the jury awarded $362,000 for non-pecuniary damages for the injuries previously described.

2005 BCCA 56 (CanLII)

[29] In none of these cases was the jury instructed on the upper limit for non-pecuniary damages prescribed in the trilogy. While the cases represent only a small sampling of jury awards in "non-catastrophic" injury cases, they indicate that the community's evaluation of appropriate compensation for personal injuries no longer conforms, if it ever did, to the "rough tariff system" referred to by Professor Cooper Stephenson, with an upper limit for non-pecuniary awards set at the present value of $100,000 1978 dollars.

[30] The divisions of our Court before which these awards have come for review have struggled valiantly to examine the awards in light of the upper limit, while giving appropriate deference to the jury's verdict and due consideration to what might be considered to be comparable cases. The Court has examined its jurisdiction to vary jury awards, the standard of review applicable, whether jury awards are to be treated differently than awards by judge alone, and of course countless cases cited by counsel as "comparables" with a view to achieving some sort of consistency, and therefore predictability, in this area of the law.

[31] The difficulty faced by the Court stems in part from the irrationality of awarding money as compensation for personal injuries. As Dickson J. (as he then was) observed in ***Andrews,*** *supra,* "There is no medium of exchange for happiness." More recently, in ***ter Neuzen v. Korn***, *supra*, Sopinka J. said, "It is simply impossible to put a money value on the non-pecuniary losses which have been suffered by the plaintiff" (para. 106).

2005 BCCA 56 (CanLII)

[32] These statements are undoubtedly true, but in my respectful opinion, the Court's answer to the unanswerable has compounded the difficulty. In ***Andrews,*** Dickson J. said that:

> The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.
>
> [emphasis added]

[33] With respect, that statement appears to overlook the true character of a damage assessment, and the attempt to make subsequent awards conform to the rough upper limit has been misguided.

[34] The amount of appropriate non-pecuniary compensation in negligence actions is, by statute, a question of fact. Section 6 of the ***Negligence Act***, R.S.B.C. 1996, c.333 says:

> In every action the amount of damages or loss, the fault, if any, and the degrees of fault are questions of fact.
>
> [emphasis added]

[35] The equivalent of this provision first appeared in the ***Contributory Negligence Act***, S.B.C. 1925, c.8, s.3 which read:

> In actions tried with a jury, the amount of damages, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

[36] The provision appeared as s.6 in the ***Contributory Negligence Act***, R.S.B.C. 1936, c.52 as follows:

2005 BCCA 56 (CanLII)

> In every action the amount of damage or loss, the fault (if any) and the degrees of fault shall be questions of fact.

[37] There were minor changes in 1960 (R.S.B.C. 1960, c.74, s.8) and 1979 (R.S.B.C. 1979, c.298, s.6), but the substance of the provision has remained unchanged. Consequently, where the parties have elected trial by judge and jury, damages must be assessed by the jury.

[38] The trilogy and the Supreme Court of Canada's more recent decision in ***ter Neuzen v. Korn***, which dealt with the issue of instructing a jury on the upper limit, may therefore be thought to have been decided *per incuriam.* Although ***ter Neuzen*** and one of the trilogy cases (***Thornton***) originated in British Columbia, in none of these cases did the Court appear to direct its mind to s. 6 of the ***Negligence Act***. (Madam Justice L'Heureux-Dubé's reasons indicate the provision was before the Court in ***ter Neuzen***: see comment by Lambert J.A. in ***Foreman v. Foster***, 2001 BCCA 26.)

[39] Damages as findings of fact, whether made by judge alone or by jury, are reviewable on appeal only for palpable or overriding error. Findings of fact by a jury are entitled to even greater deference on review than are findings of fact by a judge alone. That is essentially what Viscount Simon said for the Privy Council in ***Nance v. British Columbia Electric Railway***, [1951] A.C. 601, [1951] 3 D.L.R. 705 (P.C.):

> [20 (1)] What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages, more particularly when that finding is that of a jury as in the present case?
>
> . . .

2005 BCCA 56 (CanLII)

> [22 (1)] The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages: *Flint v. Lovell*, [1935] 1 K.B. 354, 104 L.J.K.B. 199, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601, 111 L.J.K.B. 418. The last-named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of proportion" (per Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ltd.*, at p.616).
>
> [emphasis added]

[40] Other difficulties arise in applying the upper limit to a jury award for non-pecuniary damages. First, there was no logical foundation for the choice in 1978 of $100,000 as the upper limit. (In ***Andrews***, Dickson J. acknowledged that the assessment of damages was not logical: see para. 32 above.) In ***Thornton***, *supra* the trial judge awarded non-pecuniary damages of $200,000. In ***Teno***, *supra* the trial judge also awarded non-pecuniary damages of $200,000. And in ***Andrews***, *supra* the trial judge awarded non-pecuniary damages of $150,000. In selecting $100,000 as the upper limit for non-pecuniary damages, the Supreme Court of Canada settled on a sum lower than any of the three awards made by the trial courts in those cases. It did so based on its "functional approach" to awarding compensation sufficient to provide "reasonable solace" to the plaintiffs. It is not

2005 BCCA 56 (CanLII)

apparent to me why $100,000 would better provide for “reasonable solace” than any of the trial awards for non-pecuniary damages in the trilogy.

[41] Second, in ***Andrews***, Dickson J. set $100,000 as the upper limit for “cases of this nature.” In the context in which that was written, it can only have been meant to apply to cases of “catastrophic” injury, where the real focus of compensatory awards was for loss of future income, and the cost of future care. It may well be that courts at all levels since 1978 have misinterpreted these comments as applicable to all personal injury cases, regardless of the injury’s severity or consequences.

[42] Third, the trilogy cases all concerned non-pecuniary awards made by trial judges. None of these cases discussed the possible application of the cap to jury awards, or the greater deference normally accorded to a jury’s findings of fact. In the non personal injury context a jury’s assessment of non-pecuniary damage is not subject to an upper limit, and is not varied “unless it shocks the conscience of the court” (***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 at para. 163).

[43] For all these reasons, in my respectful opinion the attempt by this and other courts to fit juries’ damage awards for personal injuries into a grid or tariff system with an upper limit of any amount (that has not been enacted by a legislature) is an unjustified interference with the function of the jury as finders of fact, and a fettering of the proper principles of appellate review.

[44] Nevertheless, this Court is bound by the Supreme Court of Canada’s decision in ***ter Neuzen***, *supra* in which Sopinka J. applied the trilogy’s upper limit to a jury award for non-pecuniary damages. In that case, the plaintiff contracted HIV through

2005 BCCA 56 (CanLII)

artificial insemination. While the injuries suffered by the plaintiff were not of the same nature as those in the trilogy, Sopinka J. said "with respect to non-pecuniary losses, I do not believe that the present case is any different than other tragedies" (para. 110). He also said:

> [114] Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive.
>
> [emphasis added]

[45] The rationale for transforming a question of fact into a question subject to a "legal limit" is not explained.

[46] Accordingly, counsel for the plaintiff at trial had little choice but to agree that the award could not be more than the upper limit of $281,000.

[47] On appeal, counsel for the plaintiff submitted both in the respondent's factum and orally that an appropriate award for non-pecuniary damages would be $200,000. In these circumstances, I do not consider that this Court could fix the non-pecuniary award at any amount greater than that sum. Specifically, I need not consider at what amount greater than $200,000, and up to the cap, the award would have passed the standard of review set in ***Nance,*** *supra*.

[48] But I am not persuaded that the Court should make any further reduction in that award. The jury heard all of the evidence in this case, including that of the

2005 BCCA 56 (CanLII)

plaintiff. Unfettered by the artificial upper limit, the jury was asked to apply its best judgement to the amount of proper compensation for the plaintiff's injuries and their consequences. The jury obviously thought the case deserving of a substantial award. Considering the evidence of injury and loss summarized above at paras. 6-11 and 15-18, I am not prepared to say the jury award is inordinately high.

2005 BCCA 56 (CanLII)

[49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases. As Mr. Justice Smith noted in ***Boyd v. Harris***, *supra*:

> [42] …[I]n determining whether the award falls so far outside the acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury. Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.

[50] Moreover, I respectfully do not agree with others who have said that, where a damage award exceeds the upper limit, and counsel concedes that damages at the upper limit are still excessive, this Court is put in the position of a court of first instance (see ***Vaillancourt,*** *supra* at para.33.). In ***Nance***, *supra* at para. 22, Viscount Simon said:

> Whether the assessment of damages be by judge or a jury, the appellate court is not justified in substituting a figure of its own for that

> awarded below simply because it would have awarded a different figure if it had tried the case at first instance.

[51] As well, a concession by counsel that an award at the upper limit is excessive should not be granted the status of a controlling factor because this Court sits in review of the order pronounced below; the parties elected trial by jury, and the jury's assessment of damage is a fact entitled to appropriate deference; and the "tariff" system for non-pecuniary damages, which underlies counsel's concession, interferes with the function of the jury.

Accordingly, I would allow the appeal against the award of non-pecuniary damages by reducing it to the sum agreed to by the plaintiff as appropriate, namely, $200,000.

B. Loss of Future Earning Capacity

[52] On her cross appeal, the plaintiff argued that the jury's award of $108,800 for loss of future earning capacity was so inordinately low as to be a wholly erroneous estimate. She said that based on the award made, the jury must have accepted that she would eventually attend college, and that she would thereafter suffer an increased eight percent risk of unemployment due to a minor physical disability.

[53] However, the plaintiff also argued that by basing its award on this evidence,

> The jury must have lost sight of or never considered that Dilello was rendered less capable overall from earning income, that her cognitive and emotional difficulties would impact on her earning capacity, as well as on her physical disabilities; and that her physical difficulties might get worse and not better in the future. (Respondent's Factum, p. 22)

2005 BCCA 56 (CanLII)

[54] The plaintiff argued that none of the experts said she was ready, at the time of trial, either to work or attend college. Dr. Wallace said she was competitively unemployable and had bleak prospects. Mr. Carson said one of the plaintiff's potential sources of loss is permanent loss of capacity to obtain and maintain employment.

[55] In short, the plaintiff says that no reasonable jury could have made the award this jury did, considering all the evidence.

[56] With respect, I cannot agree. The jury as the trier of fact could accept some or all of the evidence before it. It was open to the jury to find that the plaintiff was able to carry out her plan to go to college. There was evidence to support such a finding. The plaintiff expressed her desire to go to college but attributed her delay in doing so partly to the accident. There was evidence that persons with a mild physical disability suffer an eight to fifteen percent increased risk of unemployment, and that the plaintiff may be such a person. The jury's award for non-pecuniary loss fell between Mr. Carson's two estimates of loss that were made on the assumption that the plaintiff would both attend college and suffer an eight per cent increased risk of unemployment due to mild disability.

[57] As there was evidence before the jury that could reasonably support its award, I cannot say the award is inordinately low. I would not vary that award.

2005 BCCA 56 (CanLII)

IV. DISPOSITION

[58] I would allow the appeal and substitute an award of $200,000 for the plaintiff's non-pecuniary loss.

[59] As I would allow the appeal only to the extent conceded by the plaintiff, I would grant her the costs of the appeal.

[60] I would dismiss the cross appeal.

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Huddart"

2005 BCCA 56 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Southin:

[61] I have had the privilege of reading in draft the reasons for judgment of my lord, the Chief Justice. I agree with his disposition of this appeal.

[62] I add remarks of my own in order to expand on what I said in ***Giang v. Clayton***, 2005 BCCA 54, on what I there called the "one-size-fits-all method" of assessing damages.

[63] Here, because of the severe pain which the plaintiff had endured and will continue to endure, there was a real risk that the jury would make an award for that pain out of keeping with the "upper limit".

[64] In such a case, to ask the jury to separate its award for pain and suffering from its award for impairment of earning capacity is sensible.

“The Honourable Madam Justice Southin”

2005 BCCA 56 (CanLII)

Dube *v.* Labar, [1986] 1 S.C.R. 649

Gregory Dube *Appellant*;

and

Robert Labar *Respondent*.

File No.: 17672.

1985: January 31; 1986: May 1.

Present: Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

on appeal from the court of appeal for the yukon territory

Torts -- Negligence -- Volenti non fit injuria -- Passenger riding in car driven by driver known by him to have been drinking -- Injuries sustained in accident -- Whether or not defence of volenti non fit injuria available.

Trial -- Charge to jury -- Allegation of negligence -- Defences of volenti non fit injuria and contributory negligence -- Possibility of jury's being confused by charge -- Whether or not new trial should be ordered.

Appellant, a passenger in a car driven by respondent, was injured when it turned over. Both had been drinking the night before and on the day of the accident, and it appeared that respondent had been drinking in the car as a passenger. Respondent took over as driver when appellant could not start the car after stopping to pick up two hitchhikers. Appellant got into the car as a passenger after a short exchange in which respondent asserted that he was capable of driving. The accident occurred shortly thereafter. The car veered as respondent turned to speak to a hitchhiker in the back seat. Appellant attempted to grab the wheel and straighten out the car's course but his attempts eventually resulted in the car's overturning.

At trial, the defences of *volenti non fit injuria* and contributory negligence were put to the jury. This appeal was from a judgment of the Yukon Court of Appeal, which found the charge to the jury to be adequate and dismissed plaintiff's appeal from the jury's verdict barring his negligence claim by operation of the *volenti* principle. The appeal also concerned the appellate court's deference to a jury's verdict.

Held: The appeal should be dismissed.

Per Estey, McIntyre, Chouinard and Le Dain JJ.: The defence of *volenti* requires not merely plaintiff's knowledge of a risk but his express or necessarily implied acceptance of the risk of harm without recourse to law, along with an inference that defendant took no responsibility for plaintiff's safety. *Volenti* requires an awareness of circumstance and consequences rarely present at the relevant time in drunken driver-willing passenger cases.

The charge to the jury here, while consistent with the authorities, should have gone one step further and explained that a finding must first be made on the facts as required to support the application of the *volenti* principle. If the factual requirements of the *volenti* principle were present in the view taken by the jury, that would be the end of the matter and the remaining questions relating to contributory negligence need not be answered except as a matter of completeness lest for some reason the finding of *volens* be set aside in circumstances not requiring a new trial. The jury should have been instructed to direct their minds to the contributory negligence issue only after they had considered and rejected the *volens* defence.

The manner in which the defences of *volens* and of contributory negligence were put to the jury was confusing and misleading as to the implications of a finding that the plaintiff absolved the defendant. The charge to the jury as a whole failed to make clear the extraordinary nature of the *volenti* defence by making explicit the interaction of the questions about defendant's negligence and plaintiff's contributory negligence while failing to mention the more drastic implications of a finding of *volenti*.

Any confusion resulting from the charge was overcome by the answers given by the jury to the questions put to them. There were no ambiguities in their answers suggesting actual confusion. Although the series of questions was not without ambiguity, it was not unreasonable to conclude that the jurors approached contributory negligence as an alternative solution to *volenti*. The jurors had before them a clearly worded question on *volenti*. It would be improper, however confusing the charge might have been, for this Court to assume that the jury misunderstood the meaning of the question in the face of such clear wording.

A jury's verdict in civil proceedings is accorded great deference by the courts. Although the verdict here is not one that every jury would have reached, it does not have the character of unreasonableness that must be apparent on the face of a jury verdict before an appellate court can upset it. The paramount principle operating here is the duty of the court to sustain the jury's disposition without judicial interference so long as it is reasonable to do so.

Per Wilson J.: The trial judge adequately instructed the jury on all issues that they were required to deal with. Their answers to his clearly framed questions showed that they fully understood the questions and they should therefore be treated as definitive.

Neither the charge on the defences of *volenti non fit injuria* and contributory negligence nor the language or format of the questions put could have misled the jury. The charge effectively brought home to the jury the stringent nature of the *volenti* defence and it conformed to the principles laid down by the Court relating to that defence. Good trial practice required that the jury deal with all the issues at trial even if a finding of *volenti* were made, in the event that that finding be overturned on appeal.

It was open to the jury on the evidence to reach the conclusion it did on the *volens* issue. No complaint was made about the trial judge's charge or about the clarity of the jury's answers at any stage in the proceedings. The sole basis of the appeal to this Court, that the defence of *volenti* was not available in a case involving negligence on the highway, was without merit.

Cases Cited

By Estey J.

Car & General Insurance Corp. v. Seymour, [1956] S.C.R. 322; *Miller v. Decker*, [1957] S.C.R. 624; *Lehnert v. Stein*, [1963] S.C.R. 38; *Eid v. Dumas*, [1969] S.C.R. 668; *Jamieson v. Harris* (1905), 35 S.C.R. 625; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *Grinnell Co. of Canada Ltd. v. Warren*, [1937] S.C.R. 353; *Pronek v. Winnipeg, Selkirk and Lake Winnipeg Railway Co.*, [1933] A.C. 61; *Vancouver-Fraser Park District v. Olmstead*, [1975] 2 S.C.R. 831; *McCannell v. McLean*, [1937] S.C.R. 341; *Scotland v. Canadian Cartridge Co.* (1919), 59 S.C.R. 471, referred to.

By Wilson J.

Lehnert v. Stein, [1963] S.C.R. 38, referred to.

Statutes and Regulations Cited

Contributory Negligence Ordinance, R.O.Y.T., c. C-14.

Authors Cited

Salmond, Sir John William. *Salmond and Heuston on the Law of Torts*, 18th ed., by R. F. V. Heuston and R. S. Chambers, London, Sweet and Maxwell, 1981.

Williams, Glanville L. *Joint Torts and Contributory Negligence*, London, Stevens & Sons, 1951.

APPEAL from a judgment of the Yukon Court of Appeal dismissing an appeal from a judgment of Maddison J. sitting with jury. Appeal dismissed.

B. A. Crane, Q.C., and *R. Lunau*, for the appellant.

D. O'Connor, Q.C., and *T. Preston, Q.C.*, for the respondent.

The judgment of Estey, McIntyre, Chouinard and Le Dain JJ. was delivered by

1. ESTEY J.--This is an appeal from the decision of the Court of Appeal for the Yukon Territory, dismissing the plaintiff's appeal from a jury verdict barring his negligence claim by operation of the principle, *volenti non fit injuria*. It also concerns the appellate court's defence to the verdict of a jury. The appellant (plaintiff) and respondent (defendant), co-workers at a construction site, became acquainted shortly before the car accident, giving rise to the action, occurred. The night before the accident, the parties had participated in an evening of drinking and partying in Haines Junction, a town close to the construction camp where both lived. The morning of the accident, drinking was resumed early. The parties decided to retrieve the respondent's car, which had become stuck on the way home the night before, and then drive into Haines Junction to retrieve the appellant's eyeglasses and to try to find two young women whom they had met the previous night. On their arrival in Haines Junction, the appellant and respondent each consumed more alcohol. They left the bar, found the two women, and drove them approximately fifty or sixty miles toward Whitehorse at their request. Having dropped the women off, the parties started back to Haines Junction. The

appellant had been driving throughout. The respondent, while a passenger, had apparently been drinking beer in the car. At some point on the return trip, the parties passed two hitchhikers, and decided to stop to pick them up. When the appellant tried to start the car again, he was unable to do so, and the respondent got into the driver's seat and started the car. At about this time, the appellant saw some friends passing in another vehicle, and, when they stopped, went to talk to them. He returned to the car and went to the driver's side, but the respondent was still in the driver's seat. In a short exchange, the respondent said that he was capable of driving. The appellant then got into the car as a passenger.

2. The accident occurred very shortly thereafter. The respondent, while driving, turned to speak to the hitchhiker sitting in the back seat. As he did so, the car veered to the right. The appellant, according to the testimony of the other hitchhiker who was seated on the front seat between the appellant and the respondent, attempted to grab the wheel and straighten out the car's course. The respondent's attempts at correction resulted, eventually, in the car's overturning on the right-hand embankment, causing personal injuries to the appellant. Samples of the respondent's breath later registered at .25 and .24 in tests administered by the police.

3. At trial, without objection from the parties, only two defences, *volenti non fit injuria* and contributory negligence, were put to the jury. The trial judge, after summarizing the evidence, charged the jury on the *volenti* defence as follows:

> One of the defences of the defendant in this case is the maxim *volenti non fit injuria*. Translated, that means "to one who is willing no harm is done".
>
> The burden is on the defendant, in each case, to prove that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff, occasioned by the

> defendant's negligence. In every case, the question is whether the plaintiff gave an express or implied consent to accept or assume the risk without compensation. In other words, did the plaintiff really consent to absolve the defendant from his common-law duty of care, saying or implying, in effect, "I am prepared to take the risk of your negligence and if I am injured you will not be legally responsible for my damages." The question is not simply whether the plaintiff knew of the risk, but whether the circumstances were such as necessarily to lead to the conclusion that the whole risk was intentionally incurred by the plaintiff.
>
> ...
>
> If you find that there is evidence of an initial common design which would, as a matter of common sense, entail the risk of injury, you might think that the appropriate inference may be not that the defendant undertook to exercise due care throughout, but that the plaintiff agreed to take upon himself the obvious risk of harm. The burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability.
>
> Therefore, your test is not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.

Immediately after his discussion of the *volenti* defence, the trial judge said:

> Having earlier discussed negligence [which was done in an earlier general part of the charge just before *volenti* was discussed], I want to turn to the allied and associated matter of contributory negligence.
>
> ...
>
> If you are satisfied by a preponderance of evidence that Dube's conduct amounted to a breach of that duty to take reasonable care for his own safety, then you would be justified in ascribing to him a portion of the blame for his injuries....

The judge charged the jury that contributory negligence could arise in two ways, "firstly, from the plaintiff's active conduct in grasping the steering wheel ...; secondly, you may

find that the plaintiff was negligent about his own safety, when he remained in the vehicle after the defendant took over the driving, knowing what he knew of the defendant's condition at that time". He went on:

> Now, if you find that there was no negligence on the part of the defendant in the first place, then you need not bother considering contributory negligence. However, if you find that there was negligence on the part of the defendant, then you must consider whether the defendant has proved contributory negligence, of either of the two forms which I have mentioned, on the part of the plaintiff.

(Emphasis added.)

In contrast, no mention was made of the relationship between the two routes, or defences, open to the jury.

4. The jury was then requested to answer a number of questions. These questions, and the answers given, are as follows:

1. Was there negligence on the part of the Defendant Robert Labar which caused or contributed to the damage suffered by the Plaintiff in the accident?

   Answer: Yes.

2. If your answer to question No. 1 is "yes", of what did such negligence consist?

   Answer:

   a) Labar was operating a vehicle while impaired.

   b) Labar failed to maintain proper control of his vehicle.

c) Labar failed to operate his vehicle with proper care when he turned to converse with his passengers.

3. Did the Plaintiff Gregory Dube expressly or impliedly absolve the Defendant Robert Labar from liability for negligence?

Answer: Yes.

4. If your answer to question No. 3 is "yes" of what did such absolution consist?

Answer: By willingly assuming the role of passenger in the Labar vehicle with Labar as the operator while knowing his state of impairment.

5. Was there negligence on the part of the Plaintiff Gregory Dube which caused or contributed to the damage suffered by him?

Answer: Yes.

6. If your answer to question No. 5 is "yes", of what did such negligence consist?

Answer: Dube's touching, grabbing or attempting to touch or grab the steering wheel was a contributing factor.

7. If your answer to question No. 1 is "yes" and your answer to question No. 5 is "yes", state in percentages the degree of fault or negligence attributable to each:

Defendant Robert Labar: 75%

Plaintiff Gregory Dube: 25%

TOTAL: 100%

8. Disregarding the apportionment of negligence you have made in response to question No. 7 above, at what amount, if any, do you assess the damages sustained by the Plaintiff Gregory Dube under the following heads of damage?

(a) For pain, suffering and loss of enjoyment of life from the date of the accident to date and in future? $ 5,000

(b) For loss of income from the date of the accident until today? 15,000

(c) For loss of prospective earnings from this date forward? 0

TOTAL $20,000

These damages were reduced to $15,000 to account for the plaintiff's contributory negligence. However, because the jury had answered the third question affirmatively, the plaintiff's action was dismissed. An appeal to the Yukon Court of Appeal was also dismissed. Taggart J.A., writing for the Court of Appeal, stated in part:

> It seems to me, given the very clear and accurate charge of the judge, the answer given by the jury to question 3 must be taken to mean that the plaintiff had impliedly absolved the defendant from liability for negligence and had done so having regard for their answer to question 4, by willingly assuming the role of passenger in the vehicle driven by the defendant at a time when he knew of the defendant's incapacity to drive.
>
> ...
>
> I think it was open to the jury on the evidence to reach the conclusion they did on the issue of volens. Being of that view I think that we ought not to interfere.

5. The plaintiff's appeal to this Court was argued on the basis that the defence of *volenti* is inapplicable to a case involving negligence on the highways. This submission is plainly inconsistent with four decisions of this Court: *Car & General Insurance Corp. v. Seymour*, [1956] S.C.R. 322, *Miller v. Decker*, [1957] S.C.R. 624,

Lehnert v. Stein, [1963] S.C.R. 38, and *Eid v. Dumas*, [1969] S.C.R. 668. However, while acknowledging that *volenti* is in principle available to a defendant driver, these cases establish that the defence will only be made out in unusual circumstances. The test has been variously described. In the *Seymour* case, *supra*, Rand J. wrote, at p. 324:

> In such commitments the question ought, I think, rather to be, can the defendant reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as such a term [of the undertaking]?

Rand J. conceived of *volenti* as a bilateral "exchange of terms" governing the activity in which the parties were engaged. Abbott J., dissenting in the *Miller* case, *supra*, accurately paraphrased (at p. 626) the test set out by Kellock J. in *Seymour, supra*, (at p. 332):

> ...for a negligent driver to be completely relieved from liability, the plaintiff must have agreed expressly or by implication to exempt the defendant from liability for damages suffered by the plaintiff and occasioned by the negligence of the defendant during the carrying out of the latter's undertaking. In other words, to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. As was pointed out by Kellock J. at p. 331, the question in each particular case is, in the language of Lindley L.J. in *Yarmouth v. France* ((1887), 19 Q.B.D. 647 at 660), "not simply whether the plaintiff knew of the risk, but whether the circumstances are such as *necessarily* to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff".

Finally, in *Lehnert v. Stein*, *supra*, Cartwright J. (as he then was) held (at p. 43) that:

> ...where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts*, 13th ed., p. 44:

> The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?

6. Thus, *volenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.

7. Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence. Glanville Williams wrote in *Joint Torts and Contributory Negligence* (1951), at pp. 307-08, that

> the defence must be restrictively construed and...rarely applies in negligence actions. In almost every negligence action of modern times where the defence of *volens* has been raised it has failed. This is because the cases in which a person truly consents to run the risk of another's negligence are altogether exceptional.

He then drew the following conclusions as to the nature of the defence, which were expressly adopted by this Court in *Lehnert v. Stein*, *supra*, and in *Eid v. Dumas*, *supra*:

> It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.... To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express

> or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

8. The example given by Glanville Williams, *supra*, at p. 308, of a person who, knowing that road traffic accidents regularly occur, nevertheless decides to go for a walk along a roadside and thereby runs the risk that he may be run down, illustrates the nature of the distinction. That person could not reasonably be seen to have assumed the risk in the manner required to support the defence of *volenti*. To permit the defence to succeed on facts showing merely that the plaintiff knew of the risk and yet chose to undergo it is inconsistent with the decisions of this Court, *supra*, which require not merely knowledge, but express or necessarily implied acceptance of the risk of harm without recourse to law by the plaintiff, along with an inference that the defendant, for his part, took no responsibility for the plaintiff's safety.

9. The defence of *volenti* will, furthermore, necessarily be inapplicable in the great majority of drunken driver-willing passenger cases. It requires an awareness of the circumstances and the consequences of action that are rarely present on the facts of such cases at the relevant time.

10. The charge of the learned trial judge, on the law of *volens*, was consistent with the authorities in our Court as noted above. In my view, however, the instructions to the jury should have gone one step further. The learned trial judge ought to have explained to the jury that a finding must first be made on the facts as required to support the application of the *volenti* principle. If the factual requirements of the *volenti* principle are present in the view taken by the jury, that is the end of the matter and the remaining questions relating to contributory negligence need not in that event be answered except as a matter of completeness lest for some reason the finding of a *volens* might be set

aside in circumstances not requiring a new trial. All this should have been explained to the jury. The jury should have been instructed to direct their minds to the contributory negligence issue only after they had considered and rejected the *volens* defence. Without such a direction the charge failed to make clear the consequences of a finding of *volenti*.

11. I consider, with all respect to those who have held otherwise, that in this case the manner in which the two defences were put to the jury was misleading and confusing as to the implications of a finding that the plaintiff had absolved the defendant. The portion of the charge relating to *volenti*, although closely modelled, as the Court of Appeal noted, on the language of Cartwright J. in *Lehnert, supra*, must be considered in context. When so viewed, it can be seen that the jury could easily have been confused as to the relationship between the two defences, *volenti* and contributory negligence, and their relative effects on the outcome of the action.

12. Prior to the enactment of legislation allowing for apportionment of damages in cases where the plaintiff's own negligence had contributed to his injuries (here, the *Contributory Negligence Ordinance*, R.O.Y.T., c. C-14), drawing a distinction between the defences of *volenti* and contributory negligence was unnecessary. Both had the same drastic effect of denying completely compensation to the plaintiff. This is no longer the case. Apportionment permits a sensible distribution of the financial burden of negligent conduct. It is a more flexible and more appropriate response in the great majority of cases in which negligent conduct of the plaintiff is argued to support a *volenti* defence. Thus, it is of great importance to keep the two defences distinct (see *Salmond and Heuston on the Law of Torts* (18th ed. 1981), at pp. 472-73, Glanville Williams, *supra*, at p. 308).

13. Primarily, the nature of the *volenti* defence was obscured by two aspects of the charge. First, there is the fact that the trial judge passed quickly over the defence of *volenti* to the defence of contributory negligence, using the words "allied and associate matter" in such a way that the jury could have thought he was referring to a relationship between the defences. Secondly, he instructed the jury that (as has already been noted in another context above):

> ... if you find that there was negligence on the part of the defendant, then you must consider whether the defendant has proved contributory negligence ....

(Emphasis added.)

The impression given by these words is that the only circumstances in which the plaintiff's failure to take due care for his own safety would not affect the outcome of the action are those in which the defendant's own conduct conformed to the standard expected of him by the law of negligence. In fact, of course, there was another set of circumstances in which the plaintiff's contributory negligence could have no effect on the outcome; that is, if the jury finds the plaintiff has assumed the risk of the defendant's negligence under the *volenti* rule. By making explicit the interaction of two of the questions put to the jury (namely, the questions of the defendant's negligence and the plaintiff's contributory negligence), but failing to mention the much more drastic implications of a finding of *volenti*, the charge to the jury as a whole failed to make clear the extraordinary nature of the *volenti* defence. Further confusion could have resulted from the fact that the same evidence, showing that the appellant willingly assumed the role of passenger while knowing of the respondent's state of impairment, was put to the jury as support for both defences with no instructions as to the distinction between them.

14. Any confusion which might in this case have resulted from the charge, however, must be considered to have been overcome by the answers given by the jury to the questions put to them. There are no ambiguities suggesting actual confusion in the language used by the jury in their answers. The series of questions is not itself without some ambiguity, as without a qualification such as is found in the first phrase of question eight, they may be read as defining one problem with one solution rather than one problem with two, inconsistent, solutions. However, it is not unreasonable to conclude that the jurors may indeed have approached contributory negligence as an alternative solution to that afforded by their answer on the issue of *volenti*. Since no claim was made by the defendant against the plaintiff, the jury was not concerned in answering any question with a finding of the plaintiff's liability. It must be borne in mind that the jurors had present before them a clearly worded question on *volenti* which expressly asked whether the plaintiff had, by any conduct on his part, absolved the defendant from liability for negligence. It would be improper, however confusing the judge's charge might have been, for this Court to assume that the jury misunderstood the meaning of question number three in the face of such clear wording. Questions five through eight were surplus, given the answer to questions three and four, and it is reasonable to conclude that the jury so understood them.

15. At the outset it was observed that the courts accord a jury verdict rendered in civil proceedings with great deference. With reference to a special verdict, it was said some time ago in this Court, "We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported", *per* Nesbitt J. in *Jamieson v. Harris* (1905), 35 S.C.R. 625, at p. 631. Spence J. in *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, wrote at p. 314: "Every effort must be exerted to understand and give a

reasonable construction to the jury's answers remembering that jurors `are laymen who are not accustomed to state matters with the particularity and clarity which more trained men might exhibit' ". See also *Grinnell Co. of Canada Ltd. v. Warren*, [1937] S.C.R. 353, and *Pronek v. Winnipeg, Selkirk and Lake Winnipeg Railway Co.*, [1933] A.C. 61.

16. The jury's conclusion that the plaintiff consented to bear the legal risk when he entered the car as passenger, knowing of the defendant's state of impairment, is doubtless one that not every jury would have reached. It does not have the character of unreasonableness, however, that must be apparent on the face of a jury verdict before an appellate court can upset it: *Vancouver-Fraser Park District v. Olmstead*, [1975] 2 S.C.R. 831, *McCannell v. McLean*, [1937] S.C.R. 341. This case is rather of the sort considered in *Scotland v. Canadian Cartridge Co.* (1919), 59 S.C.R. 471, where Sir Louis Davies C.J. wrote at p. 477:

> I say on this main and controlling issue I would as a juryman probably have found against the plaintiff. But that is not my province. I have only to determine whether in the conflict of evidence we have before us in this case, scientific and practical, we find enough to justify reasonable men in reaching the conclusion these jurymen did. After much consideration and thought I have reached the conclusion, though not without much doubt, that there is such evidence in the record and that I ought not, in view of the extreme jurisdiction which juries are permitted to have over questions of fact, to set aside their findings on mere doubts I may entertain or on my reaching on the reading of the evidence a conclusion different from that the jury reached.

17. The paramount principle here operating is the duty residing in the court to sustain, so long as it be reasonable to do so, the jury's disposition of the issues without judicial intervention. The court is concerned, of course, at all times, with providing ultimate justice consistent with the principles of the law. Here, two routes lie open to a reviewing tribunal but in the selection of the appropriate route the paramount principle of support of a jury verdict governs. Despite, therefore, the potential of the jury charge to

confuse, this appeal must be dismissed. It is not apparent from their answers to the questions put that the jury members were in fact, when in the throes of ultimate disposition of the issue, confused, nor is their conclusion on the vital issue of *volenti* so unreasonable as to justify its reversal by an appellate court.

18. I therefore would dismiss the appeal with costs to the respondent.

The following are the reasons delivered by

19. WILSON J.--The facts of this case and its history in the courts below are fully dealt with in the reasons of my colleague, Estey J., and it is not necessary for me to repeat them here. I agree that the appeal should be dismissed but am not fully in agreement with my colleague's reasons.

20. I would respectfully support the unanimous conclusion of the Court of Appeal for the Yukon Territory that the trial judge properly instructed the jury in this case. I do not believe that the judge's instruction on the defences of *volenti non fit injuria* and contributory negligence misled or confused the jury. And I can see no basis on which to conclude that the language or format of the written questions put to the members of the jury would have caused any confusion in their minds. In my view, the judge adequately instructed the jury on all the issues they were required to deal with. He put clearly framed questions before them and received very clear answers. I think their answers showed that they fully understood the questions and I believe therefore that their answers should be treated as definitive.

21. My colleague considers that the fact that the judge's instruction on *volenti* was followed by an instruction on contributory negligence would have confused the jury and made it appear that these defences were interrelated. In this connection it should be noted that at the end of the part of his charge dealing with the defence of *volenti* the judge stated:

> Having earlier discussed negligence, I want to turn to the allied and associated matter of contributory negligence.

It seems to me that the jury would have understood the judge to be saying that contributory negligence was "allied and associated" with negligence not with *volenti*. The judge was quite properly dealing one after the other with the two defences put forward by the defendant.

22. I believe that the judge's charge was effective in bringing home to the jury the stringent nature of the *volenti* defence. It conforms to the principles laid down by this Court. Indeed, it parallels the language used by Cartwright J. (as he then was) in *Lehnert v. Stein*, [1963] S.C.R. 38, at p. 43, which appears to have been consistently followed in the courts below. I can find no error in it. The trial judge emphasized in several places that it was not enough for the jury to find that the plaintiff had voluntary assumed the risk of harm. They had to go on and determine whether or not the plaintiff had agreed to absolve the defendant either expressly or by necessary implication from any liability for negligence. I believe this is a correct statement of the law as it currently stands. I quote the relevant passage from the judge's charge:

> The burden is on the defendant, in each case, to prove that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff, occasioned by the defendant's negligence. In every case, the question is whether the plaintiff gave an express or implied consent to accept or assume the risk without

> compensation. In other words, did the plaintiff really consent to absolve the defendant from his common-law duty of care, saying or implying, in effect, "I am prepared to take the risk of your negligence and if I am injured you will not be legally responsible for my damages." The question is not simply whether the plaintiff knew of the risk, but whether the circumstances were such as necessarily to lead to the conclusion that the whole risk was intentionally incurred by the plaintiff.

23. My colleague is of the view that the trial judge should have instructed the jury that a finding of *volenti* made it unnecessary for it to answer the question concerning contributory negligence. The difficulty with this is that if the defence of *volenti* were to be rejected on appeal it would be necessary in order to avoid another trial to have the jury's answer on the alternate defence of contributory negligence. It seems to me to be good trial practice to have the jury deal with all the issues at trial in case their finding on a specific issue is overturned on appeal. The classic example is the jury's assessment of damages even although they have made a finding of no liability.

24. I agree, of course, that the judge might have prefaced question 5 with the words "If your answer to question 3 is `no' ..." but his failure to do does not in my view vitiate the jury's answer to the question. The legal effect of its answer to question 3 was determinative of the plaintiff's claim.

25. I agree with the unanimous conclusion of the Court of Appeal that it was open to the jury on the evidence to reach the conclusion it did on the *volens* issue. That being so, the Court of Appeal was, in my view, correct in refusing to interfere. No complaint has been made about the charge at any stage of the proceedings; nor has counsel at any stage alleged that the jury's answers were ambiguous or gave rise to any uncertainty. The sole basis of the plaintiff's appeal to this Court was that the defence of *volenti* is unavailable in a case involving negligence on the highway. I agree with my colleague that this submission is without merit.

26. For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Anton, Asquith & Campion, Whitehorse.

Solicitors for the respondent: Boylan, Preston, Kidd & O'Brien, Whitehorse.

No. CA010110
Vancouver Registry

1990 CanLII 596 (BC CA)

BETWEEN:	
WILLIAM KIM EARNSHAW PLAINTIFF (APPELLANT)	REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE SOUTHIN
AND:	
REAL JOSEPH DESPINS and REGINALD P. DESPINS, also known as REG DESPINS DEFENDANTS	
AND:	
INSURANCE CORPORATION OF BRITISH COLUMBIA THIRD PARTY (RESPONDENT)	

Before: The Honourable Mr. Justice Anderson
The Honourable Mr. Justice Wallace
The Honourable Madam Justice Southin

Counsel for the appellant: Stanley T. Cope, Esq.

Counsel for the respondent: James D. Baker, Esq., Q.C.

Date Heard: 3rd April, 1990

25th April, 1990

For the Court

At the opening of this appeal (in which reasons for judgment are being concurrently delivered), the respondent sought leave to adduce fresh evidence pursuant to rule 24. For his part, the appellant sought leave, if leave were given to the respondent, to adduce further evidence on his own behalf.

At trial, the appellant sought very substantial damages, over $200,000.00 for future pecuniary loss founded upon the proposition that, in consequence of the injury suffered by him, he could no longer pursue his previous occupation of roofer and would, in future, have to pursue a much less remunerative occupation such as labourer.

The jury obviously did not accept this argument for the award under this head was approximately $12,000.00. It may not have accepted it because there was evidence that the appellant had worked again as a roofer for some time after the accident despite medical opinion that he should not.

On the appeal, the appellant proposed to argue that the jury's award, on this head, was inordinately low and he stood upon the assertion that he was, indeed, restricted in his capacity to earn in the manner he had asserted to the jury.

1990 CanLII 596 (BC CA)

The evidence which the appellant wishes to adduce is of the respondent working as a roofer after the trial. The respondent's proposed evidence explains the nature of the roofing he was doing and the limitation his injuries have had on his performance as a roofer.

In my opinion, the evidence proposed on both sides, although it is new in the sense of relating to occurrences since the trial, is merely confirmatory of the evidence adduced at trial.

For that reason, I would dismiss both applications.

I AGREE:

_____

The Honourable Mr. Justice Anderson

I AGREE:

1990 CanLII 596 (BC CA)

The Honourable Mr. Justice Wallace

1990 CanLII 596 (BC CA)

1990 CanLII 596 (BC CA)

No. CA010110
Vancouver Registry

BETWEEN: WILLIAM KIM EARNSHAW PLAINTIFF (APPELLANT) AND: REAL JOSEPH DESPINS and REGINALD P. DESPINS, also known as REG DESPINS DEFENDANTS AND: INSURANCE CORPORATION OF BRITISH COLUMBIA THIRD PARTY (RESPONDENT)	REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE SOUTHIN

Before: The Honourable Mr. Justice Anderson
The Honourable Mr. Justice Wallace
The Honourable Madam Justice Southin

Counsel for the appellant: Stanley T. Cope, Esq.

Counsel for the respondent: James D. Baker, Esq., Q.C.

Date Heard: 3rd April, 1990

25th April, 1990

For the Court

This is an appeal by the plaintiff from a judgment rendered upon the verdict of a jury in an action for damages for injuries suffered by the negligent driving of the defendant Real Despins of a vehicle owned by his brother, the defendant, Reginald Despins. Real Despins had possession of the vehicle with his brother's consent.

The brothers did not appear by counsel at the trial and the respondent to this appeal is the Insurance Corporation of British Columbia which was added as a third party pursuant to s.20(7) of the Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204.

On 15th March, 1986, the plaintiff, the defendants and another young man engaged in what the jury called "partying". At one time in the evening, the plaintiff and the defendants were together in the motor vehicle. The accident occurred when Real Despins tried to outrun -- perhaps "outdrive" would be the better word -- the police who wanted him to stop.

At trial, he gave evidence that he was drunk.

The questions put to the jury and their answers were:

1990 CanLII 596 (BC CA)

1. Was there any negligence on the part of the defendants that caused or contributed to the injuries suffered by the Plaintiff?

   ANSWER: "Yes"__√__ or "No" _____

2. If your answer to Question 1 is "yes" of what did such negligence consist?

   ANSWER: Dangerous Driving
   Driving under the Influence of Alcohol
   Excessive Speed
   Disregard for Human Life
   Failure to Stop for Police

3. Was there any Negligence on the part of the Plaintiff that caused or contributed to his own injuries?

   ANSWER: "Yes" __√__ or "No" _____

4. If your answer to Question 3 is "Yes" of what did such negligence consist?

   ANSWER: He had opportunities to leave and didn't.
   He knew what kind of people he was dealing with.
   He was partying along with everyone else.

5. If your answers to Questions 1 and 3 are both "Yes" in what proportion do you divide the fault?

   ANSWER: Defendant ___52___%

   Plaintiff ___48___%

   Total __100___%

1990 CanLII 596 (BC CA)

ANSWER THE FOLLOWING QUESTIONS INDEPENDENTLY OF YOUR ANSWERS TO QUESTIONS 1 THROUGH 5.

6. At what amount, if any do you assess the special damages of the Plaintiff?

ANSWER: $1,929.96

7. At what amount do you assess the general damages sustained by the Plaintiff, excluding past and future pecuniary loss?

(In answer to this question you will take into consideration:

- pain and suffering, past and future;

- nature and extent of the injuries including residual disability;

- loss of enjoyment of life both past and future;

- inconvenience (including trips to doctors, past and future)

ANSWER: $10,000.00

8. At what amount, if any, do you assess the loss of income sustained by the Plaintiff from the date of the accident to the present time?

ANSWER: $26,987.00

9. At what amount do you assess future pecuniary loss (that is future diminished capacity to earn money and other future pecuniary losses) which will be sustained by the Plaintiff (this would include such items as a management fee if you think it will be required and the cost of future medical care)?

ANSWER: $11,334.00

1990 CanLII 596 (BC CA)

Counsel for the plaintiff made a number of submissions and I shall deal with each in the order of the jury's answers.

QUESTIONS 4 AND 5 - CONTRIBUTORY NEGLIGENCE

a) Alleged Errors of the Trial Judge

The plaintiff asserts errors on the part of the learned judge:

1. Failing to properly charge the jury with respect to the credence and weight to be given to the evidence led from the Defendants, Real and Reg Despins.

On this point, his counsel said in his factum:

> 1. Reg Despins' trial evidence was substantially different from that given at discovery. The Learned Trial Judge noted this inconsistency in his charge but failed to instruct the jury that it would be very dangerous for them to accept the evidence of Reg Despins in the absence of a satisfactory explanation.
>
> 2. Real Despins refused to answer questions at a scheduled discovery examination. The consequences of this refusal should have been canvassed with the jury and Real Despins' self-interest in the promotion of evidence suggesting drunkenness fully explained.

The charge on credibility generally was in these terms:

> Now, I said something about the credibility of witnesses at the opening of this trial, and I want to make a few more remarks about that now. The first is that a witness is presumed to speak the truth. This presumption may be overcome, of course, by contradictory evidence such as the manner or behaviour in the witness-box, or what we call their demeanour, the degree of knowledge of the facts to which the witness is testifying,

1990 CanLII 596 (BC CA)

the character of the witness's testimony; that is, did he or she appear to be giving evidence without exaggeration and was he or she responsive to the questions or arguments addressed to him or her. Consider the evidence showing the witness's interest in the outcome of the case or bias or prejudice against one of the parties. An example of that, both counsel commented on it yesterday, was Mr. Earnshaw's mother, who unabashedly was biased in her son's favour that -- mothers are like that. But that is a factor that you will take into account in assessing her evidence.

Next, evidence showing that on some former occasion the witness has made a statement inconsistent with his or her present testimony. Again, an outstanding example of that, I suppose, would be Reginald Despins who was faced with answers that he gave on his Examination for Discovery which, if not in conflict, were certainly a different version of the evidence than he gave in the witness-box, and you will certainly take that into account in determining whether or not you accept his version of these events.

Now, you may believe -- and this -- you often do this in everyday matters of carrying on your own affairs. You may believe all of the evidence given by a witness, part of the evidence given by a witness, or none of the evidence given by a witness.

Again, an example where the latter was suggested to you by counsel, as Mr. Cope says, don't believe a word any of these two ruffian defence witnesses gave. They are not capable of belief, don't accept any of their evidence. Mr. Baker, on the other hand, suggests to you that when you look at all the surrounding facts there is a ring of truth to what they were saying, certainly insofar as the amount of drinking was concerned. Those are matters where it is particularly apt for a jury to pass on these sort of questions.

1990 CanLII 596 (BC CA)

The learned judge did not give the jury the instruction suggested in Civil Jury Instructions (C. Lynn Smith and the Hon. John Bouck) at para. 2.47.

In my opinion, there is no duty in law on a trial judge to give an instruction in those terms. The instruction he gave concerning the inconsistent evidence was sufficient.

On the second point, as Mr. Cope says, Real Despins did have an interest in the jury believing he was drunk and known by the appellant to be drunk, an interest which arises from the regulations under the Insurance (Motor Vehicle) Act. But from my reading of the transcript, Real Despins was not asked whether he appreciated that the liability of himself and his brother to the Insurance Corporation of British Columbia would be directly affected by the degree of contributory negligence which the jury fixed on the plaintiff. If such a bias is to be asserted against a witness, and commented on by the trial judge to the jury, the issue should be raised with the witness.

It not having been put to Real Despins, this assertion of error fails.

1990 CanLII 596 (BC CA)

2. Failing to properly charge the jury with respect to the issue of contributory negligence.

The charge on this point was in these terms:

> Now again, because there has been an admission in this case that the defendants were negligent I would ordinarily not go through the rest of this definition, but you are going to have to apply the same standards to consider contributory negligence. So bear what I am now telling you in your minds when I am dealing with contributory negligence when we are talking about standards of care and so on.
>
> Now, the standard of care is before a plaintiff can succeed in an action of negligence he must show that there is a duty owed to him by the defendant. There is no question that in this case there was a duty of care owed by the defendant to the plaintiff in this case, obvious on the face of the facts.
>
> The standard of that care is for you to determine that the defendant was in breach of the duty of care. The law says that you must visualize the standard of care set for the fictional reasonable man in the community, reasonable man or woman in the community. And I am going to use the word man from now on because all the parties involved in this affair were males.
>
> The reasonable man is a mythical creation of the law. His conduct is the standard by which a court measures the conduct of all other persons and find it to be fit or proper in the particular circumstances in which it arises. He is not an extraordinary or unusual creature. He is not a superhuman person. He is not required to display the highest skill of which anybody is capable, nor is he a genius who can perform uncommon feats. He is not possessed of unusual powers of foresight, he is a person of normal intelligence who makes prudence [a] guide to [his] conduct. He does nothing that a prudent man would not do, nor does he omit to do anything a prudent man

1990 CanLII 596 (BC CA)

1990 CanLII 596 (BC CA)

> would do. He acts in accordance with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard adopted in the community by persons of ordinary intelligence and prudence. In England he has been described as the man on the Clapham omnibus. You could substitute it here as the person who is the ordinary rider in the SkyTrain.
>
> *****
>
> Now I come to what is the real meat of this case on the issue of liability, and that is the question of contributory negligence. Even although there was a duty of care on the part of the defendant, and you may find there was a breach of that duty by the defendant, in fact it is admitted and the damages suffered by the plaintiff and that is admitted, nonetheless, a plaintiff's claim may be partially defeated because of his own conduct. In other words, the plaintiff may have contributed to his damages by failing to use reasonable care and take proper precautions for his own safety.
>
> In this case, when he remained in this vehicle after Real Despins took over the driving knowing what he knew of the defendant's condition at that time. And that is basically the third party's position in this case, he says therein lies the contributory negligence.
>
> *****

The learned judge then referred to s. 1 of the Negligence Act and said:

> You may apportion the blame in any degree that you see fit. It will be for you to decide as best you can upon applying the evidence what are the degrees of fault, if any, on the part of the defendant and on the part of the plaintiff. If you find that the injuries sustained by the plaintiff were incurred by both the fault of the defendant and the plaintiff and you find it

> impossible to establish different degrees of fault, then, as the statute says, you should apportion the liability between the plaintiff and the defendant equally.

Finally, he said:

> That then brings me to the theory of the plaintiff and the theory of the defendant in this case. Mr. Cope suggested to you that you ignore the evidence of the two brothers, he said they are not reliable witnesses. And he pointed out to you, as I have just done, these conflicting answers of his Discovery. And he pointed out the fact that Real had refused to give evidence on Discovery. He says the only reliable evidence is that of Jerome Champagne. There is no contributory negligence on the part of the plaintiff. He didn't know what Real's condition was as to sobriety except that he had three beers. All the passengers told Real to stop. There was nothing the plaintiff could have done to prevent the situation that occurred.

As I understand Mr. Cope, he says that the learned trial judge ought to have said to the jury words to this effect:

> A passenger's observation and knowledge of a driver's alcoholic intake does not automatically support a finding of contributory negligence. The consumption must produce apparent and observable physical signs of impairment (slurred speech, uneasy gait, or erratic driving) that would or should have caused a lay person to conclude that he/she would be at risk riding as a passenger.

1990 CanLII 596 (BC CA)

In my opinion, no such instruction is necessary as a matter of law. The judge correctly instructed the jury on the test of the reasonable man.

b) Alleged Error of the Jury

The jury is said to have erred in finding the plaintiff contributorily negligent or, alternatively, in fixing on him a percentage of fault that was inordinately excessive.

No useful purpose would be served by my recounting the evidence of the conduct of the participants on the evening in question. Suffice it to say that there was evidence upon which the jury could conclude that these young men, who were all well acquainted with one another, knew very well what they were doing and what they were doing was having a drinking party followed by driving.

There may well be a point at which a jury's attribution of fault to the participating passenger becomes inordinately excessive and, therefore, subject to being overtur3ned by an appellate court. This is not such a case.

But one cannot but note that this jury apparently took a much sterner view of the degree of contributory negligence of a passenger, who has been partying with the driver, than judges

1990 CanLII 596 (BC CA)

generally take. See, e.g. Reekie v. Messervey (1986), 4 B.C.L.R. (2d) 194, affirmed (1989), 36 B.C.L.R. (2d) 316, leave to appeal to the Supreme Court of Canada refused 9th November, 1989.

1990 CanLII 596 (BC CA)

QUESTION 7 - AWARD FOR NON-PECUNIARY DAMAGES

The plaintiff asserts that the award of $10,000.00 was inordinately low and I agree.

The plaintiff, who was twenty four at the time of the accident and twenty six at the time of trial, suffered a number of injuries including a depressed compound fracture of the right skull, a compound fractured mandible and a fractured left wrist. One of the attending consultants described him as having a "severe head injury". He required surgery both for his fractured mandible and for his depressed skull fracture which required the draining of a subdural haematoma. He was transferred in due time to the G. F. Strong Rehabilitation Centre. On the 18th June, 1986, when he was transferred from the residential programme to the outpatient's clinic, this was said of him:

> Arrangements had previously been made for him to be transferred to the G. F. Strong Rehabilitation Centre for management of his neuropsychologic deficits, which were documented in the areas of attention, memory, insight, general information,

> initiation, affect, emotional lability, abstract thinking, a tendency towards tangential thinking and perseveration. He had tended to improve partially in all areas at a slow pace. During the past 2 weeks his agitation to be out in the community once more led him, particularly during the evenings, to leave the Centre and hitchhike home to New Westminster to his wife's apartment. On one occasion this was because he had been cut off from drinking coffee after 15 to 20 cups and he just had to have more coffee. After this had happened 3 or 4 times during the space of a week, and particularly after the last occasion when he went out and got drunk, it was decided to transfer him to the outpatient program, where it was felt he might be somewhat more emotionally relaxed, based in his home turf.

It is common ground here, and was at trial, that the plaintiff has some permanent brain damage. Unfortunately, no neurologist was called to explain the nature of the plaintiff's injury and its effect physically upon his brain.

Dr. Klonoff, a psychologist, said this in his report:

> Taking into account the findings of my psychological examination in the context of pre-morbid level of intelligence and the findings of the prior psychological examination by Dr. DeWitt, my conclusions are as follows: (1) There is no evidence of any appreciable change in intelligence; (2) There are, however, signs of impairment on neuropsychological examination and these would point to sequelae. I would estimate the extent of impairment as minimal. It should be noted that there was a time lapse of 22 months from the time of the accident and my examination, and hence some minor reconstitution may still occur; (3) Whereas Mr. Earnshaw currently does not present with difficulties in impulse control, there are continuing signs of distress and self-destructive rumination. Psychiatric intervention

1990 CanLII 596 (BC CA)

> is accordingly indicated. Decreasing Mr. Earnshaw's distress would enhance adaptation in general including re-integration into the open labor market. The relationship between emotional status and the accident would have to take into account pre-morbid adjustment and the probability that emotional status will become more stabilized with psychiatric intervention; and, (4) Mr. Earnshaw is eminently employable and active steps should be taken to integrate him into the open labor market. The intervention recommended above should be undertaken simultaneously with re-employment. I would not view Mr. Earnshaw as a candidate for Vocational School training, but he would not have been such a candidate prior to the accident. The alternatives would accordingly be some type of on-the-job training or placement.

In addition to the damage caused by his skull fracture, the plaintiff also has another permanent disability, namely, a lack of feeling in a small portion of his lower lip. He also has a scar on his head which may, if he should be afflicted with baldness, embarrass him. As this award was inordinately low, it becomes necessary to fix a proper amount. In my opinion, a proper amount under this head of damage was $40,000.00

QUESTION 8 - AWARD FOR LOSS OF INCOME BEFORE TRIAL

Mr. Cope asserts that the amount awarded is inordinately low.

For what are described as accident related reasons, Mr. Earnshaw was out of work from the 16th March, 1986, to November, 1986, for seven and a half months; in May and June,

1990 CanLII 596 (BC CA)

1987, for two months; in January, 1988, to mid-October, 1988, for nine a half months for a total of nineteen months. Counsel calculates the past wage loss at $66,350.00, founding his calculation on monthly earnings of $2,500.00 less the monies which the plaintiff, a roofer, actually earned. The difficulty with this calculation is that before the accident the plaintiff had never earned, on a steady basis, $2,500.00 per month. In the whole of 1985, he earned $21,371.35 and from the 1st January, 1986 to the 15th March, 1986, $3,137.40.

Neither counsel can deduce how the jury arrived at its result. Nor can I. But I am unable to say that, in the light of Mr. Earnshaw's earnings history before the accident, the award was inordinately low.

QUESTION 9 - AWARD FOR FUTURE PECUNIARY LOSS

a) Alleged Errors of the Trial Judge

The plaintiff asserts, first, that the learned judge ought to have admitted and put before the jury the report of an economist, Mr. Robert Carson.

As the report is some 39 pages long, I do not propose to quote it or even to explain it fully. An indication of its content can be gleaned from these passages:

1990 CanLII 596 (BC CA)

1.0 BASIS OF PROJECTION, METHOD AND COMPARISON OF PROJECTION TO REPORTED EARNINGS

Economists have extensively researched the personal characteristics which are significantly related to variations in individuals' earnings in the employment market. Research in labour economics has shown that earnings are strongly related to age, sex, educational attainment, motivation, occupation, place of residence, and parental family's socio-economic status. Each of these factors adds to an explanation of differences in people's earnings.

In practice, a projection of future earnings may be based on data showing earnings of individuals by age, sex and education, or it may be based on data showing earnings by occupation. Projections based on educational attainment have the advantage that they are more general. That is, they eliminate the need to choose, perhaps somewhat arbitrarily, a particular occupation or sequence of occupations on which to base an earnings projection. Occupational data have the advantage that they may be related to an individual's particular work history.

In the matter at hand, I understand that Mr. Earnshaw had some high school education, but that he had not completed grade 12, and that most of his work experience was as a roofer.

***

2. IMPACT OF DISABILITIES ON EMPLOYMENT AND EARNINGS

Canadian and American statistical studies consistently show slightly lower labour force participation rates and higher unemployment rates in populations of people reporting disabilities than in populations reporting no disabilities. American studies also relate the presence of disabilities to earnings. Further, both Canadian and American studies indicate that disabilities are more likely to have negative impacts on employment and earnings among those with lower levels of educational attainment.

The best work currently available on the impact of disability on employment and earnings was

1990 CanLII 596 (BC CA)

> published in 1979, by the United States Department of Health and Human Services. The survey data used in this work was obtained over the years 1971 and 1972. In the published monograph - Disability 72 - Disabled and Non-Disabled Adults - injuries were classified directly by their impact on people's ability to do work, rather than by their physiological nature or indirectly, through their effects on activities on daily living. Two of the disability categories which were defined in the study as follows:
>
> 1. occupationally disabled - able to work regularly, but unable to do the same work as before onset of disability, or unable to work full time;
>
> 2. secondary work limitations - able to work full time, regularly doing the same work as before the onset of disability, but with some limitation to the kind or amount of work done.
>
> *****
>
> For certain data published in the survey, important personal characteristics which are known to the correlated with success in the labour market were distinguished. Race, for example, is known to operate as a proxy measure for socio-economic status in American data, and race tends to be related to presence of disabilities. For these two reasons, distinction of racial groups was important in considering employment and income impacts of disabilities.

In essence, the report is not an opinion as to Mr. Earnshaw's future income had he not been in the accident nor is it an opinion as to the impairment of his earning capacity. It is, in fact, a generalization about young persons, founded on data, some of which, gathered in the United States, was, at the time of trial, over fifteen years old.

1990 CanLII 596 (BC CA)

The learned judge's ruling on the report was this:

THE COURT: (Oral) The plaintiff and the defendant have asked me to rule on the admissibility of a report entitled, "Calculation of Present Loss and Future Earnings Loss in the matter of William Earnshaw".

The report itself consists of forty-odd pages with a number of appendices, mostly statistical. Mr. Baker, for the defendant, objects to the use of this report and he does so on several bases.

First of all, he says that the assumptions on page 5 relating to the reported earnings of the defendant from the years 1981 to 1985 are inaccurate when compared with the income tax returns of the defendant and the other figures applicable to those particular years. The report, for a reason that is not clear to me, converts each prior year's earnings into 1985 values and describes them as reported earnings in constant 1985 values. No explanation is given in the report as to how that is arrived at. That may well be a valid objection but I don't think it is decisive of what is before me.

I am more concerned by the objection based on the various scenarios presented by Mr. Carson at pages 14, 15, 16 and 17 of the report, which are described not as scenarios but as samples. I don't think there's any real distinction between the word, "scenario", and the word "sample", for the purposes of these reasons for judgment.

The fact is that those scenarios are based on figures from a report published in the United States in the year 1979 and that report, in turn, is based on figures compiled by the United States Department of Health and Human Services in the years 1971 and 1972.

There are some very strange statements in this report which I simply can't appreciate as having any bearing on the problems that this jury is going to face. The scenarios created by Mr. Carson are based on these figures and on certain figures compiled in Canada which are not complete and, in my view, the assumptions based on those

1990 CanLII 596 (BC CA)

figures cannot possibly form a proper underpinning for evidence [of] this type.

During the course of argument, I suggested to counsel that figures of this nature are not of any assistance to a modern-day jury. In the first place, they're getting on to twenty years old; in the second place, they are studies which took part in the employment market of another country and, in the third place, they are coupled with remarks that can do nothing but confuse the jury.

For instance, I quote as I did during the course of argument from a passage at the bottom of page 8 of the report:

> For certain data published in the survey, important personal characteristics which are known to be co-related with success in the labour market, were distinguished. Race, for example, is known to operate as a proxy measure for socio-economic status in American data and race tends to be related to the presence of disabilities. For these two reasons, distinction of racial groups was important in considering employment and income impacts of disabilities.

Now, that to me is just so much gobbledy-gook. It's going to do nothing to assist the jury, and there are other similar passages throughout. I simply point to the top passage at page 9 of the report and the bottom passage on the same page.

Here, probably it would be useful for me to summarize what was said by the former Chief Justice of this Court in the recent case of Sengbush v. Priest, 1987, 14 B.C.L.R. (2d) 26:

> In my view, it is appropriate for the Court to enforce reasonable limits upon the admissibility of opinion evidence. Too often, as in this case, persons with special training or experience are retained to construct scenarios or advance arguments in the form of an opinion when, with proper assistance from counsel, the Court is able to

1990 CanLII 596 (BC CA)

> analyze the evidence and reach a proper conclusion in commonplace problems such as suitability for employment --

and I underline those words --

> -- or calculations in personal injury, family matters or other areas of litigation.

I'll stop there.

Now, the tendency to get this kind of report seems to be growing all the time and it is something not to be encouraged. Here I refer, with enthusiastic endorsement, to the remarks of Mr. Justice Meredith in the case of Hennesy v. Rothman, 1988, 26 B.C.L.R. (2d) 322, where he says in the concluding paragraph:

> If this type of unedited report of an expert is to be permitted, the cost and duration of litigation is bound to multiply and the precision of the trial process put very much in jeopardy.

For those reasons, I have disallowed the report but, quite properly, defence counsel does not object to the introduction of the actuarial tables and calculations that form part of the report to which allusion was made during the course of argument.

The practice of putting in evidence opinions of economists in personal injury cases is comparatively recent. It cannot be much more than 25 years old and was brought about by catastrophic injury cases.

Catastrophic injury cases themselves go back, in my observation, to the late 60's or early 70's. The reason, I suspect, why they were unknown 30 or 40 years ago is simply that

1990 CanLII 596 (BC CA)

victims of catastrophic injury did not survive. Medical science has changed all that.

For a number of years, economists were called in these cases to give evidence in order that a discount rate might be established.

So much time was consumed with these attempts to predict the future that, in 1981, the Legislature put this provision in the Law and Equity Act:

> Discount rates
>
> 51. (1) In this section
>
> "discount rate" means the rate, expressed as a percentage, used in calculating the present value of future damages;
>
> "future damages" means damages to compensate for pecuniary losses to be incurred, or expenditures to be made, after the date of the trial judgment in a proceeding.
>
> (2) The Chief Justice of the Supreme Court may make regulations prescribing
>
> (a) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity, and
>
> (b) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of general price inflation.

1990 CanLII 596 (BC CA)

> (3) In a proceeding, the discount rate prescribed under subsection (2)(a) shall be used in calculating the present value of future damages that are intended to compensate for or are determined with reference to
>
> (a) loss of future earnings because of partial or total loss of income earning capacity, or
>
> (b) loss of dependency under the Family Compensation Act.
>
> (4) The discount rate prescribed under subsection (2)(b) shall be used in calculating the present value of all future damages other than those referred to in subsection (3).

Discount rates have since been fixed by the Chief Justice.

The underlying difficulty with "evidence" of the sort at issue here is that it is not of a past or present fact and not of an opinion founded on known facts, e.g., in a building collapse case, an opinion as to the cause of the collapse, but is of matters said to be of assistance in determining what the plaintiff, as an economic unit, would have been worth had he not been hurt and what he will be worth for the rest of his working life, as an economic unit, in consequence of his injuries.

1990 CanLII 596 (BC CA)

The judge or juror when dealing with future pecuniary loss is engaged in prophecy. To prophesy requires knowledge but the question is what knowledge is useful.

A judge has no discretion to refuse to receive evidence of facts relevant to the pleadings, assuming that evidence is not otherwise inadmissible, e.g., as hearsay, and he has no discretion to refuse proper opinion evidence on proven fact. But, in my opinion, the judge does have a right and duty to keep within bounds the sort of "evidence" that is adduced for the purpose of prophesying the future. It is for the judge to draw a sensible line.

For instance, this plaintiff might have adduced evidence of the present average earnings of persons living, as he does, in the Fraser Valley in various occupations in which he would have been engaged but for his accident. The jury would then have had to decide whether, indeed, this plaintiff might have followed any one of those occupations. But studies on the effects of disabilities in general are not of much help. Some people overcome disabilities with remarkable tenacity. Others are weak reeds. The jurors must decide into which category the plaintiff before them falls.

1990 CanLII 596 (BC CA)

In the case of a catastrophically injured child, broad general statistics of earnings may be all that the trier of fact can rely upon.

But in the case of an adult plaintiff with an established history, the learned judge has it in his discretion to keep away from the jury and, for that matter, from himself, material which is not sufficiently connected to the plaintiff before him.

It is, of course, open to counsel to put to an expert such as Mr. Carson a true hypothetical question founded on the characteristics of the plaintiff and ask the expert his opinion on that question.

Such a question, drafted in the once hallowed manner, might, in this case, have gone something like this:

Assume the following facts:

> A man is aged 24 on the 15th March, 1986, is in good health, has a grade 10 education, is living in the Fraser Valley of British Columbia, has no recognized trade qualifications but has followed the occupation of roofer in the three years before that date and has earned the following sums in each year:

1990 CanLII 596 (BC CA)

	Reported Earnings in Constant 1985 Values
1981	10,529
1982	5,693
1983	11,314
1984	7,577
1985	21,371
Average	11,297

> He likes working outdoors and is uninterested in intellectual pursuits.
>
> Assume, also, that the current rate of pay for a roofer is $XXXX per sq. and a healthy capable roofer can install XXXX number of squares per day for 150 days per year. And assume, further, that a roofer must usually give up roofing by the age of 60.
>
> What is your opinion as to what such a person would earn over his working life from the 15th March, 1986, until retirement?

While that question would, in my view, be admissible within traditional evidentiary concepts, I doubt there is an economist who would or could answer the question and, if he would, cross-examination as to the foundation of his opinion might well demolish the answer simply because he might have to say that there are too many imponderables which are not expressed in it.

In this case, the answer to that question, even if it survived cross-examination, would not have helped the jury much because this was not a case of complete loss of earning capacity but of impairment.

1990 CanLII 596 (BC CA)

To sum up, and contrary to the opinion which I tentatively expressed during the course of argument, I am of the opinion that the trial judge does have a discretion about this sort of material which, I reiterate, is not evidence in the traditional sense but may be, in some circumstances, the best that can be produced and adduced by way of information to assist the judge or jury.

I see no error in the learned judge's exercise of the discretion in this case.

The plaintiff also alleges that the learned trial judge erred in his explanation to the jury of the burden of proof.

What the learned trial judge said to the jury relating to this head of damage was this:

> The onus of proof is on the party who asserts a positive or negative contingency should be applied to the claim. The standard of proof is a simple probability or by showing there was a risk or likelihood of the event occurring. The more certain the likelihood, the more reason to add or subtract the estimated value of the contingency and what the plaintiff was earning immediately before the accident. If the contingencies balance themselves out, of course then they should be disregarded.
>
> This isn't the only case where contingencies apply. Let's take the future loss of income. That will be a very important part of this case, as to whether there is anything owing as to future loss of income. The third party says no way.

1990 CanLII 596 (BC CA)

The plaintiff says I want two hundred and thirty thousand dollars.

Now, with respect to the claim of the plaintiff for future loss of income evidence was introduced to the effect that he will suffer a loss from today until sometime in the conceivable or not conceivable future. As I say, the present value of the amount claimed by the plaintiff under this head of damages is the figure indicated to you yesterday by Mr. Cope of two hundred and thirty thousand dollars. And on the other hand the third party says that his witnesses clearly indicate that any award under this head should be zero.

Now, when deciding whether or not you should award all or any part of this claim, you can keep in mind again the contingencies of life. For example, tomorrow, next month, next year, the plaintiff may become disabled by health or other accidents. He may lose his job. On the other hand, the plaintiff may receive an increase in pay or acquire another job at another salary. He may prosper more than he did in the past. Again, the onus of proof is on the party who asserts a positive or a negative contingency. The standard of proof is by a simple probability or by showing there is a risk or likelihood of the event occurring. The more certain the likelihood, the more reason to add or subtract the estimated value of the contingency when assessing the value of the plaintiff's claim for loss of future income. Again, if the contingencies balance themselves out, they should be disregarded.

*****

He [Mr. Cope] says the major injury that demands compensation in this case is the brain injury. The way he uses his intelligence is effective, and that will affect the rest of his life. [I suspect that what counsel said, and the judge quoted him as saying, was "defective".] He said you will find that the plaintiff needs a lot of help in the future. Dr. DeWitt delivers results, helped the plaintiff to improve, but there will be a lot of damage left behind.

He says the plaintiff will probably be a labourer the rest of his life instead of a roofer.

1990 CanLII 596 (BC CA)

He now earns seven dollars per hour instead of earning much more as a roofer. He said look at his earnings of twenty-one thousand dollars in 1985 but that would have gone up to at least thirty to thirty-five thousand dollars and it would have kept going up.

He has a very uncertain future. His past wage loss, he suggests, should be calculated by taking thirty-two months at either between two and three thousand dollars a month. He takes an average of two and a half thousand a month, and that works out to eighty thousand dollars. And that, he suggests, you deduct twelve thousand dollars as far as the amount he has earned up until last month of thirteen thousand plus the amount that he earned last month of thirteen thousand odd dollars, and he suggests to you the figure of sixty-six thousand three hundred and fifty dollars. He says his future income loss is based on Exhibit 5. If his income is reduced by a thousand dollars a year, his loss is twenty-three thousand plus dollars. You have it in the exhibit. There's ten thousand dollars a year, there's two hundred and thirty thousand dollars. And he says that is the minimum amount you should take. He says don't take a figure of less than two hundred and thirty thousand dollars. He said then you must provide him with a sufficient amount for future care, including his computer, his retraining, treatment for his suicidal tendencies, and a management fee of one percent per annum.

The evidence showed some impairment of earning capacity. In his evidence, Dr. Klonoff said:

Q Now, you indicated in your direct evidence that we are dealing with organic brain damage here?

A In my opinion, I am not changing one iota of what I stated on page seven of my report and page seven of my report, conclusion number (2), "There are, however, signs of impairment on neuropsychological examination ..." seems to "... point to sequelae. I would estimate

1990 CanLII 596 (BC CA)

the extent of impairment as minimal." That is still my opinion.

Q But we're talking organic brain damage, are we not?

A Oh, yes.

Q We're talking about damage that is going to affect this man for the rest of his life, are we not, when we get into organic area?

A Well, again, one has to be cautious. It's not an all or none affair. For example, it is not usual, although it will happen, it is not usual to have impairment of any scope where intelligence is not implicated. In other words, in this instance for example, and pre-morbid level indicates an I.Q. of around 83, 84, 85. Had he dropped ten I.Q. points, because his intellectual resources were not that extensive to begin with, then my opinion about the level of impairment would have been entirely different than what it is now. So that because intelligence has not been compromised is more or less the same. Kim is different. Mr. Earnshaw is different. I'm not saying there are not signs of impairment. The effect of these in a global sense in my opinion, is minimal, which will have ramifications. I'm not minimizing the ramifications.

Doctor O'Shaughnessy, a witness for the third party, said this:

As above, I am left with the opinion that this man does show evidence of personality change secondary to frontal lobe damage. I concur with Dr. Klonoff that he likely does not show any cognitive deficit, i.e., no deficit in actual intelligence or abilities to work. I also concur with Dr. Klonoff that he has a strong work ethic and is well motivated to become gainfully employed and should be continued to be encouraged to do so as quickly as possible. His interests in the

1990 CanLII 596 (BC CA)

> outdoors are appropriate given his personality makeup and he would be ill suited to any work involving verbal or higher abstract reasoning skills. I would expect that he will continue to require some form of help in making reasonable judgements for himself and he seems to trust both his mother and her fiance to provide this kind of advice to him. I would regard this as potentially therapeutic and beneficial. His abilities to work as a roofer seem more harmed at this point by his fears of falling off the roof than anything else, but without having talked to his employer it was difficult for me to give a true estimate as to how impulsive he was at the time and how much of a factor this played in his inabilities to return to that job. Nevertheless, I would not recommend that he does return to roofing at this point and think it would be a far better course of action to do vocational testing and for him to follow less dangerous career pursuits.

After the accident, the plaintiff did go back to work as a roofer and he did have a fall from a roof which fortunately was not catastrophic itself. There was evidence as to what it would cost for the plaintiff to receive further treatment to assist him in coping with his remaining neuropsychological deficits. The evidence showed an estimated cost of slightly over $12,000.00.

Another psychological report put in by the third party contained this passage:

> The ongoing problems that Mr. Earnshaw can expect with this type of injury will mostly affect his behaviour and emotional state. This will probably take the form of his pre-existing personality but in a more exaggerated form. He will be impulsive, distractible, emotionally labile, and exercise

1990 CanLII 596 (BC CA)

> poor judgment. These factors may have some effect in the work setting but some measures can be taken to minimize such influence. Since he prefers to work in settings with few other employees, staff interactions should not be a problem. He has already learned to control his reactions to some degree and may be able to function with little erratic behaviour. Mr. Earnshaw has good upper body strength and could continue in a labouring job, particularly since he states that he enjoys heavy physical work. He did mention that he had a broken back but it is not clear from the medical reports if there are any restrictions caused by this. His only physical limitation would appear to be a neck pain that he described as a whiplash feeling and although he fell off a roof while working it is not clear what caused it.
>
> *****
>
> It is difficult to provide a definitive answer for Mr. Earnshaw's career. His preference is for manual outdoor work and he has the body strength for this. He could return to cement work, as an example, depending on his back. Since his interests are general, there are many jobs he could fit into; however because of his frontal lobe dysfunction, he will need to learn a task well which he could then repeat successfully once learned. He would be best in a position whereby a supervisor could keep track of his activities.

Mr. Cope's objection is to the passage emphasised on p. 26. He says the charge does not accord with the judgment of this Court in Unrau v. Mundreon, C.A. 002121, Vancouver Registry, 14th November, 1986, unreported. There is no merit in this proposition.

But, in my opinion, with the greatest respect for a most experienced trial judge, the learned judge's charge on future loss generally was inadequate.

1990 CanLII 596 (BC CA)

No objection was taken by counsel for the plaintiff to this charge on "future loss of income" and no request was made to the learned trial judge to expand upon it.

I think the charge unfortunate, in the light of the evidence to which I have referred, because the jury might well have taken from it that it had to be satisfied on a balance of probabilities that the plaintiff's income was going to be less throughout life and less by the amount the plaintiff sought under this head of damages. The amount sought of $230,000.00 was, on the evidence, absurd.

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 Alberta 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

1990 CanLII 596 (BC CA)

> 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 $12,000.00.

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.

The question of the effect of failure to make objection was addressed by this Court in Rendall v. Ewert (1989), 38 B.C.L.R. (2d) 1, but not resolved.

1990 CanLII 596 (BC CA)

I do not propose to attempt to resolve it because the question was not argued.

b) Alleged Error of the Jury

I am satisfied that, on the whole of the evidence, the award of the jury was, on this aspect, inordinately low.

I do not know what the award of the jury would have been had it been fully charged on this point. But it was my understanding that neither party wished a new trial and both wished us to fix an amount if we came to the conclusion either that there was an error in the charge or that, even if the charge were correct, the award was inordinately low.

In my opinion, the proper award, on this head, encompassing all the aspects of future loss, ought to have been $40,000.00.

1990 CanLII 596 (BC CA)

JUDGMENT

It follows that I would allow the appeal by increasing the non-pecuniary damages of the plaintiff from $10,000.00 to $40,000.00 and the damages for future pecuniary loss from $11,334.00 to $40,000.00. Costs shall follow the event.

"The Honourable Madam Justice Southin

I AGREE: The Honourable Mr. Justice Anderson

I AGREE: The Honourable Mr. Justice Wallace

1990 CanLII 596 (BC CA)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Evans v. Keill,*
2018 BCSC 1651

Date: 20180925
Docket: M152181
Registry: Vancouver

Between:

Crystal Evans

Plaintiff

And

Sunni Keill and Wendy Abbott

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:	E.A. Poyner A.E. Jackson
Counsel for the Defendants:	A. Du Plessis M. Jeftic
Place and Dates of Trial:	Vancouver, B.C. April 16-20 and 23-27, 2018
Place and Date of Judgment:	Vancouver, B.C. September 25, 2018

2018 BCSC 1651 (CanLII)

2018 BCSC 1651 (CanLII)

I. Introduction

[1] The plaintiff, Crystal Evans, seeks damages for neck, upper back and psychological injuries in this claim for damages for personal injuries arising out of a motor vehicle accident. She alleges that these injuries caused severe headaches, migraines, neck pain, back pain and mental illness that permanently interfered with her ability to do physical work and required her to limit her recreational and social pursuits. She also seeks damages to compensate her for expenses relating to treatment and vocational retraining.

[2] The defendants, Sunni Keill and Wendy Abbott, are the driver and owner, respectively, of the motor vehicle which hit Ms. Evans' motor vehicle from behind. Ms. Keill and Ms. Abbott do not dispute liability for the action or for the injuries that Ms. Evans submitted were caused by the accident. Rather, Ms. Keill and Ms. Abbott dispute the extent of the injuries and whether the injuries were solely caused by the accident or were, with regard to her mental health issues, pre-existing the accident. Ms. Keill and Ms. Abbott argue that Ms. Evans failed to mitigate her losses with regard to her work. They submit that this failure to mitigate should be taken into account in assessing her past income loss and future loss of earning capacity.

II. Issues

[3] The issues are:

1. What injuries were caused by the accident and what is their prognosis?
2. Did Ms. Evans fail to mitigate her losses:
    a. by taking a buyout of her position with Canada Safeway ("Safeway");
    b. by resigning from her position with Telus; or
    c. by retraining to be a chef?
3. What are Ms. Evans' likely future employment and earnings prospects?
4. Taking into account the answers to the above questions, what is the appropriate award for damages for:

a. non-pecuniary damages;

b. past income loss;

c. loss of future earning capacity;

d. loss of pension;

e. cost of future care;

f. cost of vocational retraining; and

g. special damages?

2018 BCSC 1651 (CanLII)

III. The Accident Injuries and Prognosis

[4] The facts that I set out are my findings except where I indicate that there is a contest about the facts. In such cases I will set out the conflicting evidence and my findings.

A. Pre-Accident Background

[5] Ms. Evans was born in Saskatoon, Saskatchewan on November 22, 1978. She grew up in Sherwood Park, Alberta. She was one course short of graduation when she left high school. She has never achieved high school graduation. She was 34 years old at the time of the accident and 39 years old at the time of trial.

[6] After leaving high school, Ms. Evans was been consistently employed until two years after the accident. Since her early twenties, she has been employed in the banking and credit industry the retail industry, specifically for Safeway.

[7] In 2002, Ms. Evans and her then partner, Bradley Parker, moved from Alberta to British Columbia. At that time, Ms. Evans was working for Household Finance. She transferred from their Edmonton branch to their North Delta branch.

[8] In 2004, Ms. Evans resigned from her position with Household Finance. She applied to Safeway and was hired as a grocery clerk at the Robson Street store. She

transferred to the Caulfeild Village store, and then to the Davie Street store where she worked from 2009 up to and after the time of the accident.

[9] At the time of the accident, Ms. Evans held the position of produce manager. She belonged to the United Food and Commercial Workers Union, Local 158. Her employment wages and benefits were provided for by a collective agreement.

[10] Ms. Evans testified that she enjoyed her work with Safeway and she did well in the positions she held up until the accident. Some of her co-workers testified to this, as did her one time supervisor, Mr. Shoring. He testified that she was one of the strongest produce managers under his supervision and one of the few women in that role in his area. Her performance reviews were strong. In 2012, the year before the accident, her performance was rated as exceeding expectations in all categories but one. Ms. Evans was proud that she had attained a position of responsibility and good pay despite not having graduated from high school.

[11] At the time of the accident, Ms. Evans was earning $29.02 per hour. She worked 40 hours per week. She had four weeks of holiday per year and a benefit she described as “accumulated time off”: four hours of time off for every 40 hours worked. This generally amounted to five weeks off per year in addition to her four weeks of holiday. She had a sick time allowance which was paid out to her if not used, a pension plan, extended medical benefits, and dental coverage.

[12] As produce manager, Ms.Evans supervised between five and ten employees per shift, depending on how busy it was. A typical shift involved several hours of physical work receiving produce which could include pushing or pulling heavy pallets; stocking the produce department which could include lifting produce of up to 50 pounds; and lighter duties such as scheduling shifts and ordering produce.

[13] In 2005, Ms. Evans and Mr. Parker were married. In 2009, they divorced. Their parting was amicable. They shared a residence for two years following their divorce and they remain friends.

2018 BCSC 1651 (CanLII)

[14] Prior to the accident, Ms. Evans was physically active. She hiked two to three times per week with a friend, including the Grouse Grind and Lynn Loop. She attended yoga classes. Her job was also physically demanding and required her to lift up to 50 pounds frequently and regularly.

[15] Prior to the accident, Ms. Evans socialized with friends with whom she hiked and with other friends and co-workers. In addition to socializing through physical and recreational activities, she liked to get together with friends informally or to go out for dinner. She drank socially. She testified that she had no problems with alcohol abuse prior to the accident.

2018 BCSC 1651 (CanLII)

B. The Accident

[16] On July 18, 2013, Ms. Evans was driving home from work at the Davie Street Safeway store. She was driving north on Capilano Road in North Vancouver and took the eastbound exit to Highway 1. As she prepared to merge with highway traffic, she came to a stop behind another eastbound vehicle in traffic. She was struck from behind by Ms. Abbott's vehicle which was being driven by Ms. Keill. The force of the impact dislodged her rear-view mirror and retracted her sunroof cover.

[17] The day after the accident, Ms. Evans had severe pain in her neck, back and trapezius muscles. She went to work but could not perform her duties due to the pain. She saw her family doctor, Dr. Love, that day. He noted significantly reduced range of motion and diagnosed soft tissue injuries to her cervical spine and trapezius muscles. He prescribed Ibuprofen for swelling, Emtec-30 for pain, icing and physiotherapy. He directed that she be on medical leave from work given the physical demands of her position as a produce manager.

[18] Ms. Evans started physiotherapy at the end of July 2013 and attended physiotherapy thereafter to control her symptoms. The frequency has varied based on her ability to afford the therapy and her symptoms. Ms. Evans has also sought out massage therapy and chiropractic treatment at various times since the accident. She has received hundreds of such treatments.

[19] In addition to the pain in her back, neck and trapezius muscles, Ms. Evans suffered from headaches, some of which were accompanied by nausea, dizziness and vomiting, as well as pain in the backs of her eyes. These headaches would last for a few hours to a few days.

[20] Ms. Evans testified that her injuries affected her sleep because they caused her to wake in the night with pain. She often felt fatigued in the morning.

i. Affects of Accident on Safeway Work

[21] Ms. Evans was off work for six weeks. She returned to work on a gradual basis, starting with restrictions that she not lift and that she only work four hours per day. Ms. Evans did that but found that she often came home from work with pain in her neck and upper back and often had a throbbing headache. Dr. Love advised her to reduce her work to allow for days off between shifts to recover and seek treatment. Ms. Evans followed this advice.

[22] In October 2013, Ms. Evans wanted to increase her work. Dr. Love permitted her to work four hours a day, five days per week on light duties. Ms. Evans also tried some light lifting at work but she continued to experience neck pain and headaches. She discontinued lifting and went back to four hours per day, three days per week.

[23] In December 2013, Ms. Evans tried light lifting at work because it was the Christmas season and she felt pressure to work at greater capacity. She did so against Dr. Love's recommendation. She experienced neck pain and headaches.

[24] In February 2014, Ms. Evans again tried lifting with the same results. This pattern of trial and setback continued over the first half of 2014. In August 2014, ICBC provided for an occupational therapist who drafted a graduated return to work program. That program anticipated that she would lift up to 40 pounds (20% less than her job requirement of 50 pounds) and work eight hours a day, five days a week by the end of October 2014. Ms. Evans was willing to try it. She encountered

2018 BCSC 1651 (CanLII)

problems with neck pain and headaches when lifting 30 pounds. Dr. Love reduced her lifting restriction to 20 pounds.

[25] Around this time, in September 2014, Safeway demoted her from produce manager to grocery clerk and transferred her from the Davie Street store to the Caulfeild Village store.

[26] As a grocery clerk, her hourly wage was $25.41, a 13% reduction from her previous hourly wage. She was no longer eligible for her annual 20% bonus. She was not entitled to the accumulated time off benefit. Her vacation time was no longer four weeks but a percentage of hours worked. She lost sick day benefits as well as her life and disability benefits. Although the grocery clerk position had exactly the same physical requirements as the produce manager position, there was not enough work for her in the produce department within her restrictions and the situation was increasing the workload for other staff.

[27] Mr. Hogeweide, the manager of the Caulfeild store, gave evidence that enough work could be found for her in the grocery department. He said they did provide her with work that was lighter. Ms. Evans disputes this. She testified that when she was working in an area and light duties had been exhausted, she was required to do whatever work was needed regardless of whether it was within her restrictions. On some days she was lifting or moving crates of soft drinks. On some days she was assigned to work in the dairy section, one of the most physically demanding positions in the store. She was scheduled to work the night shift which involves constant lifting and re-stocking shelves. She did not complain because she wanted to get her produce manager job back, and to do so she had to prove she could do the physical job requirements of the grocery clerk job which were the same as those of produce manager.

[28] Mr. Cristofferson, a co-worker, testified that Ms. Evans was scheduled to work in the dairy from time to time. He was aware of this because he worked in the dairy and he was particular about how the work was done so he made it his business to

2018 BCSC 1651 (CanLII)

know who was scheduled there. Mr. Hogeweide did not schedule Ms. Evans work so his knowledge of where she was working was restricted to what he noticed when they were on shift together. I accept Ms. Evans' evidence about the nature of work she did as a grocery clerk.

[29] Ms. Evans grieved the demotion. However, her union representative advised her that after discussions with Safeway, the union viewed the accommodation as reasonable until such time as she could work the produce manager position without restrictions. This evidence came from Ms. Evans and is hearsay. I accept this evidence as being what she was told. The facts show that the union did not pursue the grievance.

[30] On November 30, 2014, Ms. Evans' life insurance and disability insurance benefits were cancelled because she had not maintained an average of 32 hours of work per week.

[31] In early December 2014, Ms. Evans received Botox injections or her neck pain and headaches on the recommendation of Dr. Love. She paid for the treatments privately in order to expedite them. The first set of injections was successful and enabled her to work a good part of the very busy Christmas grocery season without exacerbating her neck pain and headaches. She had a second set of injections in January 2015 which did not provide any relief and her headaches returned. Dr. Love recommended that she decrease her work to six hours every second day.

[32] At this time, Dr. Love was of the opinion that Ms. Evans was going to have to change her work because despite several attempts to increase her lifting capabilities and her working hours, she was still suffering from pain and headaches affecting her ability to work. He recommended that she consider a change in employment to a less physically demanding job.

[33] In March 2015, Ms. Evans was in a conundrum. The position to which she had been demoted, grocery clerk, required the same physical abilities as the

2018 BCSC 1651 (CanLII)

produce manager position, except that as a produce manager, she was able to delegate heavy lifting and was therefore better able to manage her symptoms. Safeway would not permit her to return to her produce manager position until she was cleared to work it without restrictions. Her union told her that it would not proceed with her grievance until she was able to work the position. She was highly stressed financially.

[34] Ms. Evans went to Dr. Love and persuaded him that if she was medically cleared to return to full duties, and was able to get back to the produce manager job where she could delegate heavy lifting, she would be better off both physically and emotionally. Dr. Love reluctantly acceded to her request to remove the restrictions on lifting and hours of work. Ms. Evans advised the Safeway rehabilitation specialist who was overseeing her return to work program that "I explained to my doctor that if I can lift the restrictions I may be able to get back my position, less lifting, so we decided to lift the restrictions. I'm hoping and excited to get back as a produce manager." Safeway did not accept this approach. Safeway Human Resources Director Dave Robertson told Ms. Evans that until she could work full time hours consistently, Safeway would not consider other work for her.

[35] Ms. Evans increased her work schedule from 32 hours to 40 hours per week. She testified that her neck ached and her headaches worsened. She was resigned to not being able to work without pain and not being able to work as a produce manager. Ms. Evans testified that she was afraid she would be fired. The evidence of Safeway personnel who testified was that there were no plans to fire her and no one had threatened to fire her. I find that she was not in danger of being fired.

[36] Meanwhile, Ms. Evans' long-term disability benefits, which paid 60% of the difference between her full time produce manager wage and her part time grocery clerk wage, were set to run out at the end of June 2015.

[37] In June 2015, Safeway offered a voluntary severance package to long-term employees who held certain positions, including grocery clerks, as part of a

2018 BCSC 1651 (CanLII)

downsizing program. It was not available to produce managers. The severance payout was $60,000. Ms. Evans accepted it and decided to retrain for another occupation. The package required her to work full time until September 5, 2015, but she was not required to do any duties that caused her discomfort. She met this criteria. At this time, she also started taking a course in wine appreciation as she was interested in working in the wine industry.

[38] In July 2015, Dr. Love referred Ms. Evans to a specialist in rheumatology to consider trigger point injections and possibly Botox injections. Ms. Evans saw Dr. Badii for trigger point injections in 2016.

ii. Social, Recreational and Mental Health

[39] After the accident, Ms. Evans stopped socializing and stayed at home to try to recuperate from her pain, headaches and fatigue from not sleeping.

[40] Friends and co-workers testified that Ms. Evans stopped going out completely for a period of time after the accident. Then, several months after the accident, she began to make arrangements to go out but would often cancel them and explain that she had a headache.

[41] One of these witnesses was Mr. Parker, Ms. Evans' ex-husband. He testified that he saw her less frequently following the accident. He attributes this to the headaches she told him that she was suffering from. He said that when he did see her she appeared to be uncomfortable and unhappy.

[42] Ms. Evans was not physically active due to the accident until the spring of 2014. Due to her inactivity, she gained 30 pounds. This caused her to feel depressed and lowered her self-esteem. Friends who had previously hiked with Ms. Evans testified that she did not hike with them for the balance of 2013.

[43] In addition, she began drinking heavily. She would often consume two bottles of wine in the evening which contributed to her feelings of depression. Mr. Parker testified that prior to the accident Ms. Evans was a social drinker who would

2018 BCSC 1651 (CanLII)

consume four or five drinks in an evening. He described her drinking after the accident as out of control.

[44] In the spring of 2014, Ms. Evans was dating someone. At this time, she said her mood was poor. She was drinking heavily. The individual whom she was dating broke off the relationship. Ms. Evans testified that after that time her drinking "took over".

[45] On an evening in May 2014, Ms. Evans was at home and drinking alone. She took a handful of sleeping pills that had been prescribed to her and drank approximately two bottles of wine. She testified that when she swallowed the pills, her wish was to go to sleep and not wake up. She sent a message to a friend about what she was feeling. Her friend contacted the individual Ms. Evans had been dating. He came to Ms. Evans' apartment and stayed with her until she revived. Ms. Evans did not seek medical attention following that episode or report it to her family doctor because she was embarrassed and ashamed of what she had done. Ms. Evans testified that prior to this episode, she had never become depressed or sought to harm herself following the loss of a relationship, including at the time of her divorce in 2009. Ms. Evans testified that two years prior to the accident she had sought counselling due to issues she had with a relationship but she was not depressed at that time.

[46] After the May 2014 incident, Ms. Evans took steps to improve her mental health. She attended a ten day meditation retreat and tried to learn techniques to relax. She found this beneficial. After the retreat, Ms. Evans slowly began trying to resume her recreational activities. She began to take yoga classes again but found that many of the poses aggravated her neck symptoms and caused headaches. She also attempted to start hiking again.

[47] In 2014, she hiked the Stawamus Chief (the "Chief") with some friends. She was badly affected by pain in her neck and shoulders. She switched her backpack for a friend's waist pack, and continued the hike to the top. Ms. Evans testified that

2018 BCSC 1651 (CanLII)

the steep downward portion was painful because she had to keep her neck angled to look down at her footing. One of her hiking friends testified that it was apparent that she was in pain especially hiking down the Chief. Another friend testified that Ms. Evans was faster going up than she was because she was in better shape.

[48] She testified that she attempted to continue to resume hiking by doing occasional short and easy hikes on level terrain. She also purchased her own waist pack to use instead of a backpack.

[49] The Safeway demotion further exacerbated her feelings of low self-worth and depression especially since it involved a transfer back to the Caulfeild store as a grocery clerk alongside people she had formally supervised when she was a produce manager. After the meeting during which she learned of her demotion, Ms. Evans said she went home, cried and drank. She was sad and depressed about having lost a job that she loved. She was worried about her finances. Ms. Evans had to move out of her one-bedroom apartment into a less expensive studio apartment. She caused herself to be socially isolated and continued to drink heavily.

iii. Post Safeway Buyout

[50] After leaving Safeway in September 2015, Ms. Evans took a six-week holiday to recover from what she considered to have been a hard two years of rehabilitation and setbacks at work. She used her buyout money to finance that holiday, reduce her debt, and provide for retraining and job search costs.

[51] When she returned from her holiday, she began working with a career counsellor to put together a *curriculum vitae* and to look for work. She made numerous job applications. In February 2016, she took a part-time job with Telus as a telephone customer service operator. The training was full-time and took place over several months.

2018 BCSC 1651 (CanLII)

[52] In March 2016, Dr. Badii tried trigger point injections in her shoulder and upper back to address her pain and headaches. She had minimal lasting benefit from those injections and Dr. Badii did not recommend them further.

[53] In June 2016, Ms. Evans completed her training with Telus and began working in the call centre. She was assigned more shifts than she anticipated. She found the work demanding and the breaks were not frequent enough to allow her to stretch. She was required her to sit or stand at a desk and wear a headset. During phone calls, she used a keyboard to take notes. She was not a proficient typist and had to flex her neck forward when typing to see the keyboard. There were no substantial opportunities to stretch or move around as the employees were only permitted a 30-second break between calls. She tried to alternate sitting and standing with no significant relief. Her neck pain, back pain and headaches were aggravated.

[54] A co-worker testified that he worked near Ms. Evans and observed that she was in pain. Ms. Evans told him she had neck pain and headaches. In 2016, Ms. Evans tried hike the Chief again with this same Telus co-worker who had become a friend. She testified that despite wearing a waist pack, she had pain in her neck and back as well as a headache and was unable to carry on. She had to turn around and return to the bottom of the mountain shortly after the hike began. The rest of the group carried on and met her at the bottom afterward.

[55] In July 2016, Dr. Love concluded that Ms. Evans was depressed based on her reporting to him that she was crying at home, had a decreased appetite, was having pain at work, and a four month relationship had broken up. He prescribed an anti-depressant, duloxetine, and suggested she see a psychologist for counselling. Ms. Evans saw a psychologist but did not find that session helpful.

[56] In August 2016, Ms. Evans consumed a couple bottles of wine and took a number of pills. Once again she hoped to go to sleep and not wake up. Her ex-boyfriend took her to the hospital. The hospital referred her to the North Vancouver

2018 BCSC 1651 (CanLII)

HOpe Centre, a mental health treatment centre, but Ms. Evans did not receive follow-up communication from the HOpe Centre despite seeking it out. She continued to see Dr. Love who refilled her prescription for duloxetine. Over the next few months her prescription was switched to venlafaxine as Ms. Evans was experiencing nausea from duloxetine. Ms. Evans reported to Dr. Nader, a psychologist she saw on two occasions, that she felt the medication helped to improve her mood and to reduce her overall level of negative emotions.

[57] In the fall of 2016, Ms. Evans was still working for Telus, recovering from her suicide attempt, and living in North Vancouver. She met Greg Montgomery, and over the course of a few months, their friendship evolved into a romantic relationship. At the time, Ms. Evans was drinking heavily. Mr. Montgomery testified that when he met her she was drinking approximately a case of wine per week and her mood was depressed. He also noted that strenuous activity such as lifting, sitting or standing would trigger a headache for Ms. Evans for which she would lie down in a dark room and take pain medication.

[58] In September 2016, Mr. Montgomery moved to California to take advantage of a job opportunity. Ms. Evans moved into his vacant apartment. Despite having hired movers for her belongings, Mr. Montgomery observed Ms. Evans carrying some small bags and boxes herself. He testified that this effort knocked her out for a few days with neck pain and headaches.

[59] Ms. Evans and Mr. Montgomery maintained a long-distance romantic relationship and saw each other whenever Mr. Montgomery had occasion to return to North Vancouver from California.

[60] In the summer and fall of 2016, Ms. Evans missed work frequently due to her pain and headaches. This prompted a talk from her manager at Telus. Ms. Evans explained that she had taken the job expecting it to be part-time but that she was working full-time hours. Her manager told her that she would look into putting her on a schedule of working evenings and weekends that would reduce her hours.

2018 BCSC 1651 (CanLII)

Ms. Evans did not hear anything back from her manager on this issue. Ms. Evans wanted to transfer to another department but understood that Telus would not permit that to happen without her manager's consent, and given the extensive training that Ms. Evans had received, it would not be well-received for her to ask for a transfer until she had worked in the position for which she been trained for at least two years. After the meeting with her manager, and no response on her request to work part-time, Ms. Evans began to worry that she would be fired due to her frequent absences. In December 2016, she resigned from Telus.

[61] In January 2017, Ms. Evans visited Mr. Montgomery in California. Ms. Evans had taken courses through the Wine & Spirit Education Trust ("WSET") in order to pursue work in the wine industry as a sommelier agent. During this visit to California, Ms. Evans developed an interest in working in the produce industry, and decided to combine her education in wines and spirits with becoming a chef.

[62] Ms. Evans enrolled in a culinary institute specializing in raw vegan cuisine, which she testified was a niche area with a growing customer base in California. She had looked at other cooking schools and most required a year of full-time culinary studies. The school in which she enrolled permitted her to take several separate one-month courses to complete the course as a whole. She considered this to be more appropriate given her uncertainty around her physical limitations and culinary training. Unfortunately, she had an accident with a knife during the first level of the course. She had to postpone completion of the course.

[63] In the meantime, Ms. Evans and Mr. Montgomery married. Ms. Evans then completed the first and second levels of the culinary course. She started the next level of course work but found it to be more physically demanding as it required a lot of standing time in the kitchen and postures with neck angulation that triggered pain and headaches. At the time of trial, Ms. Evans was working with a physiotherapist to strengthen her muscles with the aim of rejoining the course in June 2018.

2018 BCSC 1651 (CanLII)

[64] Once she completes the full set of raw cuisine courses she plans to enroll in a more traditional culinary program which will involve a six-month culinary arts diploma and then follow that with a six-month baking and pastry arts diploma. Ms. Evans does not believe that restaurant cooking is feasible for her because it is physically demanding and requires significant lifting. However, she hopes that training as a chef will permit her to seek employment within her physical limitations such as being a private chef, running a catering company or teaching.

[65] With the support of Mr. Montgomery, Ms. Evans has limited her alcohol intake to occasional glasses of wine when socializing. She testified that her mood is improved and her depression has gone into remission. She has given up hiking as she finds it places too much strain on her neck. She walks her dog on flat terrain for exercise. She attends physiotherapy and is undertaking strength training to try to improve her stamina.

C. Ms. Evans' Credibility

[66] Before I address the expert evidence tendered by the parties, I will address the defence's argument that I must take into account that much of the evidence about Ms. Evans' injuries and the impact they have had on her comes from Ms. Evans herself.

[67] There must be convincing evidence led by the plaintiff. It can be the plaintiff's own evidence, so long as the court is careful to scrutinize the evidence when there is no objective evidence available. As stated in *Butler v. Blaylock,* [1983] B.C.J. 1490 (C.A.) at para. 13:

> [13] … It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages…

[68] In assessing credibility, I follow the approach described by Dillon J. in *Bradshaw v. Jenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

2018 BCSC 1651 (CanLII)

> Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally *(Wallace v. Davis,* [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; R v. S.(R.D.), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

2018 BCSC 1651 (CanLII)

[69] The defence argues that the nature of Ms. Evans' injuries must be assessed taking into account that there is no objective evidence of them, only Ms. Evans' subjective reporting. Aside from the fact that the law does not preclude recovery in such circumstances, I do not accept this argument on the facts of this case. There is evidence of several doctors as well as lay witnesses that is objective in nature.

[70] For example, Dr. Waseem, a physiatrist seen by Ms. Evans, testified that he identified trigger points in her left paraspinal muscle which caused pain in her upper back upon palpation. He also observed spasms on both sides of the base of her neck and in her trapezius muscles in the region of her neck. The evidence includes co-workers and friends who saw signs of apparent pain in Ms. Evans and testified that she cancelled plans with them and withdrew socially.

[71] In addition, Ms. Evans' evidence is acceptable on a credibility analysis following the approach and factors outlined in *Bradshaw*. Ms. Evans' actions corroborate her evidence of her injuries. She is a hardworking individual who attempted, for two years, to recover from her injuries and get back to the work she loved to do. She invested financially in the costs of treatment such that she fell into debt. She has missed days of work and she was demoted, losing a position that superior in terms of its financial compensation and the fulfillment she derived from it. She did not present as a person attempting to exaggerate her problems for financial

gain. In the almost five years between the accident and this trial, she has behaved like a person trying to regain and then rebuild her life.

[72] I find there to be corroborating evidence that Ms. Evans' pain and headaches were severe enough to cause her to not be able to work, socialize and engage in recreational activities as she reports. The sacrifices she endured to her financial well-being and her lifestyle are such that I find she has not exaggerated her symptoms. Her account of her injuries and the affects they have had on her makes sense and I accept it.

2018 BCSC 1651 (CanLII)

D. Expert Medical Evidence

[73] Ms. Evans tendered the reports of the following medical experts: Dr. Love, her family physician (reports dated July 10, 2015 and July 28 2015), Dr. Heran, a neurosurgeon (report dated July 3, 2015); Dr. Waseem, a physiatrist (report dated August 13, 2015); Dr. Badii, a rheumatologist (reported dated July 28, 2017); and Dr. Nader, a psychologist (reports dated October 5, 2015 and June 26, 2017).

[74] Ms. Evans underwent independent medical examinations at the request of the defendants. The defendants did not tender any reports.

[75] The medical evidence is cohesive and not challenged on the following points:

a) Ms. Evans has soft tissue injuries to her neck, shoulder and upper back. The injuries have led to chronic myofascial pain which affects the muscles and muscle lining in the area of her neck, shoulders and upper back;

b) Ms. Evans initially had pain in her low and mid-back as well but that has completely resolved;

c) her myofascial pain has resolved somewhat, but it is chronic; and

d) she has had cervicogenic headaches (headaches originating in the muscles around the neck) as well as migraine headaches featuring severe pain, sensitivity to light, nausea and vomiting. The migraine headaches became less frequent over time.

[76] The defendant takes issues with the medical evidence in the following regards:

a) the extent of improvement Ms. Evans had in the first two years following the accident and whether she will continue to improve;

b) whether Ms. Evans' facet joints are affected and part of her ongoing pain, and if so, whether all treatment options have been exhausted;

c) whether Ms. Evans should have passive rehabilitation as well as active rehabilitation or only active rehabilitation; and

d) whether Ms. Evans' psychological issues were due to relationship problems or the accident and whether the events described as suicide attempts were in fact suicide attempts, in particular the first event.

i. The Extent of Ms. Evans' Improvement

[77] The debates about Ms. Evans' improvement are two fold. First, there is debate about whether she, by 2015, had daily neck and upper back pain and headaches, or whether she has some headache-free and/or pain-free days and was significantly improved by the summer of 2015. Second, there is a debate as to whether she may still improve.

[78] Dr. Love contends that Ms. Evans is never headache free and pain-free and she has not had significant improvement. The defendants criticize Dr. Love as an advocate for Ms. Evans and argue that I should not rely on his evidence for much, if anything. Dr. Love knew Ms. Evans prior to the accident and saw her on a regular basis throughout her recovery. He provided two medical-legal reports, chronicling her visits, his advice and her progress. He testified at trial. In many respects, his opinions are similar to those given by the other medical experts. At times he reported that she was pain-free upon examination and at other times he reported marked pain. He testified about his involvement in her return to work attempts over the course of two years. At some junctures, he was reluctant to approve certain aspects of Ms. Evans' return to work plan but he supported Ms. Evans who wanted

2018 BCSC 1651 (CanLII)

to keep her job and regain her position as a produce manager after she was demoted.

[79] There are parts of Dr. Love's evidence which appear to be overstatements of Ms. Evans' pain status. When questioned on this in cross-examination, he became unreasonably insistent despite internal contradictions in his reports and contradictions with Ms. Evans' evidence. I accept that Dr. Love's objectivity has been impacted because of the position he has been trying to mediate between Ms. Evans' physical symptoms, which were exacerbated by lifting and working full-time hours, and her emotional state, which was impacted by feelings of depression around the loss of the work she loved as well as the financial stress of her demotion and reduced work hours. He became her advocate in her rehabilitation. He presented that way at trial on some issues.

[80] There are certain elements of his evidence, mostly matters of degree, which I do not accept because they are in conflict with the other evidence that Ms. Evans put forward – including her own evidence.

[81] An example is the evidence pertaining to the extent of her recovery, and in particular, whether she experienced about a 60% recovery by the summer of 2015 and whether she had pain-free days.

[82] In July 2015, Ms. Evans saw Dr. Heran, a neurosurgeon, for an independent medical examination. Dr. Heran reported that at that time Ms. Evans reported that her accident symptoms had improved and she thought she was getting better over time. She said the pain had improved from being in her neck, trapezius, shoulders and arms to being really only in her neck and extending into the proximal trapezii. At that time she reported that she still got headaches. She reported that she was never pain-free but from time to time she was headache-free. She reported that the headaches typically occurred once or twice per week. Ms. Evans confirmed that this was her status at that time.

2018 BCSC 1651 (CanLII)

[83] Ms. Evans also saw Dr. Waseem, a physiatrist, for an independent medical examination on July 28, 2015. Dr. Waseem reported that Ms. Evans told him that she had improved by about 60% and then plateaued. At that time, Ms. Evans reported to Dr. Waseem that her neck pain and her trapezius pain was present one half to three quarters of the time and her headaches occurred less than one quarter of the time. Ms. Evans testified that initially she had debilitating headaches five out of seven days per week. At the time she saw Dr. Waseem, she was having them less than one quarter of the time. She told Dr. Heran that she was having them one or two days per week. That is a reduction that corresponds well to a 60% improvement. This type of improvement was echoed with regard to neck and trapezius pain and Dr. Love's reports on her headache frequency.

[84] Dr. Love also reported that in June 2017 Ms. Evans had a sore neck all day, every day and her trapezius muscles were sore all day every day. I note Dr. Heran reported in July 2015 that she was never pain-free from the neck and trapezius pain. If these statements are taken to represent her status during the whole of her recovery, they are contradicted by other statements in Dr. Love's reports and Ms. Evans' evidence at trial. She confirmed on cross-examination that when on holiday, for example, she had a pain-free week. She also agreed that when she was not doing something strenuous, she would not experience pain. I do not accept Dr. Love's insistence that Ms. Evans has had pain every day since the accident.

[85] With regard to ongoing improvement, Ms. Keill and Ms. Abbott rely mainly on Dr. Heran's opinion that her soft tissue areas of pain would likely continue to improve. He felt that she should continue to further manage the pain with the treatment she was already using but she should also be re-integrating back into all aspects of her life including trying to lift and do activities at work. With regard to her headaches, he felt that the trigger point injections might be helpful. He also said there was room for consideration for management of the facet joints and for Botox injections. With respect to medications, he noted that in her condition there was a role for "neuromodulating medications". He thought she was borderline for

2018 BCSC 1651 (CanLII)

implementing those at that time as she was able to tolerate her symptoms and manage her affairs by adjusting her activities. He felt that those medications should be considered if her symptoms were to worsen.

[86] Dr. Waseem opined that her current symptoms were chronic myofascial pain syndrome involving the cervical spine as well as chronic post-traumatic headaches with mixed migraine and cervicogenic features. He noted that her conditions and symptoms have been “refractory” which means not resolved by spontaneous recovery, conservative therapy, or Botox injections, all of which had been tried before he saw her. He opined that the conditions were permanent in nature and her prognosis for full symptom recovery was guarded.

[87] Dr. Badii opined that Ms. Evans has had her maximum medical improvement and now has chronic pain; she will always have a level of pain similar to her current level in her neck and shoulders; and she will continue to have cervicogenic headaches. He opined that her symptoms will be aggravated by strenuous physical activity and/or prolonged sitting. His view is that she should be able to work full time in a line of work that does not require prolonged sitting, keeping the neck in one position, or any significant degree of heavy lifting. He opined that Ms. Evans’ pain is chronic and she needs to manage by adjusting her lifestyle accordingly. He reported that she has lower pain days, but she is rarely pain free.

[88] Ms. Evans’ physical symptoms have neither improved nor worsened since she saw Dr. Heran. It has been almost three years since he saw her. She had already tried Botox injections, and she subsequently tried trigger point injections without success. Dr. Badii did not think there was an indication that deeper facet joint injections (blocks) were warranted given the risks and the chances of only temporary relief. Dr. Badii treated her and I accept his opinion in this regard.

[89] Dr. Love opined in July 2017 that after four years it was unlikely that she would improve and that she would have pain in her neck, in her trapezius muscles and cervicogenic headaches indefinitely.

2018 BCSC 1651 (CanLII)

[90] I conclude that Ms. Evans' symptoms have improved. Fortunately, her headaches have reduced from most days of the week to between one and three days per week, depending on her activity. She has pain in her neck and upper back more than half the time. While this is an improvement from the first few months after the accident, it is chronic and regular, if not constant. The evidence was also clear that Ms. Evans experiences exacerbation of the pain and the onset of headaches when lifting, working with her arms over her head, or working with her neck flexed forward. I accept that Ms. Evans has some pain-free days and has headaches weekly but not daily. She reached that level of improvement by mid-2015. Her condition has not changed significantly since then and is not likely to.

2018 BCSC 1651 (CanLII)

ii. Facet Joint Injuries

[91] Ms. Evans argues that Ms. Evans' ongoing pain stems at least in part from facet joint injuries. The expert evidence was inconsistent on whether or not Ms. Evans' ongoing pain stems primarily from soft tissue injuries, her facet joints, or both.

[92] The evidence of Dr. Heran was that the difference between the two types of injuries is that soft tissue injuries settle down after they are aggravated, but facet joint injuries do not. He also opined that facet joint injuries can get worse over time. While this issue is important to the issue of whether her condition might deteriorate, it does not affect whether she can expect improvement. All the opinions are that she cannot work in occupations which keeping the neck fixed in one position, or any significant degree of heavy lifting and strenuous physical activities; she is only suited to strength activities of up to 10 pounds which essentially limits her to sedentary-light occupations; and she should avoid prolonged and sustained neck postures and repetitive cervical extensions and shoulder checks. These opinions are based on the nature of her pain, not the source of it.

[93] Dr. Heran opined that Ms. Evans' pain was arising from both soft tissues and facet joints because the source of her pain on the left side appeared to be within the region of the facet joint complex. He recommended targeting her facet joint at the

C4-5 level with injections with local anaesthetic and steroids for diagnostic purposes. He also felt she would benefit from facet joint blocks. He said, however, that where there is substantial overlap between the sources of pain, it can be impossible to tell even with injections.

[94] Dr. Waseem diagnosed chronic myofascial pain and recommended cervical facet joint blocks to address Ms. Evans' cervicogenic headaches. In his testimony he explained that "blocking the joint" or "the nerve" can help treat headaches. He did not opine that her pain or headaches had a "structural" component as did Dr. Heran.

[95] Dr. Badii treated Ms. Evans with injections. Dr. Badii tried trigger point injections in her neck with local anaesthetic and a corticosteroid. These are more superficial injections which Dr. Heran described as being for the soft tissue injuries and which, if offering relief, would assist in diagnosing a significant soft tissue injury component. Ms. Evans had minimal lasting benefit from those injections and Dr. Badii did not recommend them further. Dr. Badii stated in his report and on the stand that he thinks soft tissue injuries are the main source of Ms. Evans' pain.

[96] Dr. Badii testified that based on the fact that neither Botox injections nor trigger point injections offered lasting or repetitive relief, he did not see a further basis for attempting other treatment modalities such as facet joint blocks or deeper injections. He considered them, but did not recommend them because he felt that her baseline pain, i.e. when her neck and back were not aggravated, was manageable for her. Facet joint block injections are deeper injections and carry with them risks of damaging blood vessels or nerves. The treatment does not provide permanent relief. At best if offers three to six months of relief.

[97] Ms. Keill and Ms. Abbott argue that Dr. Badii's evidence should be interpreted to mean that Ms. Evans' facet joints were not affected. I agree. Dr. Badii's evidence, in his report and in oral evidence, was that he thinks her pain is mainly soft tissue related. While he did not definitively rule out the facet joints as a source of her pain, he also did not offer the opinion that they are a source of the pain or even mention

2018 BCSC 1651 (CanLII)

them in his report. Dr. Badii treated Ms. Evans on four occasions. He was able to see her reaction to the trigger point injections.

[98] In his second report, Dr. Love referred to Dr. Heran's opinion of left facet joint mediated pain and the potential for degenerative changes. Despite having seen that opinion, he offers the same opinion he had previously: that her pain arises from soft tissue injuries.

[99] In my view, Ms. Evans has not proven facet joint involvement on a balance of probabilities.

iii. Recommended Course of Rehabilitation

[100] Ms. Keill and Ms. Abbott argue that the medical evidence was that passive rehabilitation (physiotherapy, massage therapy, chiropractic treatment) will not have long-lasting benefits and are not reasonable expenses.

[101] This argument is mostly based on the opinion evidence of Dr. Heran. He recommended Ms. Evans continue with active rehabilitation but did not think that passive modality treatments would be of value for long-term injury and pain management. However, he also opined that the passive modality treatments have been reasonable in the past and if they provided substantial benefit lasting from several to many days, they could still be considered.

[102] Dr. Waseem and Dr. Love support the use of passive modalities such as physiotherapy and massage therapy to manage symptom exacerbation on an as required basis. Dr. Badii opined that 12 to 24 physiotherapy sessions a year for symptom control would be reasonable.

[103] Ms. Evans has been attending passive therapy sessions including physiotherapy, massage therapy and chiropractic treatment since shortly after the accident as her finances have permitted. Within about two months of the accident, she began active rehabilitation. At present, Ms. Evans is using both active and passive modalities with a focus on strength-training to build up her endurance.

2018 BCSC 1651 (CanLII)

[104] She had been prepared to invest in these therapies with her own funds, causing her considerable financial distress, because they offer relief.

[105] I conclude that the weight of the opinion is that active rehabilitation should be Ms. Evans' focus, but that it is reasonable for her to use passive treatments to manage her symptomatology and that she is likely to require such symptom management on an ongoing basis.

iv. Psychological Injuries

[106] The defence argues that Ms. Evans' suicide attempts coincided with her relationship breakdowns and those relationship breakdowns were the main causes of her major depressive episodes and suicide attempts.

[107] In a personal injury case, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused or material contributed to an injury. There must be a substantial connection between the injury and the defendant's conduct. The primary test for causation is the "but for" test: but for the defendant's negligence, would the plaintiff have suffered the injury?: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[108] However, the defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*: *Athey Leonati,* [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[109] Where there are both tortious and non-tortious causes of injury, the defendant is liable so long as the defendant's conduct is a cause of the plaintiff's injury. The plaintiff must establish such causation on a balance of probabilities before damages are assessed: *Blackwater v. Plint,* 2005 SCC 58 at para. 78.

[110] As described above, after the accident Ms. Evans did not see friends as often as she previously did. She cancelled plans. She drank heavily. On two occasions she took pills after drinking large amounts of wine and hoped to go to sleep and not wake up. She was prescribed two different types of antidepressants. The second

2018 BCSC 1651 (CanLII)

prescription helped her and in late 2016, with a combination of medication and other changes in her life, her mood improved. She drinks less and feels better.

[111] With regard to her emotional distress and psychological condition, Ms. Evans tendered the medical evidence of an independent psychologist, Dr. Nader. In his November 2015 report, Dr. Nader opined that Ms. Evans met the diagnostic criteria for mild somatic symptom disorder, major depressive disorder in partial remission, and social anxiety disorder.

[112] Dr. Nader opined that Ms. Evans' somatic symptom disorder was precipitated by her physical injuries and complaints following the accident. Somatic symptom disorder caused Ms. Evans to catastrophize and ruminate on the impact of her pain which was likely maintaining her distress about it. With regard to depression, Dr. Nader noted that she had not experienced significant depression symptoms prior to the accident. Dr. Nader opined that her psychological symptoms were most significant in the year following the accident and that in October 2015 she no longer met the diagnostic criteria for major depressive disorder but had ongoing residual symptoms of depression. Her prognosis was cautiously optimistic. Having seen her after she had taken the buyout from Safeway, he raised concerns about her then current transition with regards to her work: he felt that if she had difficulty finding meaningful work in the next six to twelve months then she would be at a relatively high risk for relapse of her depressive symptoms and would benefit from psychological treatment. Dr. Nader also opined that her 2014 major depressive episode meant that she had a greater than 50% chance of experiencing another major depression and that psychological treatment may benefit to assist with her current symptoms and prevent future episodes of depression.

[113] Ms. Evans saw Dr. Nader for a second time in June 2017. He opined that at that time, Ms. Evans no longer met the diagnostic criteria for somatic symptom disorder or major depressive disorder. He opined that Ms. Evans was more accepting of her pain and not as bothered by it. Her attention had shifted to how to function effectively within her physical limitations. He opined that she had suffered a

2018 BCSC 1651 (CanLII)

second depressive episode in the summer of 2016 leading up to the second suicide attempt. Dr. Nader opined that her depression in the summer of 2016 was related to the fact that she had been optimistic and hopeful about starting her new job at Telus – in particular that it would help her get back on her feet financially – but that within a few months of starting the job she realized she would not be able to function at the job long-term and started having increasing headaches and worsening pain. This led to stress and caused her to question what she would be able to do for work in the future. This concern about her future, the stress of the job itself, and the relationship problems she had contributed to the worsening of her mood. Her previous major depressive episode increased her risk of this second depressive episode. Dr. Nader opined that her treatment with Effexor had gone well and she was not experiencing any significant depressive symptomology at the time of the examination and had not since September 2016.

[114] Dr. Nader opined that her prognosis was cautiously optimistic. He opined that she should consider psychological treatment in the future should she notice a recurrence of depressive symptoms. However, he did not feel that she needed psychological treatment at that time.

[115] In my view, the submission of the defendants that relationship break-ups were the cause of Ms. Evans' suicide attempts parses the evidence too thinly and ignores other evidence. Ms. Evans' evidence, as supported by evidence of friends and co-workers, was that was depressed after the accident. She was moody and irritable. She withdrew socially. Her evidence was that she was drinking heavily which had not been a problem for Ms. Evans prior to the accident. Prior to the accident she had endured a marital breakdown without a depressive episode.

[116] I accept that the relationship breakdowns that immediately preceded her two post-accident suicide attempts played a role in her depression and suicide attempts. But I also accept that she became depressed as a result of her accident injuries, her loss of self-esteem due to not being able to do a job she had previously been very good at and derived a lot of self-worth from, her inability to engage in strenuous and

2018 BCSC 1651 (CanLII)

challenging physical activity, her associated weight gain; and her inability to become and remain pain-free and headache-free.

[117] I find that the accident was meets the but for causation test with regard to Ms. Evans' somatic symptom disorder, which caused her to dwell on and catastrophize her symptoms, her depression and her suicide attempts.

IV. Failure to Mitigate

[118] Ms. Keill and Ms. Abbott argue that Ms. Evans failed to mitigate her past wage loss damages in the following ways:

a) taking a buyout from Safeway;

b) limiting her post-Safeway job search;

c) resigning from her position with Telus; and

d) choosing to retrain as an executive chef by taking vegan culinary courses.

[119] In the result, they submit that past income loss should be limited to the losses up to when Ms. Evans left Telus and her loss of earning capacity damages should be reduced by 30% after reduction for negative contingencies.

A. Legal Principles

[120] A plaintiff in a personal injury action has a positive duty to mitigate, including actively pursuing job opportunities. A failure to mitigate loss of income can be found on the basis of a lack of diligent efforts to find alternative employment: *Graham v. Rogers*, 2001 BCCA 432 at para. 82, leave to appeal dismissed, [2001] S.C.C.A. No. 467. The plaintiff is obliged to take reasonable steps to find employment at a level he or she reasonably could have been expected to achieve in light of the injuries suffered as a result of the accident: *Midgley v. Nguyen,* 2013 BCSC 693 at para. 282.

[121] The defendant bears the burden of establishing on a balance of probabilities: (1) that there were steps the plaintiff could have taken to mitigate; (2) that those

2018 BCSC 1651 (CanLII)

steps were reasonable; and (3) the extent, if any, to which the loss would have been avoided by taking those steps: *Wright v. Mistry*, 2017 BCSC 239 at para. 103, citing *Lemieux v. Evers*, 2000 BCSC 1464 at para. 64. If the defendant establishes, on a balance of probabilities, that the plaintiff acted unreasonably, the determination as to the amount the plaintiff's damages would have been reduced as a result of him or her acting reasonably may involve hypothetical or future possibilities which the court will weigh according to the relative likelihood, where the possibility is real and substantial: *Gill v. Lai*, 2018 BCSC 101 at para. 73. In *Power v. Carswell*, 2011 BCSC 1672 at para. 220, the Court described the defendant's burden as heavy.

2018 BCSC 1651 (CanLII)

[122] With regard to the first two steps, while the analysis is focussed on whether the plaintiff's actions have been reasonable, the analysis is not purely objective. The court should take into account the subjective knowledge of the plaintiff regarding the proposed alternative employment: *Gallina v. Honda Canada Finance Inc.*, 2014 BCSC 974 at para. 129. If the injuries the plaintiff has suffered, for example psychological injuries or a brain injury, are at the root of the alleged unreasonable behaviour, it will be inappropriate to make a deduction for failure to mitigate: *Mullens v. Toor*, 2016 BCSC 1645 at para. 123, aff'd 2017 BCCA 384, and *Litt v. Guo*, 2015 BCSC 2207 at paras. 415-16.

[123] A plaintiff is not being reasonable in circumstances where he or she is not able to undertake pre-accident employment and insists on pursuing a line of work which he or she likes but which is not reasonable because it does not offer good employment opportunities, will require lengthy retraining compared to an alternative option, or does not provide comparable income as an available reasonable alternative would: see, for example, *Mullens* at paras. 112-14.

[124] Where the plaintiff does not take reasonable steps by pursuing employment that is not suitable, the trial judge, in assessing future loss of earning capacity, may take into account the earnings that would have been attained at reasonable employment, rather than from the employment the plaintiff has chosen to pursue. For example, in *Odian v. Carriere*, 2016 BCSC 112, the plaintiff could not work as a

finishing carpenter due to her accident injuries, but was suited to work in the supervisory aspects of homebuilding. Medical professionals – an occupational therapist and a vocational expert – had recommended that course. Instead, the plaintiff decided to retrain as a bookkeeper. Mr. Justice Dley held that the plaintiff had established an entitlement to loss of earnings capacity, but compared her pre-accident earning capacity as a finishing carpenter with what she was deemed capable of earning post-accident as a homebuilder on modified duties, as recommended by the experts, rather than what she was capable of earning as a bookkeeper (see paras. 111-123). Dley J. also refused to award the plaintiff retraining expenses for the costs of retraining as a bookkeeper on the basis of the expert evidence that she was "best suited to continue as a home builder": *Odian* at para. 133.

2018 BCSC 1651 (CanLII)

B. Discussion

[125] The evidence shows that Ms. Evans was not able to do her job at Safeway without an unacceptable level of pain even on a part time basis. She made genuine efforts to her detriment in exacerbating her pain and headaches. After two years of trying, it was clear that she was not going to be able to go back to her produce manager position or work as she had on a full-time basis.

[126] Ms. Keill and Ms. Abbott argue that the fact that she worked full time during the month prior to leaving Safeway on September 15, 2015 proves that she was continuing to improve and if she had not given up her employment at that time, she could still be working full time for Safeway.

[127] This positon is undermined by the factual evidence and the expert opinion evidence. The factual evidence demonstrated that when she worked full time with lifting and reaching duties, she exacerbated her pain and headaches. She was able to work the last month because she was told that in order to qualify for the severance package, she must be present at her job but was not required to do anything that made her uncomfortable. This was not a work arrangement that was available to her except to qualify for the severance package. The medical evidence

was that she is not fit for physically demanding work and her recovery has plateaued. There was no evidence that supports the contention that if she had simply kept at it, she would be able to do the grocery clerk job full time.

[128] Ms. Keill and Ms. Abbott also argue that there were other Safeway jobs available that were not physically demanding including positions in the meat department, in the flower department and in the bakery. Ms. Evans' evidence was that the flower department positions required employees to lift heavy buckets of water. The meat department and bakery were different union locals and paid less. In order to secure a position in these departments, Ms. Evans would have had to give up her seniority and her pay grade. With no seniority, she had a diminished ability to secure a position in these departments. Mr. Koehler, a Safeway store manager to whom Ms. Evans reported when she was the produce manager at the Davie Street store, testified that Ms. Evans was not eligible for such positions.

[129] In addition, the defendants argue that in taking the buyout, Ms. Evans abandoned her grievance. They argue she should have taken a position in the meat department, floral department or the bakery and waited out the resolution of the grievance. The evidence from Ms. Evans was that there had been no activity on her grievance because the union was unwilling to pursue it unless she could physically do her produce manager job. As noted above, she had tried to "fudge" her way back into that job but Safeway did not accept that she could physically do the job.

[130] Finally, Ms. Keill and Ms. Abbott argue that Ms. Evans' took the buyout for financial reasons. Ms. Evans agrees. Her inability to do her job had resulted in a demotion where her pay was cut. She was not able to work full time. Her long-term disability benefits made up part of the difference, but they were about to terminate at the end of June 2015. Due to her reduced pay and the costs of her therapy to rehabilitate, she had fallen into debt even though she had moved out of a one bedroom apartment into a studio apartment. She saw the $60,000 buyout as a way to support herself through retraining.

2018 BCSC 1651 (CanLII)

[131] At the time Ms. Evans left Safeway, her condition had improved and plateaued. I will review the evidence pertaining to Ms. Evans' vocational options with reference to her abilities and the medical evidence as of that time.

[132] The physicians opined that Ms. Evans is capable of full time work so long as the position does not require heavy lifting (Dr. Waseem specified no more than 10 pounds); prolonged sitting; prolonged neck flexion; or strenuous physical activity (pushing, pulling and carrying). Although cross-examined, none of this expert evidence was undermined and I accept it.

[133] Ms. Keill and Ms. Abbott focus on Dr. Heran's opinion that the soft tissue areas of pain would likely continue to improve. Dr. Heran stated "if major improvements are established with time, then she should be able to get back to her previous level of vocational functioning". This eventuality has not developed. On the evidence before me, I am of the view that it is not possible that Ms. Evans will be able to return to work as a produce manager or as a grocery clerk.

[134] Ms. Evans tendered the expert reports of Mr. Jeff Padvaiskas, an occupational therapist who undertook a functional capacity evaluation of Ms. Evans in September 2015. He prepared a report after that evaluation and a supplementary report to take into account the lifting limitation of 10 pounds imposed by Dr. Waseem. He opined that the 10 pound strength limitation limits her to sedentary or limited strength occupations. The limits on neck posture and positioning impact her suitability for desk or computer based types of positions. He opined that if a position requires substantial sitting she should have ergonomic adaptations and/or intersperse her tasks to allow her to move around and take breaks.

[135] On cross-examination, Mr. Padvaiskas agreed that Ms. Evans could do sedentary work involving sitting or standing as long as she has a good ergonomic set up. Regardless of sitting or standing, she is not suited to work with awkward positions, non-neutral neck and back positions or work involving reaching, lifting or having her arms loaded.

2018 BCSC 1651 (CanLII)

[136] The parties relied on expert reports on vocational rehabilitation: Trevor Lesmeister for the plaintiff and Diane Cameron for the defendants.

[137] Mr. Lesmeister opined that with Ms. Evans' limited education, including not graduating from high school and not having any other formal education, the loss of her ability to work in a physical capacity significantly narrows her pre-accident range of suitable positions. He provides examples of the type of work she can no longer consider such as a landscaper, housekeeper or painter.

[138] Mr. Lesmeister opined that there are some suitable occupations within her pre-accident industry of retail such as a merchandiser, assistant store manager, or buyer. He opined that some of those may have physical requirements for which she would need accommodation. He opined it was not likely she would secure employment in these jobs.

[139] Ms. Cameron criticized Mr. Lesmeister for ruling out work as a produce manager given Dr. Heran's opinion about the potential for improvement in her pain from her soft tissues injuries. For the reasons given above, I do not accept this to be a valid criticism. Ms. Cameron also opined that Ms. Evans is suited to retail management positions that are within her physical tolerances as they are categorized as limited strength requirements. Mr. Lesmeister's expressed the concern that notwithstanding the job classification of limited strength, some positions may involve carrying product or stocking shelves for which Ms. Evans would need accommodation. I agree with Ms. Cameron that this opinion is too sweepingly restrictive. Obviously, there will be some positions that are not suited to Ms. Evans, but there will be others that are.

[140] Mr. Lesmeister opined precisely that later in his report when he gave some examples of occupations that are suitable such as retail sales:

> While I note that Ms. Evans would be able to access these types of positions given her current education and functional limitations, there could be specific positions that had job demands that exceeded her physical capabilities.

2018 BCSC 1651 (CanLII)

> Therefore she would not be able to consider them as options and this would narrow the overall number of employment opportunities available to her.

[141] Mr. Lesmeister opined that without further training, Ms. Evans is suited to work involving customer service such as retail sales, a casino worker or hotel front desk clerk. He opined that with further retraining she could improve her options to obtain a higher paying position (but not as high as a produce manager position), such as sales representative, event planner, retail supervisor or office administrator.

[142] Mr. Lesmeister prepared a second report in which he was asked to provide an opinion on the suitability of Ms. Evans to participate in a one year culinary arts program. He opined that this would fit within her vocational capacity but he deferred to a functional capacity expert on the issue of whether she has the functional capacity to undertake such a program. Such an opinion was not proffered.

[143] Ms. Cameron criticized Mr. Lesmeister for only providing the median hourly wages for the jobs he opined are open to Ms. Evans. Ms. Cameron provided the low, median and high wage rates for these positions. For some of these positions, the range between the low and high rate is so great that they do not add any meaningful information. Having said that, it is helpful to know the ranges for the purpose of addressing contingencies in loss of earning capacity as discussed below.

[144] Ms. Cameron also disagreed with Mr. Lesmeister's opinion that Ms. Evans is more suited to shorter hands-on retraining programs of one year in duration or less. Ms. Cameron opined that Ms. Evans has the general learning ability for training programs up to two years in duration. In addition, Ms. Cameron criticized Mr. Lesmeister's choice of expensive retraining programs. However, admission to the Capilano University program that Ms. Cameron recommends requires grade 12 graduation and so is not suitable.

[145] After leaving Safeway, in September 2015, Ms. Evans did not begin looking for replacement work for three months, 38 days of which was spent on an extended holiday. She then commenced working with a career counsellor to put together a

2018 BCSC 1651 (CanLII)

curriculum vitae and look for work. She made numerous job applications in the retail area and the wine industry. She only had one interview. In February 2016, she was offered a part-time job with Telus as a telephone customer service operator. She took the position, even though it was not the type of job she wanted to do, so that she could support herself financially while she continued to consider options for a rewarding career.

[146] A break from work to rehabilitate, consider future options and undertake a certain period of job hunting is reasonable. In my view, Ms. Evans' five month break and job search was too long. The evidence was that from the time she started searching for a job to the time she attained the Telus position was two months. I conclude that had she acted reasonably, she could have had a job within three months after leaving Safeway.

[147] With regard to her employment at Telus, the defence argues that Ms. Evans resigned because she did not like the job, not because she could not do the job. They argue that the ergonomic accommodations at Telus were appropriate for her. They submit that it was unreasonable for her to leave a unionized job with benefits and a pension without having another job to go to. They submit that I should not accept that the job caused exacerbation of her neck pain and headaches because the evidence on the point is only that of Ms. Evans.

[148] I have already addressed that I find Ms. Evans to be credible. I accept her evidence that she had increased pain because despite the ergonomic set up there were prolonged periods when her neck was flexed forward. Her evidence is supported by the evidence of a co-worker who witnessed pain behaviour, and her husband, who was a friend at the time, who saw that she was in pain after her shifts. He described that she would cancel plans because of it.

[149] I also accept that the fact that Ms. Evans did not like the work at Telus played a role in her decision to resign. She took the job knowing it was not her preference but with a plan to find work that she would like while working part time at Telus. She

2018 BCSC 1651 (CanLII)

was assigned full time shifts. She asked for part time shifts but there was no change. In my view, the fact that she was prepared to take a job that was not the type of work she wanted to do demonstrates that she is not trying to make the defendants pay for her to find a job she likes. I find that the exacerbation of her neck pain and headaches, the related onset of another depressive episode, and the fact that the work was full time so she had no break to recover and look for alternate work, were significant factors in her decision to resign. I find the decision to be reasonable.

[150] Ms. Evans left Telus in December 2016. She has not worked since. Rather, she has been training to become a chef. There was a four month gap between leaving Telus and enrolling in her first raw cuisine, which she had to discontinue after the first month due to being injured by a knife. She completed the first course in July 2017. She took the second course and completed it in August 2017. She enrolled in the next course in January 2018, but had to discontinue that course due to neck pain and headaches. In that course, there was less classroom work and more kitchen work than the first two courses. She is working on rehabilitation with the goal to be able to complete the course in the summer of 2018. She then plans to take a final raw food course. Following that, she will take two courses in traditional culinary training. Her evidence was that once the training work became kitchen-oriented, she experienced a recurrence of neck pain and headaches. This is consistent with the evidence that even with an ergonomic set up at Telus, Ms. Evans found that she had neck and back pain due to the postures she needed to maintain and the pace of the work.

[151] Ms. Evans testified that she does not think she will be able to work as a chef in a restaurant but believes she could be a personal chef or teach cooking. There was no evidence to demonstrate that type of chef work would accommodate her neck pain and headache issues.

[152] Ms. Evans' damages claim are premised on the assumption that starting in January 2019, she will be in a position to seek employment as a chef. This assumes

2018 BCSC 1651 (CanLII)

that she will not complete the traditional chef training because she will not finish her raw food training until some time in mid to late 2018.

[153] Ms. Keill and Ms. Abbott argue that she has led no evidence about the earnings of a chef. It is true that Ms. Evans' evidence was simply that she felt there was a good niche for raw cuisine chefs in California. She has led evidence, through her expert economist, Mr. Benning, of chef wages in Canada. It is not clear on the evidence whether Ms. Evans plans to work in California or Canada but she plans to take all of her training in California.

[154] On the issue of mitigation, I conclude that the defendants have shown that Ms. Evans has not acted reasonably since she decided to pursue becoming a chef given how much of the work inherently involves standing with a flexed neck posture. She started in a niche area, raw cuisine. Between leaving Telus in December 2016 and trial in April 2018, a period of 16 months, she has completed two months of coursework. She has another two months to complete. At the time of trial, she had discontinued her third course because of her neck and back pain. Given her experience with work that exacerbates her neck pain and headaches, it is not reasonable for her to think that more rehabilitation at this time will make this work feasible for her.

[155] In their submissions, each party argued that the other bears certain evidentiary burdens that relate to mitigation that have not been met. Counsel for the defendants asserted that the plaintiff bears the burden on past income loss and loss of earning capacity, including proving what work she is capable of doing and what loss is occasioned. Counsel for the plaintiff submitted that the defendants bear the burden of proving failure to mitigate.

[156] I accept that Ms. Evans bears the burden in proving what her losses are. For loss of past income and loss of earning capacity, that means showing the difference between what Ms. Evans would have earned had the accident not occurred, and what she has earned and/or how her capacity has been diminished. She is entitled

2018 BCSC 1651 (CanLII)

to do that based on her theory of the case, which is that absent the accident she would have continued to work at Safeway as a produce manager and her earning capacity has been diminished by the difference between her career at Safeway and what she will earn as a chef. She has led evidence on all of these points.

[157] I accept that the defendants bear the burden of proving failure to mitigate. As stated in Graham, at para 35:

> Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

[158] Proving Ms. Evans could reasonably have avoided some part of her loss requires demonstration that Ms. Evans failed to pursue reasonable opportunities available to her. The factual context is such that this exercise is necessarily hypothetical and a matter of considering possibilities. The vocational evidence led by both parties is evidence of what other options she could have pursued, as is Ms. Evans' own evidence, including her interest in retail work and the wine industry. The evidence as a whole discharges the defendants' burden to prove that there were reasonable alternatives to mitigate damages.

C. Conclusion on Mitigation

[159] Ms. Evans has acted reasonably except with regard to the length of time she took to find replacement work after leaving Safeway and her efforts to retrain after leaving Telus, especially after she learned that chef work exacerbates her neck pain and headaches.

[160] The vocational evidence was that Ms. Evans is suited to training programs of one to two years in length. I conclude that two years (24 months), including time for a job search, represents a reasonable vocational retraining period for Ms. Evans. The total time that Ms. Evans has been unemployed since leaving Safeway, excluding the time she worked for Telus, was approximately 21 months up to the

2018 BCSC 1651 (CanLII)

time of trial in April 2018. Three additional months from trial exhausts the two year retraining period. This occurs in July 2018. As will be discussed below, Mr. Benning, her expert economist, calculated her loss of earning capacity assuming she commences employment as a chef in 2019. If she commences working in January 2019, her time to retrain and find a new job will have exceeded what I have concluded is reasonable by about six months. I will take two months into account when assessing her past loss of income and four months into account in assessing her loss of earning capacity.

2018 BCSC 1651 (CanLII)

V. Assessment of Damages

[161] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. Gordon*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.

[162] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong they were subjected to. Non-pecuniary damages are assessed to compensate for pain, suffering, and loss of enjoyment of life both prior to trial and into the future having ensured that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages.

[163] In a trilogy of cases decided in 1978, the Supreme Court of Canada set a rough upper limit of $100,000 (in 1978 dollars) for non-pecuniary damages based on the premise that pecuniary damages are fully compensated: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 261-62; *Arnold v. Teno*, [1978] 2 S.C.R. 287 at 333-34; and *Thornton (Next friend of) v. Prince George School District et al.*, [1978] 2 S.C.R. 267 at 270. In 2018, the rough upper limit, adjusted for inflation, is $382,681.

[164] The premise on which the rough upper limit was set demonstrates that while the heads of damages are to be assessed individually, they are also interlocking. In particular, the future needs of the plaintiff must be met through the pecuniary awards so that the balance struck between restorative care awards and policy-driven non-pecuniary damages will be achieved.

A. Non-pecuniary damages

[165] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

[166] I have concluded that as a result of the accident, Ms. Evans has suffered pain and a loss of enjoyment of life, which will continue into the foreseeable future and from which she is unlikely to ever fully recover.

[167] As a result of the injuries she sustained in the accident, Ms. Evans suffered from soft tissue injuries to her mid-back, upper back, neck and shoulder. She now has chronic pain in her neck and upper back. The pain is exacerbated by lifting and many different postures, including sitting, standing, certain neck angles and some yoga postures. It is exacerbated by physical activities where her neck or back bears weight, or involves lifting or working with her arms above a certain height. She experiences headaches and migraines. Over the course of two years after the accident the pain has gradually improved by about 60% but has plateaued at its present level. It is permanent and not likely to improve. She has been prescribed analgesics and has taken over-the-counter medications to cope with her pain.

[168] Before the accident, Ms. Evans' mood was good and she enjoyed being physically active and social. She hiked several times a week, sometimes with friends, and regularly did yoga. She had a career that she enjoyed and was

2018 BCSC 1651 (CanLII)

justifiably proud of given her eligibility for further promotion and that she achieved it without graduating high school. Her injuries rendered her unable to do her job.

[169] Due to the accident injuries, Ms. Evans suffered two major depressive episodes and somatic symptom disorder. She withdrew socially from her friends. She attempted suicide twice. She drank excessively.

[170] Overall, Ms. Evans' life is very different from what she enjoyed prior to the accident. However, after a significant and challenging struggle, she has reworked her life into a place where she is happy.

[171] The most significant of the *Stapley* factors in this case are Ms. Evans' age; the severity and duration of the pain; the impairment of her physical abilities; her associated loss of lifestyle; and the impairment of her relationships. Ms. Evans is relatively young. She was 34 years old at the time of the accident and she was 39 years old at trial. She faces the prospect of a lifetime of chronic pain and associated functional limitations. One of the most significant impacts of her injuries has been the impact on her ability to do her job as a produce manager, which she enjoyed and which was a source of pride.

[172] It is typical for courts to consider cases in which the plaintiff has suffered injuries similar in nature and duration to those of the plaintiff in the case at bar. Such cases act as a guideline, but should not be used to develop a "tariff" for injuries of a certain type: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. Similar injuries may not have similar consequences for the injured person.

[173] I considered the following cases relied on by Ms. Evans concerning the appropriate quantum of non-pecuniary damages: *Alafianpour-Esfahani v. Jolliffe*, 2017 BCSC 701; *Ashcroft v. Dhaliwal*, 2007 BCSC 533; *Eccleston v. Dresen,* 2009 BCSC 332; *Herman v. Paley,* 2017 BCSC 728; *Leach v. Jesson,* 2017 BCSC 577; *Morena v. Dhillon,* 2014 BCSC 141; and *S.R. v. Trasolini,* 2013 BCSC 1135. Ms. Evans submits that the appropriate range for nonpecuniary damages is between $110,000 and $130,000. I have considered the cases relied on by the defendants:

2018 BCSC 1651 (CanLII)

Lourenco v. Pham, 2013 BCSC 2090; *Blackman v. Dha,* 2015 BCSC 698; *Smith v. Moshrefzadeh*, 2012 BCSC 1458; and *Montgomery v. Williamson*, 2015 BCSC 792. These cases produce a range of $54,000-$99,000 in 2018 index dollars.

[174] In *Stapley,* the 51-year-old plaintiff was injured in a tractor accident. He suffered injuries to his upper back and neck including thoracic outlet syndrome, myofascial pain syndrome to his neck, and strain of ligaments in the thoracic section. He had chronic pain and permanent headaches. He continued to work at his very physical job with some modifications but would finish work in considerable pain. His ability to participate in recreational activities was curtailed but he continued to do some. The jury awarded him non-pecuniary damages of $275,000 which the Court of Appeal reduced to $175,000. The Court of Appeal said that the case had special circumstances in that he was a rancher whose occupation was threatened by his injuries. If he could not work as a rancher, he and his family would lose their way of life and community. Had the case not had that feature, the appropriate award would have been $100,000. The plaintiff had thoracic outlet syndrome in addition to the physical injuries which were similar to the plaintiff in this case. He did not have psychological injuries or emotional upset like the plaintiff here. He was able to be more active recreationally. He was approximately 15 years older than Ms. Evans.

[175] *Scelsa v. Taylor*, 2016 BCSC 1122 also has similar features to the present case. The plaintiff was 43 years old at the time of trial and 40 at the time of the accident. The injuries and their sequelae are similar except for in two ways: in *Scelsa* the plaintiff had cervical facet arthroplasty (pain originating from facet joints); and the plaintiff's depression in that case was not as severe as the two major depressive episodes Ms. Evans has had. Mr. Justice Brown determined that an award of $125,000 was fair and reasonable. In the course of doing so, he reviewed authorities where the plaintiff suffered from myofascial soft tissue injuries (some also included herniated discs or facet joint pain) and observed:

> [234] … The higher range of cases exhibit more intense iterations of depression such as social isolation or significant loss of social contact and an impact on significant other persons in the plaintiff's life such as children and

2018 BCSC 1651 (CanLII)

> spouses. Chronic myofascial pain, permanent or significant loss of work previously highly valued by the plaintiff and/or significant loss of earning capacity also mark cases in the range of $100,000 or more.

[176] The comments made by Brown J. in *Scelsa* are apt and apply to the consideration I have undertaken of the cases on which Ms. Evans relies.

[177] I turn to the cases relied on by the defendants. In *Lourenco*, the plaintiff suffered ongoing chronic pain in her neck and upper back. There was no discussion of a psychological injury. The Court's discussion of its reasons for non-pecuniary damages, other than the causation issues, was very brief.

[178] In my view, this case is an outlier. All of the cases cited by Ms. Evans involving chronic limiting pain of this type have awards above $100,000 and all of the cases cited by the defendants have awards above $80,000.

[179] In *Blackman* and in *Smith*, the plaintiffs' physical symptoms were similar to Ms. Evans', however in *Blackman* there was no mention of depression or psychological injury and in *Smith* there was a passing mention of counselling for depression but it did not feature significantly in the case. The Court awarded $80,000 ($84,000 in 2018 dollars) in non-pecuniary damages in both cases.

[180] In *Montgomery*, the plaintiff had suffered severe soft-tissue injuries to his upper back and neck and aggravated a pre-existing condition in his shoulder. The description of his chronic pain and symptomatology from his physical injuries, including ongoing headaches, are very similar to this case. He had become irritable and socially withdrawn. The chronic pain, headaches and loss of sleep had a "depressive effect". But there was no medical evidence of a psychological injury and the description of the emotional and mood issues is much less severe than in this case. The Court awarded $95,000, which is $99,000 in 2018 dollars.

[181] In summary, some of the cases cited by Ms. Evans involve other injuries, such as thoracic outlet syndrome, disc herniation or facet joint arthroplasty, on top of chronic myofascial pain and psychological injuries. Most of the defendants' cases do

2018 BCSC 1651 (CanLII)

not include cases where a psychological condition has been diagnosed and/or the chronic pain is not as functionally disabling as that experienced by Ms. Evans. The cases which are most similar are *Stapley* and *Montgomery.*

[182] Having considered the *Stapley* factors and all the above authorities, I assess non-pecuniary damages at $110,000.

B. Past Income Loss

[183] Past income loss is Ms. Evans' income loss from the date of the accident to the date of trial. As the evidence above demonstrates, the components of her past income loss include: the six weeks immediately following the accident when she was off work completely; the period of her attempt to return to work full time at Safeway where she was working less than full time hours as part of her graduated return to work as well as days during this time that she called in sick due to headaches and pain; her reduction in wages and associated loss of bonus and benefits when she was demoted from produce manager to grocery clerk; and the difference between what Ms. Evans would have been earning working full time as produce manager at Safeway and what she has earned since she took the buyout from Safeway, less her Safeway buyout of $60,000.

[184] Ms. Evans introduced into evidence the expert report of Darren Benning, an economist who calculated past income loss among other things. The defendants did not introduce an expert report disputing Mr. Benning's calculations. Rather, the defendants focused on Ms. Evans' full time produce manager earnings versus her post-buyout earnings and argue, as already discussed, that Ms. Evans' decision to leave Safeway was not reasonable and her efforts to retrain and replace her income loss have not been reasonable.

[185] Mr. Benning's calculation of her after tax losses were about $4,750 per month in the months she had no income. He calculates her total pre-trial loss, taking into account her Telus earnings over 10 months, to be $115,089.00. Had she retrained and commenced working after 3 months instead of after 5 months, she would have

2018 BCSC 1651 (CanLII)

reduced her losses by something less than $4,750 per month. I deduct $9,000 for failure to mitigate in the pre-trial period.

[186] I award damages for past income loss in the amount of $116,089.

C. Loss of Future Earning Capacity

i. Legal Principles

[187] Assessing an award for loss of future earning capacity involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Gregory v. Insurance Corp. of British Columbia,* 2011 BCCA 144 at para. 32. The assessment requires a very fact-intensive, case-specific inquiry; comparator cases are of limited assistance: *Gregory*, at paras. 32-33.

[188] There are two widely used approaches to quantify loss of future earning capacity, the earnings approach and the capital asset approach. The distinction between the two was explained as follows by Mr. Justice Kent in *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-59:

> [156] … The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
>
> [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
>
> [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

2018 BCSC 1651 (CanLII)

> [159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[189] The defining distinction between the earnings approach and the capital asset approach is the extent to which the loss is measureable. If there is little or no evidence of what the plaintiff's post-accident earnings will be, the earnings approach may not be appropriate. Although the earnings approach is more mathematical, both approaches are a matter of judgment, not "mere calculation": *Hosseinzadeh v. Leung*, 2014 BCSC 2260 at para. 126.

[190] The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries: see, for example, *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 25.

[191] The capital asset approach is used where there is a level of uncertainty making it difficult to measure the loss in a pecuniary way. As this Court stated in *Riding-Brown* at para. 26, this approach is "usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult."

[192] The same two-step process is followed, regardless of whether the earnings approach or capital asset approach is used. First, the plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Second, if the plaintiff discharges his or her burden of proof, the court turns to an assessment of damages.

[193] Regardless of the approach taken, per *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the general principles the court should apply when making an assessment under this head of damages are:

a) the court should assess damages rather than calculate them mathematically;

2018 BCSC 1651 (CanLII)

b) the standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are weighed according to their relative likelihood;

c) allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong; and

d) the overall goal of the assessment is to be fair and reasonable.

[194] Turning to the assessment, I find that Ms. Evans has met the threshold test showing that she has a real and substantial possibility of future income loss. She is not employable in her pre-accident position and she has not found replacement work that she is capable of doing that pays an equivalent amount.

[195] Ms. Evans argues that the earnings approach should be used and the court should compare her pre-accident Safeway earning capacity working as a produce manager until retirement ($1,223,000 including benefits) with her potential earnings as a chef or as a wine sales representative. Ms. Evans submits that these numbers should be adjusted for contingencies that her opportunities within these industries will be limited and she will be less competitive for those jobs as against able-bodied applicants. She submits that an earnings approach assessment in this manner produces a range of damages of $634,000 to $720,000.

[196] The defence argues the capital asset approach is appropriate, relying on *Mullens*. The plaintiff in *Mullens* worked in a bank at the time of the motor vehicle accident but left the bank to pursue retraining as a counsellor following the accident. The Court held that her decision to leave her work at the bank was “peculiar” and did not accept that she was not able to do that work. Further, if she was not able to work at the bank, the Court held she would not be able to complete the coursework and master’s degree to become a counsellor. The Court applied the capital asset approach because the evidence of what work the plaintiff might do in the future was

2018 BCSC 1651 (CanLII)

far too speculative, assessed a loss of earning capacity of $350,000, and reduced it by 50% for failure to mitigate.

[197] Counsel for Ms. Evans argues this case is not similar because it was mostly about the plaintiff's "peculiar" decision, not supported by vocational evidence, to leave her pre-accident line of work. I agree. However, the reasons that the earnings approach was not applicable in that case are germane to this case. Although there was a substantial possibility that the accident caused income loss, the evidence as to what the plaintiff would do for work in the future was too uncertain.

[198] As stated, Ms. Evans submits that the earnings approach should be based on a future career as a chef, which she prefers, or as a wine representative which she had thought of undertaking, and took some courses towards and then abandoned. In my view, neither of these options provides a sufficient evidentiary basis to take an earnings approach even on simple probabilities.

[199] Although Ms. Evans' likely earning capacity if the accident had not happened is relatively easy to quantify, her likely earning capacity after the accident has happened is very uncertain. Accordingly, the capital asset approach is more appropriate in the circumstances.

ii. Application of the Capital Asset Approach

[200] Four non-exhaustive factors from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment: *Villing v. Husseni*, 2016 BCCA 422 at para. 19-20. Those factors include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;

2. the plaintiff is less marketable or attractive as an employee to potential employers;

2018 BCSC 1651 (CanLII)

> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to that plaintiff, had he or she not been injured; and
>
> 4. the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

[201] Economic evidence provides helpful context to the application of the *Brown* factors by identifying in a general sense the magnitude of the plaintiff's loss: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20. In *Dunbar,* the Court of Appeal said:

> [21] The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss. … The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances.
>
> [Citations omitted.]

[202] Even though the claim may not readily be measurable on an earnings analysis, earnings projections may provide a starting point for the assessment of the plaintiff's loss: *O'Brien v. Cernovec*, 2016 BCSC 1881 at para. 143. Both positive and negative contingencies should be taken into account in the analysis.

[203] Starting with the *Brown* factors, it is clear that Ms. Evans is less capable overall of earning income from all types of employment. Prior to the accident, she was suited to and did physical work. She is now only suited to work with restricted physical demands or sedentary work. The vocational evidence demonstrates that there are some positions she can do but she will require accommodations or a sympathetic employer. Accordingly, she is less marketable and attractive as an employee. Ms. Evans' former supervisor, Mr. Shoring, testified that he would have considered her for future promotions. The evidence establishes that Ms. Evans lost the ability to take advantage of all job opportunities which might otherwise have been open to her. Ms. Evans derived self worth and fulfillment from the way she did her job as a produce manager, from performance reviews, and from financial

2018 BCSC 1651 (CanLII)

rewards, including annual bonuses she earned many years. She is less valuable to herself as a person in regard to her incoming earning capabilities.

[204] I find that her future earning capacity is significantly reduced. Mr. Benning's unchallenged evidence is that had she continued working as a produce manager and earned a bonus every year (she had not earned one every year) her future lifetime earning capacity was $1,222,503 including the value of her benefits.

[205] One approach, considered in *Mullens*, is to compensate in an amount equal to a few years of income at the pre-accident salary. In this case, two years would be approximately $150,000 and three years would be $225,000. In my view, that does not provide adequate compensation for her loss.

[206] If Ms. Evans retrains and earns the median wage of the type of position Mr. Lesmeister sets out in his report and there is no bonus or benefits package, her income will be reduced by approximately 25%-35%. If she does not retrain but pursues the type of employment she is currently suited for, the reduction is greater. This approach does not fully take into account that her range of employment options is markedly narrowed. She is now very vulnerable to the vagaries of the employment marketplace. Given her lack of education, her ability to do physical work well was strongest asset to her in the employment market. She has lost that.

[207] Based on all of the evidence, especially given that Ms. Evans is restricted to sedentary and limited strength work and she has a lost a position with excellent benefits, I find that her earnings capacity has been reduced by 40-50%. Applied to her lifetime future capacity, that provides a range of $488,000 to $611,000. I reduce this by $18,000 for failure to mitigate.

[208] I identify the following negative and positive contingencies:

a) Ms. Evans might achieve earnings higher than the median earnings for jobs for which she might retrain;

2018 BCSC 1651 (CanLII)

b) given Ms. Evans struggles with retraining as a chef, she might struggle in other occupations and be limited to part time work or work with accommodations, resulting in lower earnings and/or further restricted opportunities;

c) Ms. Evans might find a position with benefits equivalent to Safeway;

d) absent the accident, Ms. Evans might have been promoted at Safeway and increased her earnings; and

e) absent the accident, Ms. Evans might not have earned a bonus at Safeway every year.

[209] In my view, these contingencies largely cancel each other out except the first one. Prior to the accident, Ms. Evans achieved earnings and work that exceeded what might have been considered to be her reasonable capability given her limited education. This cuts both ways. On one hand, she was able to do so because she excelled at physical work and she has lost that ability. On the other hand, her personality and drive were also responsible for her success. Her post-accident attempts to get back to her produce manager job demonstrate that she still has that drive. I find that if she applies her drive to finding work in an area to which she is suited, she will be successful and she will likely exceed the median wages for the type of work for which she is suited.

[210] Taking all of this into account, I assess loss of future earning capacity at $510,000.

D. Loss of Pension

[211] Mr. Benning calculated Ms. Evans' loss of pension at between $168,308 and $170,821 based on careers as a chef or wine sales representative. The defendant does not challenge these calculations. As I said, I cannot determine whether Ms. Evans will establish a career in either of these fields. However, it is apparent that she has suffered a significant loss of benefits, most particularly pension benefits, from her unionized position with Safeway. I conclude that it is unlikely, but

2018 BCSC 1651 (CanLII)

not impossible, that she will replace her loss in this regard with a position with an equivalent pension. Future losses are a matter of simple probabilities, not an all or nothing perspective based on where a balance of probabilities lies. Taking into account the possibility that she may have some earnings that generate a pension, I assess her loss of pension at $140,000.

E. Costs of Retraining

[212] To date, Ms. Evans has incurred $2,193 in wine appreciation course expenses and approximately $14,618.75 in raw cuisine culinary course expenses. The further raw food course she plans to take and the full year traditional culinary arts program will cost an additional $18,000, approximately.

[213] The defence submits that the wine appreciation courses are reasonable but the raw food culinary courses and the traditional culinary course are not.

[214] Ms. Evans' vocational consultant expert, Mr. Lesmeister, opined that Ms. Evans could consider retraining within a business-related program that would complement her previous employment experience. He opined that training for such positions can be completed on a full-time basis in a year or less. He provided an example of Sprott Shaw College which offered a 49 week Business Administration Management program at a cost of approximately $13,725. This would lead to positions such as a sales representative, an event planner, a retail supervisor or an office administrator, the median wages for which vary between approximately $18 per hour and $24 per hour. In his supplemental report, Mr. Lesmeister opined that a one-year culinary program would also be a reasonable choice for Ms. Evans. The Pacific Institute program which Ms. Evans identified costs between $40,000 and $41,000 for a year of training consisting of two six-month courses.

[215] Ms. Cameron opined that Ms. Evans is suited for retraining courses of up to two years in duration. She also opined that public programs, such as Capilano University, are much less expensive, however Capilano's program would require

2018 BCSC 1651 (CanLII)

Ms. Evans to complete her high school graduation before being admitted. In my view, in the circumstances, this is not a suitable alternative.

[216] Mr. Lesmeister recommends a course of vocational counselling costing in the range of $1,500-$2,000. Given my findings, I agree this is a reasonable expense.

[217] Because of my findings that it is not reasonable for Ms. Evans to continue to pursue a career as a chef, and because the other courses of retraining are much less expensive than the raw cuisine course she has taken, the traditional course she plans to take or the Pacific Institute course, I assess her damages in this regard to be much more modest amount. I award $20,000 for the costs of retraining and vocational counselling, inclusive of the expenses she has already incurred.

F. Cost of Future Care

[218] Ms. Evans seeks damages for cost of future care for physiotherapy and massage therapy; a gym membership; psychological counselling; occupational therapy; equipment; sleep posture aids; cold packs; and medication.

[219] The defendants dispute the claim for the costs of physiotherapy and massage therapy. They argue that the cost of one of those two modalities is reasonable but both are not. If both are undertaken once per week the cost is $116,673.

[220] I have found that the balance of medical evidence is that passive rehabilitation will continue to be reasonable to manage her symptoms and flare-ups. She has undertaken and obtained relief from both physiotherapy and massage therapy. Despite that they may not offer long-term improvement, it makes no sense to deny her the short-term relief they offer. In my view, that would be inconsistent with the approach mandated by *Andrews v. Grand & Toy Alberta Ltd.*, at 241-248. However, I find that it is unlikely she will need to undertake both physiotherapy and massage therapy every week.

[221] I award $50,000 for physiotherapy and massage therapy. The total award for cost of future care is $71,299.00

2018 BCSC 1651 (CanLII)

G. Special Damages

[222] Ms. Evans has incurred a total of $40,719.28 in expenses for Botox injections, physiotherapy, massage therapy, active rehabilitation, pain medications, and other medical costs relating to the accident. The defendants have paid $16,086.59.

[223] Ms. Keill and Ms. Abbott dispute the physiotherapy expenses. They argue Ms. Evans' use of physiotherapy has been excessive. As discussed above, I disagree. Accordingly, I award the full net amount of $24,632.69.

VI. Conclusion

[224] I award Ms. Evans damages as follows:

a) non-pecuniary damages: $110,000.00

b) past income loss: $106,089.00

c) loss of earning capacity: $510,000.00

d) loss of pension: $140,000.00

e) cost of retraining: $20,000.00

f) cost of future care: $71,299.00

g) special damages: $24,632.69.

[225] The total is $982,020.69.

[226] Subject to any matters of which I am not aware relating to costs, I award Ms. Evans costs at Scale B. If the parties wish to speak to costs, they shall, within 30 days of these reasons, contact the registry to make arrangements to do so.

"Matthews J."

2018 BCSC 1651 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Evans v. Metcalfe,*
2011 BCCA 507

Date: 20111207
Docket: CA038228

Between:

Tatiana Evans

Appellant
(Plaintiff)

And:

Benjamin Eastwood Metcalfe

Respondent
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson

On appeal from: Supreme Court of British Columbia, May 26, 2010
(*Evans v. Metcalfe*, 2010 BCSC 745, Victoria Docket 08 1095)

Oral Reasons for Judgment

Counsel for the Appellant:	B. A. Marlatt
Counsel for the Respondent:	A. L. Murray, Q.C.
Place and Date of Hearing:	Victoria, British Columbia December 5, 2011
Place and Date of Judgment:	Victoria, British Columbia December 7, 2011

2011 BCCA 507 (CanLII)

[1] **HALL J.A.:** This is an appeal from a jury verdict. The appellant plaintiff was involved in a motor vehicle accident on April 4, 2006. Liability was admitted by the defendant, hence the only issues at large before the jury concerned damages.

[2] For some few years prior to the occurrence of the accident, the appellant had been engaged in practise as a massage therapist. That enterprise was showing some measure of decline in remuneration in 2004 - 2005. For part of the year 2005, the appellant had made something of a shift in emphasis to engage in teaching. There was evidence adduced before the jury that over a considerable time period, long prior to the accident, the appellant had sought the intervention of health care professionals to deal with a number of musculoskeletal difficulties that caused her pain and on-going functional difficulties. Since I am ordering a new trial, I do not consider that I should say more than we need to about the evidence that was placed before the jury.

[3] The collision itself occurred at the intersection of Douglas and Superior in Victoria. The impact itself was neither extremely serious nor trivial but somewhere in a mid-range. The vehicle of the appellant which was about 15 years old was deemed not worth repairing. The appellant attended at an emergency ward but did not remain in hospital. Health professionals who dealt with her in the early period subsequent to the accident considered that any injuries she suffered from the collision should be amenable to treatment and comparatively early resolution.

[4] It should be noted that for some considerable period prior to the motor vehicle accident, the appellant seems to have been affected by a number of life stressors that had an impact on her that was both psychological and physical. In the time period immediately anterior to the April 2006 accident, the appellant appears to have concluded that she wished to move away from the massage therapy field and seek retraining in some other discipline. Apparently in aid of such a course of action, she successfully importuned her general physician to give her a note to the effect that as a result of moving certain equipment related to her practise, she “had suffered irreversible musculoskeletal injury, and needed to be retrained”. As I understand it,

2011 BCCA 507 (CanLII)

the objective of this course of action was to obtain the necessary funding to pursue a course of studies.

[5] I infer the jury did not take an entirely benign view of the evidence of either the plaintiff or certain of her treating physicians. The plaintiff sought substantial awards under a number of heads including past wage loss, special damages, loss of capacity and damages for pain and suffering, the latter often referred to as non-pecuniary damages. As occurred in the recent case of *Cahoon v. Brideaux,* [2010] B.C.J. No. 853, there was a vast gulf between what the appellant sought by way of compensation and what the jury awarded.

[6] The jury awarded $6,000 for special damages and $10,300 for past loss of income, the latter award being ordered reduced by 15% for failure to mitigate. On a Motion for Judgment, the learned trial judge set aside the mitigation disposition as being without any evidential foundation. The jury awarded the appellant non-pecuniary damages of $1,000. In the result, the total amount of damages awarded totalled $17,300.

[7] Counsel before us adverted quite extensively to the evidence. It appeared that counsel considered it possible to give some explanation of the pecuniary damage awards granted by the jury on the basis that the jury probably considered that the sequelae of the motor vehicle accident persisted into early 2007. Counsel for the appellant submitted that this supported her argument that the non-pecuniary award of $1,000 was wholly anomalous. Counsel for the respondent, in a careful and comprehensive submission, reminded us of the limited scope for appellate review as enunciated by this Court in the cases of *Cahoon* and *Moskaleva v. Laurie*, [2009] B.C.J. 1150 amongst others. In the latter case, Rowles J.A. giving the judgment of the Court observed as follows:

> [125] An appellate court cannot alter a damage award made at trial merely because on its view of the evidence it would have come to a different conclusion. Whether made by a judge sitting alone or by a jury, damage assessments are questions of fact or mixed fact and law and therefore awards of damages may only be set aside for palpable and overriding error (*K.L.B.* at para. 62; *M.B.* at para. 54; *Young* at para. 64; *Dilello* at para. 39).

2011 BCCA 507 (CanLII)

> [126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para 64 and *Dilello* at para. 39, both citing *Nance* at 614).
>
> [127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" (*Foreman* at para. 32 citing *Nance* at 614, and referred to with approval in *Boyd* at paras. 13-14, *White v. Gait* at paras. 10-11, and *Courdin* at para. 22; *Wade* at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or, in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young* at para. 64).
>
> [128] Support for the view that in order to determine whether a jury award is "wholly out of all proportion" or "wholly disproportionate or shockingly unreasonable", it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in "the same class of case" may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.'s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras. 33-43; and Finch C.J.B.C.'s dissent in *Stapley* at paras. 116-124.
>
> [129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: *Cody* at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

[8] Those principles are, I should think, to some degree tempered by the observations of K. Smith J.A. in the case of *Boyd v. Harris*, 2004 BCCA 146 that there must be some measure of consistency in jury awards or the trial process may come to be viewed as something of a lottery. Rowles J.A. noted at para. 124 of *Moskaleva*:

> [124] However, Smith J.A. observed at para. 11 of *Boyd* that the deference accorded to jury awards, while great, is not unlimited. Appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs, and that unadjusted outlier awards could lead to an undermining of public confidence in the courts through a perception that the judicial system operates "like a lottery".

2011 BCCA 507 (CanLII)

[9] In the present case, there was a body of medical evidence that did not depend on the veracity or reliability of the appellant plaintiff or her primary treating physician that was supportive of the thesis that she continued to suffer from the sequelae of the April 2006 accident throughout 2006 into the early months of 2007. As I earlier noted, the quantum of the awards made by the jury under the heads of past income loss and special damages are reasonably susceptible of the interpretation that the jury made a factual decision that the effects of the accident did persist for about nine months post-accident.

[10] In my respectful opinion, these findings of the jury as reflected in their pecuniary awards make the award for non-pecuniary damages very anomalous. It is not impossible that the jury may have taken a quite censorious view of the appellant because of her economic circumstances or because of her conduct in importuning the physician to give her a note in aid of possible financial advantage. These would not be judicious reasons for denying her an appropriate award of non-pecuniary damages. As I observed, there was a body of credible evidence that would support an award under this head significantly greater than the amount awarded at trial. While there can be considerable variance in awards made under this head as the cases cited to us demonstrate, this award seems almost derisory.

[11] Generally this Court must be very restrained in any interference with a jury disposition as a consistent body of precedent makes plain. However, I have been persuaded that this is one of those rare cases where the interests of justice make intervention appropriate. The degree of anomaly in the respective awards, coupled with a very real possibility of the triers of fact taking an unduly severe view of the appellant's conduct unrelated to her physical condition persuade me that the award made by the jury for non-pecuniary damages cannot stand.

[12] We were invited by counsel for the appellant to either fix awards under various heads ourselves, or refer the matter to the trial judge for assessment. The latter course does not commend itself to me for two reasons: the judge has previously expressed certain fairly strong preliminary views and it is of course the

2011 BCCA 507 (CanLII)

right of the defendant respondent to choose the forum of a jury if so minded. As to the possible remedy of this Court adjusting upward awards made by the jury, this is very much dependent on factual issues, including particularly issues of credibility. Historically this Court has been properly reluctant to engage in factual determinations in this class of matter. In my view, the only appropriate resolution of this case is to set aside the order made at trial and order a new trial and I would so order.

[13] Concerning the disposition of costs, the appellant having succeeded in this Court, ought to be entitled to costs in this Court on the usual scale. The costs of the previous trial should be reserved for disposition by the judge presiding at any new trial. I would allow the appeal in these terms.

[14] **SAUNDERS J.A.:** I agree.

[15] **CHIASSON J.A.:** I agree.

[16] **HALL J.A.:** The appeal is allowed and a new trial is ordered.

“The Honourable Mr. Justice Hall”

2011 BCCA 507 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Fast v. Moss,***
2005 BCCA 571

Date: 20051125
Docket: CA031855

Between:

Dean Trevor Fast

Appellant
(Plaintiff)

And

Matthew John Moss

Respondent
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

M. J. Yawney — Counsel for the Appellant

T. J. Decker — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
November 1, 2005

Place and Date of Judgment: Vancouver, British Columbia
November 25, 2005

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Low

2005 BCCA 571 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] Dean Fast appeals from a judgment entered on a jury's verdict against Mathew Moss awarding $10,000 for damages suffered in a motor vehicle accident. In the main, Mr. Fast contends that the verdict is inconsistent in that, although the jury found that he had suffered a loss in his capacity to perform household or yard duties in the future, it awarded nothing for his loss in that regard, and found that he had suffered no impairment to his future earning capacity. He seeks to have this Court make the awards under those two heads of damages that he says the jury ought to have made or to remit the matter to the trial judge to make the awards.

[2] The accident occurred in 2001, three years before the trial. Liability was admitted. Mr. Fast, who was in his early 40's, suffered soft tissue injury. It was his case that his injuries caused him ongoing pain to his neck, back, arms, and knees, as well as headaches, stiffness and numbness with tingling in his hands. He did not work for two weeks after the accident and underwent some prescribed physiotherapy. He had seen his family doctor on a regular basis since he was injured, and he had been assessed by a physiatrist. He maintained that he had followed the suggestions for treatment he had been given throughout. At the time of the trial, he was said to be still symptomatic and that physical activity aggravated his symptoms. He was, however, said to be slowly improving and would continue to do so, although he may always have some residual symptomatology.

2005 BCCA 571 (CanLII)

[3] Mr. Fast's case for an award for a loss in his capacity to perform household and yard activities in the future was that, while he will be able to do all of the housework he once did to assist his common-law spouse, albeit somewhat more slowly, he will be unable to work around the yard to the same extent as before he was injured without suffering pain and discomfort that will require that he take numerous breaks and work at a reduced pace. His spouse operates a landscaping business and she and Mr. Fast maintain a garden of their own. Mr. Fast maintained that his responsibilities lay in mowing and raking the lawns, tending the garden, and at times sandbagging the creek running through the property. His case was that his activity in that regard will for at least some time, if not always, be substantially curtailed.

[4] The case Mr. Fast advanced with respect to a loss of earning capacity was somewhat ill-defined. He has been employed as a computer salesman for over 20 years. Following his injury, he moved from a position which required him to travel significant distances by automobile to a position in his employer's office. There is no evidence that the move adversely affected his income and, on discovery, Mr. Fast said it had nothing to do with his injury. At trial, however, he said the move was a consequence of his injury, having been made because the position he took was less demanding on him physically. He contended that he had suffered a loss in his capacity to earn income because his physical condition rendered him less employable in terms of the kind of work he could do such that he was accordingly less valuable to himself as an income earner.

2005 BCCA 571 (CanLII)

[5] As is typical in cases of this kind, Mr. Fast's case for both non-pecuniary and pecuniary loss turned largely on his credibility which was put squarely in issue. The defence maintained that his injuries were far less severe than he claimed and that his ability to participate in physical activity was not impaired to the extent that he said it was.

[6] The jury was asked to respond to various questions that were settled by the judge and counsel under headings of Non-Pecuniary and Pecuniary Losses. The questions relating to loss of household or yard duties as well as loss of earning capacity were stated under Pecuniary Losses, and as answered by the jury were as follows:

> 3. Future Loss of Earning Capacity
>
> (a) *Has the Plaintiff suffered an impairment to his future earning capacity to any degree as a result of his injuries?*
>
> Answer: Yes ____ No √
>
> (b) *If so, what amount should be awarded for this?* $ Ø
>
> 4. Loss of Ability to Perform Household and Yard Duties in the Future
>
> (a) *Has the Plaintiff suffered a loss of capacity to perform household and/or yard duties to any degree as a result of his injuries?*
>
> Answer: Yes √ No ____
>
> (b) *If so, what amount should be awarded for this?* $ Ø

[7] Thus, the jury answered "No" to question 3(a). They answered "Yes" to question 4(a) and "zero" to question 4(b). It follows that the jury found that Mr.

2005 BCCA 571 (CanLII)

Fast had suffered a loss of his capacity to do household and yard duties (which could only be attributable to his physical limitations) but declined to award compensation for that loss. The jury also found that, while his physical limitations impaired his capacity to do household and yard work, his capacity to earn an income was not compromised to any degree.

[8] Mr. Fast says these findings are not consistent. In response, efforts are now made to demonstrate why that is not so. It is said that the jury's answers are not necessarily conflicting and various arguments are advanced to support the verdict as consistent. While I intend no disrespect, I see little purpose in attempting to repeat the arguments here and, as I have concluded that the appeal must be allowed and remitted back to the trial court, I consider it desirable that I not comment upon them.

[9] A loss of a person's capacity to do household and yard duties is a compensable loss. Mr. Fast relies on ***Kroeker v. Jansen*** (1995), 4 B.C.L.R. (3d) 178 (C.A.); ***McTavish v. MacGillivray*** (2000), 74 B.C.L.R. (3d) 281 (C.A.); and ***Deglow v. Uffelman*** (2001), 96 B.C.L.R. (3d) 130 (C.A.) where in each instance the plaintiff adduced evidence of what the loss could be in terms of replacement costs, and it was held that the loss could be assessed as a pecuniary loss. Mr. Fast did not adduce evidence of that kind in this case, but it was assumed at trial, as it is on this appeal, that the loss he claims is a pecuniary loss.

2005 BCCA 571 (CanLII)

[10] The proper assessment of the loss of capacity to do household and yard duties can be somewhat complex and it is important that the assessment of such a claim be carefully explained to a jury particularly when a pecuniary award is sought. Here, all the trial judge said in his charge in referencing question 4 was this:

> The fourth item is a claim there for loss of ability to perform household duties in the future. That would anticipate then some dollar figure and again we'll have to consider -- and I am going to go over that with you as to what evidence there is for you to see if there's an award to be made there.

The judge did not return to question 4 in the remainder of his charge – nothing more was said about it – and unfortunately counsel did not see fit to draw his attention to his oversight.

[11] The answers to questions 4(a) and 4(b) are, in any event, inconsistent because the jury found Mr. Fast had suffered what in law is a compensable loss but found he was not entitled to be compensated.

[12] Further, the answers to questions 3(a) and 4(a) appear to be inconsistent. On its face, a finding that Mr. Fast has suffered no loss of his capacity to earn an income is not consistent with a finding that he has lost some capacity to perform household or yard duties because of physical limitations his injuries will impose. The loss may be small, but a loss of even some capacity to do physical work will usually mean a plaintiff is less valuable to himself as an income earner because his employment opportunities will have been compromised.

2005 BCCA 571 (CanLII)

[13] I see no alternative now but to remit the matter to the trial court. There is no other remedy in this Court because the damages to be awarded turn largely on an assessment of Mr. Fast's credibility which this Court is of course in no position to undertake. Any doubt about the course open to this Court where credibility is critical to the resolution of the issues here is put to rest in ***Balla v. Insurance Corp. of British Columbia*** (2001), 85 B.C.L.R. (3d) 70 (C.A.) ¶ 9-13, and ***Banks v. Shrigley,*** 2001 BCCA 232:

> [11] In view of my conclusion that the answers of the jury to the questions posed to it are conflicting, at this stage a retrial is the only remedy available from the trial court. However, the appellant asks this Court to exercise its jurisdiction under s. 9 of the *Court of Appeal Act* to make the award she requests.
>
> [12] In *Balla v. ICBC* 2001 BCCA 62, Mr. Justice Mackenzie writing for this Court rejected such a course where the critical issues turned on credibility. That is also the case here, as both counsel submit. While counsel for the appellant would have this Court assess damages despite that fact, counsel for the respondent does not agree. In these circumstances it is not appropriate for this Court to embark on an assessment of the damages.

[14] In seeking to have this Court order that the matter be remitted to the trial judge as opposed to ordering a new trial, Mr. Fast relies on ***Johnson v. Laing*** (2004), 30 B.C.L.R. (4th) 103 (C.A.). There this Court remitted the assessment of damages for both pecuniary and non-pecuniary losses to the trial judge in circumstances where a jury's verdict in respect of such awards was unreasonable. After undertaking a remarkably comprehensive review of the history of this Court's jurisdiction, writing for the Court, Southin J.A. concluded that the Court had the jurisdiction to order that the trial judge

2005 BCCA 571 (CanLII)

assess the damages and, because of the pragmatic considerations in that case, should do so. She said:

> [157] I have concluded, although not without some hesitation, that s. 9(1)(c) [of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77] does empower this Court to remit a cause to the trial judge to assess damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the [plaintiff].

2005 BCCA 571 (CanLII)

[15] In my respectful view, however, the unusual disposition of the appeal from an unreasonable jury verdict in that case, that was seen to be dictated by the circumstances, should not be seen as a determination that this Court should no longer order that an action be retried where a jury's verdict on an assessment of damages cannot stand. Much of the importance that has long been attached to litigants being entitled to have a jury adjudicate their dispute, if they wish, would be lost.

[16] There is no doubt much to be said for the pragmatic approach this Court took in the circumstances of the ***Johnson*** case. The cost of litigation and the time required to retry cases of this kind are certainly of great consequence, but the right to a jury's assessment cannot be lightly compromised in favour of expediency. As long as there continues to be a legal right to have a jury empanelled in civil cases in this province, the consequences of unsupportable verdicts must continue to be accepted. Generally, a litigant who wishes to exercise that right should not lose it simply because the jury empanelled renders a verdict that is not legally supportable. It cannot be a matter of a

litigant having only one kick at the can so to speak before having to accept an assessment made by a judge.

[17] Mr. Fast does not want to have his case retried. In seeking to have the matter remitted to the trial judge, Mr. Fast contemplates that the judge would answer only questions 3(a) and 3(b) as well as question 4(b), leaving the jury's award for his non-pecuniary loss intact. It is not clear to me whether Mr. Fast has in mind that the judge should be directed to accept the jury's answer to question 4(a) or answer it himself. But, in any event, I do not consider the judge could properly undertake the task of assessing part of Mr. Fast's loss because that would entail the whole of his loss being assessed by two triers of fact who may hold much different views on his credibility upon which much of his case turns.

[18] It follows that I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Low"

2005 BCCA 571 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Ferguson v. Lush,***
2003 BCCA 579

Date: 20031103
Docket: CA29701

Between:

Tracey Ferguson

Appellant

And

John Lush

Respondent

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Thackray

K.H. Wirsig — Counsel for the Appellant

D.H. Taylor — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
October 3, 2003

Place and Date of Judgment: Vancouver, British Columbia
November 3, 2003

Written Reasons by:
The Honourable Mr. Justice Thackray

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

2003 BCCA 579 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] The appellant, Tracey Ferguson, was injured in a motor vehicle accident. She appeals from a jury's verdict on liability and its assessment of non-pecuniary damages. The jury held that Ms. Ferguson's contributory negligence was 50% of the entire fault. It assessed non-pecuniary damages at $1,500.

[2] The appellant submits that the trial judge erred in his instructions to the jury with respect to the common law rules of right-of-way. Further, that the jury's award for non-pecuniary damages is inconsistent with its award for income loss and is inordinately low.

LIABILITY

[3] On 2 November 1997 Ms. Ferguson was driving north on Hornby Street in Vancouver. She was the first car in a line of traffic approaching Drake Street. She testified that about one-half block prior to Drake Street the traffic light turned green in her favour. As she entered the intersection she saw the respondent's vehicle coming from her right, proceeding west. She applied her brakes but collided with the mid-section of the respondent's vehicle.

2003 BCCA 579 (CanLII)

[4] Mr. Lush testified that as he approached the intersection a vehicle in front of him made a right turn. He could not say what the colour of the traffic control signal was when he entered the intersection. He did not see the appellant's car before the collision.

[5] A passenger in his vehicle testified that the preceding vehicle did not signal its turn and that Mr. Lush proceeded through the intersection against an amber light. When cross-examined she was adamant that she was paying attention to the colour of the light and that she was "sure" that it was "amber, yellow."

[6] The driver of a car following Mr. Lush testified that Mr. Lush went through a red light. However, his memory of the events was extremely limited and he could not recall if Mr. Lush was forced to stop for another vehicle before proceeding through the intersection.

[7] In his charge to the jury the trial judge summarized the testimony of each of the witnesses to the accident. He read to the jury the ***Motor Vehicle Act,*** R.S.B.C. 1996, c. 318 sections governing traffic control signals. He explained, in simple terms, the meaning of negligence and onus of proof with regard to the alleged negligence of Mr. Lush and the alleged contributory negligence of Ms. Ferguson.

2003 BCCA 579 (CanLII)

[8] The appellant submits that the trial judge "failed to instruct the jury regarding vehicular rights-of-way and the related duties to yield." I do not agree. While the trial judge did not go into detail as to the applicability of right-of-way and corresponding duties arising out of various findings of fact, he nevertheless made it clear to the jury that both drivers had both common law and statutory duties to drive with due care and attention, to yield and to obey traffic control signals.

[9] The appellant submits that the jury found that the respondent entered the intersection illegally and that the appellant therefore had the right-of-way. I cannot agree that this was necessarily the finding of the jury. Credibility was, of course, an issue and it is apparent that the jury did not accept the appellant's evidence that she was one-half block from the intersection when the light turned green in her favour.

[10] Having come to this conclusion, it was open to the jury to conclude that Mr. Lush legally entered the intersection, was held up by another vehicle and then attempted, in accordance with his statutory right, to clear the intersection. It might have concluded that Ms. Ferguson,

2003 BCCA 579 (CanLII)

contrary to her statutory obligation, thereupon failed to yield the right-of-way.

[11] On the other hand, the jury might have concluded that neither driver was keeping a proper lookout or that they were both driving without due care and attention. On the basis of such negligence the jury, in accordance with the trial judge's instructions, proceeded to assess the respective degrees of negligence. If it could not arrive at definitive degrees of negligence it was entitled to find each driver equally responsible.

[12] In my opinion the evidence left it open to the jury to conclude as it did on the issue of liability. Absent a misdirection by the trial judge, the verdict of the jury must be left undisturbed. There was no objection by counsel at trial to the judge's charge to the jury. The trial judge informed counsel that he would be preparing a written charge and invited suggestions.

[13] The draft charge was provided to counsel to review and no suggestions were made nor any objections taken. As was said by this Court in ***Rendall v. Ewert*** (1989), 38 B.C.L.R. (2d) 1 at 10, failure to object to a jury charge in a civil case "is a powerful circumstance militating against treating the defect as grounds for setting aside the verdict." In any event, I do

2003 BCCA 579 (CanLII)

not find any “defect” that could reasonably be said to be misdirection by the trial judge.

[14] I would not accede to this ground of appeal.

DAMAGES

[15] The appellant injured her arm, chest and back in the accident. She complains of continuing pain that prevents her from working and participating in physical activities.

[16] Dr. R. Shuckett, an internist and rheumatologist, testified that the appellant suffered right-sided sacroiliac ligament dysfunction, thoracolumbar and lumbar spine strain. She also diagnosed a whiplash disorder and said that Ms. Ferguson fulfilled the criteria for a diagnosis of fibromyalgia. She defined fibromyalgia as a rheumotologic syndrome characterized by diffuse generalized pain.

[17] Dr. Shuckett’s opinion was based upon incomplete clinical records and upon the self-reporting of the appellant. She had not reviewed the appellant’s pre-accident medical records nor did she ask for or review the clinical records of the doctors who treated the appellant after the accident.

[18] Dr. C. Hershler, a physical medicine specialist, also had an incomplete medical history for the appellant. Under “past

2003 BCCA 579 (CanLII)

medical history" the only words that appear are "yeast infection." Dr. Hershler's report, dated 16 December 2001, indicates that he relied upon and accepted the appellant's self-reporting as a basis for his opinion. His opinion was that the appellant had physical findings "consistent with soft tissue (connective tissue) injuries." He said that based on the appellant's history, her condition was caused by the motor vehicle accident.

[19] Dr. Hershler's report contains the opinion that the appellant "has also developed a severe fibromyalgia syndrome." He does not state that it was caused by the accident.

[20] Dr. J. Dunne, an internist and rheumatologist, diagnosed chronic pain syndrome resulting in anxiety and mood changes. As with Dr. Hershler, the past history of the appellant upon which he was relying was incomplete. He accepted her statement to him that she was fully active and healthy prior to the accident. His report says that the appellant's history was "unremarkable." In cross-examination he was asked if "things like alcohol and cocaine and rape" would be remarkable. He answered, "Those are remarkable."

[21] Dr. G. Hirsch, an expert in physical and rehabilitation medicine, who examined the appellant on behalf of the

2003 BCCA 579 (CanLII)

respondent, reported that the appellant's back injuries "were probably relatively mild."

[22] Dr. W. Koch, a psychologist, testified that Ms. Ferguson was suffering from a somatization disorder. He defined this as a psychological and mental health problem that reflects an undue preoccupation with physical problems.

[23] Evidence was presented to the jury that the appellant had physical and psychological symptoms before the motor vehicle accident. She had an abusive third husband, which marriage culminated in a divorce; she had an alcoholic mother who died in 1988; she had a relationship with a man addicted to drugs and alcohol; and she was raped in 1993.

[24] There was also evidence of the appellant's abuse of alcohol and drugs. This problem dated back at least as far as 1988. In 1995 the appellant was admitted to an abuse treatment centre but she continued to abuse alcohol and use illicit drugs in 1996 and 1997. After the motor vehicle accident the appellant participated in a counselling program directed at these problems.

[25] There was further testimony that the appellant was unwell in the months preceding the accident. She attributed this to a condition called candida, a yeast overgrowth. In October

2003 BCCA 579 (CanLII)

1997 she consulted a naturopath about candida, fatigue and depression. After the accident she consulted a medical doctor about candida and depression.

[26] Dr. E. Mintz, one of the appellant's physicians, testified that the appellant suffered soft tissue injuries to her neck, back and sacroiliac joint area. He said that he found tenderness over the right sacroiliac joint and over the right buttock. He said that her prognosis was poor.

[27] However, Dr. Mintz first saw the appellant on 29 September 2000, some three years after the motor vehicle accident and injuries were sustained. In those three years the appellant had seen at least six different family doctors. Dr. Mintz testified that when he first saw the appellant she did not bring with her a complete medical history. He agreed that he was not provided with the records for "the treatment that she received prior to November 2, 1997 or subsequent to that." He relied upon her self-reporting.

[28] The conclusion of Dr. Mintz' cross-examination was as follows:

> Q. […] so if she was a person who was vigilant about her health, as we have seen she certainly is, she goes doctor to doctor to doctor searching out a reason for her constellation of problems that no one can objectively find a reason for through tests or through examinations, perhaps it is caused by another

2003 BCCA 579 (CanLII)

> psychological component other than this vague untestable diagnosis of fibromyalgia?
>
> A. Like what?
>
> Q. Well, some somatic dissation disorder.
>
> A. Perhaps.

[29] The respondent submits that the credibility of the appellant was a major issue in the case. He asserts that the appellant's failure to provide full particulars of her pre-accident medical condition was such that it was open to the jury to find her entire testimony to be suspect. The respondent sets forth in his factum many instances where, he alleges, the appellant was less than truthful in her dealings with health professionals.

[30] I cannot be definitive as to whether the appellant was acting in a manner that could be defined as purposefully deceptive. However, it was open to the jury, on the evidence, to find that the appellant was not always forthright when dealing with her injuries and alleged incapacity to work. On this basis the jury may have concluded that the majority of the appellant's injury complaints were neither real nor caused by the motor vehicle accident.

[31] It will be seen in the few passages from the medical evidence that I have referred to that the evidence was far

2003 BCCA 579 (CanLII)

from definitive and at times even the tentative diagnoses were based upon self-reporting and incomplete medical documentation. If the jury decided that the appellant was not a credible historian it was open to it to reject the majority of the medical opinions. This they appear to have done.

IS THE NON-PECUNIARY AWARD INORDINATELY LOW?

[32] The appellant contends that the award for non-pecuniary damages of $1,500 is "inordinately low." There is no issue that this Court has the jurisdiction to vary a jury award, either up or down: ***Vaillancourt v. Molnar Estate*** (2002), 8 B.C.L.R. (4th) 260, 2002 BCCA 685. The issue is whether the award can be supported on the basis of the evidence.

[33] The appellant urged this Court to compare the injuries and the jury award with "comparable" injuries and awards in judge-alone decisions. This has become a common method in this Court of assessing the appropriateness of jury awards: see the comments of K. Smith J.A. in ***Lam v. Main***, [2003] B.C.J. No. 2290, 2003 BCCA 517.

[34] The history of analyzing jury awards by this comparative method is interesting. Lord Wright in ***Davies v. Powell Duffryn Associated Collieries Ltd.***, [1942] A.C. 601 (H.L.), which did not have for consideration a jury award, nor an award for pain and suffering, said, at page 616, "Where the

2003 BCCA 579 (CanLII)

verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case."

[35] This *obiter* statement suggested only an internal comparison and not one directed to awards in other cases.

[36] Then came ***Nance v. British Columbia Electric R. Co.,*** [1951] A.C. 601, 2 W.W.R. (N.S.) 665, [1951] 3 D.L.R. 705, [1951] 2 All E.R. 448 (P.C.). It held that the foundation for varying an award, whether by a judge or a jury, is that the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." (D.L.R. pp.713-14) In support of this proposition it referenced ***Flint v. Lovell***, [1935] 1 K.B. 354, approved by the House of Lords in ***Davies***.

[37] ***Flint*** does not add anything to this analysis. It says the same thing as ***Nance*** but uses different words. It held an award would be subject to correction if it was "so extremely high or so very small as to make it […] an entirely erroneous estimate of the damage to which the plaintiff is entitled." (p.360) In any event, the judgment was by a judge alone and was not concerned with an award for pain and suffering.

2003 BCCA 579 (CanLII)

[38] Similarly, the award in ***Nance*** was not for pain and suffering. The award was to recompense the widow for the loss of the savings that would have been available to her but for her husband's untimely death. Furthermore, contrary to popular thinking, there was no suggestion that awards in other cases were to be used for comparative purposes.

[39] In ***Scott v. Musial***, [1959] 2 Q.B. 429, [1959] 3 All E.R. 193 (C.A.) at p.722 Ormerod L.J. said that in deciding when a verdict was out of all proportion to the facts of the case the court "has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind."

[40] This was as close as the courts had ever come to using judge-made decisions as a comparison until Lord Denning in ***Ward v. James***, [1965] 1 All E.R. 563 (C.A.) stated at p.574 that in carrying out the proportionality test "the only standard which this court can apply is to take the conventional figure awarded in comparable cases and see how far the award is above or below it."

[41] But it is ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.) that is the lynchpin in comparing jury awards to those of judges' decisions. Chief Justice McEachern said:

> 6. The opinion of Lord Wright in ***Davies*** introduces the concept of proportionality between the award and

2003 BCCA 579 (CanLII)

> the circumstances of the case. This must include reference to other cases because *a priori* reasoning is hardly a basis for reviewing damage awards.
>
> 7. In ***Nance v. British Columbia Electric Railway*** (1951), 2 W.W.R. (N.S.) 665 (P.C.), Viscount Simon delivered what is often regarded as the *locus classicus* on this question. He said, at p.675, that an assessment of damages by a trial judge should not be interfered with unless the appellate court is:
>
> > … satisfied either that the judge … applied a wrong principle of law … or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
>
> 8. Because of its reference to inordinately low or high awards and to wholly erroneous estimates of the damage, ***Nance*** continues the proportionality approach taken in ***Davies***. This calls for consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases. In my view, an award is inordinately high, low, or disproportionate if it falls substantially beyond the upper or lower range for damage awards in the same class of case.

[42] Chief Justice McEachern's introduction of this form of comparison was now on the books and was adopted in ***Cody v. Leonard*** (1995), 15 B.C.L.R. (3d) 117 (C.A.). Mr. Justice Legg said at p.124 that the Court did not apply a new test in ***Cory v. Marsh*** but rather applied the "long established" test of "proportionality stated in ***Davies*** […] and ***Nance.***"

[43] At common law it is well established that the determination of the amount of an award is a matter of fact.

2003 BCCA 579 (CanLII)

In ***Mechanical & General Inventions Co. & Lehwess v. Austin & the Austin Motor Co.***, [1935] A.C. 346 (H.L.) at 369 the following observation was made:

> […] once it has been decided that a civil case has to be tried by a jury, that tribunal and that tribunal alone is the judge of fact; and no appellate Court can substitute its own findings for those of the lawful tribunal.

[44] In ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130 at 1194 it was said as follows:

> Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. […] I]t is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

[45] In ***Cody v. Leonard***, *supra* at 125, Legg J.A. said:

> This Court must recognize that a jury award is not necessarily wrong if it does not conform with damage awards made by judges when considering whether a jury award is out of all proportion to the circumstances of the case. …

[46] Mr. Justice Legg then referred to what was said by Morris L.J. in ***Scott v. Musial***, *supra* at 438. Morris L.J. said

2003 BCCA 579 (CanLII)

"[t]he views of juries may form a valuable corrective to the views of judges." Mr. Justice Gibbs, in his dissenting reasons in ***Cory v. Marsh***, *supra* at 266, said:

> […] imposing trial judge awards as an appropriate measure of reasonableness negates the very purpose of a jury, to bring into the courtroom the standards and the common sense of the community.

[47] In ***Way v. Frigon,*** [2001] B.C.J. No. 1629, 2001 BCSC 573, Mr. Justice K. Smith said as follows:

> [32] Mr. Justice Gibbs, in his dissenting opinion in ***Cory*** […] remarked perceptively at para.52 that the assessment of damages by trial judges by reliance on awards made by other trial judges is really a circular exercise. It has often been said in our courts that juries are the conscience of the community and, in fact, trial judges often tell juries that they bring an educational value to trials in that they let the trial judges know what members of the community are thinking. Mr. Justice Gibbs acknowledged this axiom, as well, in the passage I have just referred to.
>
> [33] I think that juries have been telling trial judges for the past few years that trial judges have been awarding too much money in non-pecuniary damages for minor soft tissue injuries. The many recent reported cases in which juries have awarded damages for medical expenses and for loss of income, but nothing for non-pecuniary loss, support that impression. […]

[48] Trial judges inform juries that the law is the responsibility of the judge but the facts are the

2003 BCCA 579 (CanLII)

responsibility of the jury. That principle is enshrined in s.6 of the ***Negligence Act***, R.S.B.C. 1996, c. 333: "In every action the amount of damages or loss, the fault, if any, and the degrees of fault are questions of fact."

[49] Counsel for the appellant in the case at bar urged the Court to compare the award for pain and suffering to the awards in what he presented as comparable cases. One was a "fibromyalgia" case wherein the award was $80,000 for non-pecuniary damages. The other case involved chronic pain syndrome and an award of $90,000 for pain and suffering. On this basis the appellant submitted that the award in the case at bar should be between $80,000 and $100,000.

[50] In ***Laycock v. Longo*** (2002), 169 B.C.A.C. 164, 2002 BCCA 186, I said as follows:

> [22] There is a lack of logic in citing what are suggested to be comparable cases of judge-made awards with the award under review. A jury is generally not supplied with guidelines as to a range of damages. The jury in the case at bar did not have before it the allegedly comparable cases cited to us by counsel for the appellant. Yet this Court is asked to find that the jury made an award "outside of the range." That is to say, the court is asked to find that the jury was in error. This is illogical, unfair to the jury and unfair to the civil jury system.

[51] In the case at bar, for reasons that I have earlier expressed, the jury concluded that the injury suffered by the

2003 BCCA 579 (CanLII)

appellant was modest in nature and that its effects, as far as they were caused by the negligence of the respondent, resolved in a short period of time. I cannot say that this conclusion was not open to the jury.

[52] Furthermore, accepting that this Court has adopted the procedure of comparing jury awards to judge-made awards, no comparison with judge-made awards would be appropriate in this case. In the case at bar a judge, sitting alone, could, on the evidence, come to the same conclusion as did the jury as to the modest nature of the injuries suffered by Ms. Ferguson. Based solely on the evidence in the case at bar it cannot be said that the award is inordinately low.

ARE THE AWARDS INCONSISTENT?

[53] That leaves for consideration the matter of whether the awards for special damages, loss of future income earning capacity and cost of future care are inconsistent with the award for pain and suffering and, if so, should this result in either a variation of the injury award or an order for a new trial.

[54] The appellant’s factum contains, in its opening statement, the submission that the other awards are “internally inconsistent” with the award for pain and suffering. The awards were $3,100 for special damages,

2003 BCCA 579 (CanLII)

$50,200 for past wage loss and $4,800 for loss of future income earning capacity.

[55] The full argument on this in the factum is as follows:

> 8. The Appellant submits that logically implicit in the Jury's verdict awarding compensation to the Appellant for approximately 4.5 years of past wage loss, loss of future capacity to earn income and cost of future care is an acceptance of a significantly disabling injury caused by the car accident.

[56] In the oral hearing counsel for the appellant submitted that the awards for income loss reflect an acceptance by the jury of the appellant's income in 1997. Her tax return for that year shows earned income of $10,060 and employment insurance income of $10,079. It is on this basis the appellant argues that the jury must have accepted that the injury was serious and had an extended duration.

[57] There is support, in a general sense, for the submission that inconsistent verdicts can result in appellate interference. It was said by Mr. Justice Braidwood in ***White v. Nuraney*** (2000), 80 B.C.L.R. (3d) 307 at 325, 2000 BCCA 536, that "It is open to an appellate court to interfere with a jury award for damages if that award is internally inconsistent or contradictory." He cited the following cases in support: ***James McLennan, McFeely & Prior Ltd.***, [1941] 1

2003 BCCA 579 (CanLII)

D.L.R. 555, (1940) 56 B.C.R. 1 (C.A.) at 6; ***Cairns v. Emsley et al.*** (1995), 56 B.C.A.C. 147; and ***Graham v. Hodgkinson*** (1983), 40 O.R. (2d) 697 (C.A.).

[58] In ***James McLennan*** a new trial was ordered because the "answers of the jury […] are unintelligible in that they are contradictory and irreconcilable." (p.6) In speaking of "answers" the Court was referring to questions regarding particulars of negligence.

[59] The award for the non-pecuniary loss in ***Cairns*** was assessed by a jury at $150 whereas the award for loss of income was in excess of $3,365.90. Madam Justice Ryan said at p.149 that there was "some substance" in the submission that the awards were "incompatible." While the award for non-pecuniary damages was increased, this was done on the basis that it was inordinately low, not that it was incompatible with the loss of income award.

[60] The jury in ***Graham*** awarded damages for income loss that were calculated up to a certain date. That date was inconsistent with another date given for the cessation of the pain and suffering. The Court held that the first date could not be reconciled with the latter date and that the answer to the second question was not one that was available to the jury.

2003 BCCA 579 (CanLII)

[61] It will be readily seen that while it might be open to a court to vary an award due to “inconsistent verdicts”, as was said by Mr. Justice Braidwood in ***White v. Nuraney,*** the circumstances in the cases upon which he relied are far removed from those in the case at bar.

[62] ***White v. Nuraney*** represents but one of many cases wherein juries made no awards for non-pecuniary damages but made awards under other heads of damage. In ***Stewart v. Shimpei*** (1995), 65 B.C.A.C. 113, the Court held that a finding by a jury of no non-pecuniary damages following a finding of injury is an error of law. In ***Balla v. ICBC*** (2001), 85 B.C.L.R. (3d) 70, 2001 BCCA 62 at ¶12 Mackenzie J.A. cites ***Shimpei*** in holding that “[i]t is illogical to conclude that a plaintiff was injured and suffered out of pocket expenses but did not sustain any pain, suffering and loss of enjoyment [of life].”

[63] This Court sent ***Banks v. Shrigley*** (2001), 154 B.C.A.C. 214, 2001 BCCA 232 back for a new trial. There was no award for non-pecuniary damages for an admitted injury but an award for wage loss and special damages. The Court made its ruling on the basis that the answers of the jury were in conflict thereby bringing into play Rule 41(2) of the Supreme Court Rules. That rule provides that where jury answers are

2003 BCCA 579 (CanLII)

conflicting so that judgment cannot be pronounced, the action shall be retried.

[64] However, cases wherein there was no award for an admitted injury are distinct from the case at bar. It could be argued that there is a hint of support for the "internally inconsistent" theory of intervention to be found in ***Dubach v. Nahal,*** [2003] B.C.J. No. 2292, 2003 BCCA 526. The submission by the appellant was as in the case at bar. That is, that the award for non-pecuniary damages was inordinately low and that there was an internal inconsistency between the various awards.

[65] In ***Dubach*** the Court said that the awards for pecuniary damages were "inherently inconsistent with the non-pecuniary award." (¶11) However, the Court did not ground its judgment on that finding. Rather, it held that "the award of non-pecuniary damages […] was inordinately low." (¶10)

[66] In the case at bar the respondent submitted that the appellant's submission "assumes that the Jury's award for wage loss should be taken to be incontrovertibly correct, a proposition for which there is no foundation in law." In support she cited ***Gunderson v. Hoogerdyk***, [1995] B.C.J. No. 1602 (C.A.) wherein a jury awarded $1,920 for non-pecuniary damages and $16,000 for income loss. It was submitted that in

2003 BCCA 579 (CanLII)

awarding that amount of income loss the jury "must have found her [the plaintiff] to be disabled for several months. Therefore, the award of $1,920 is inordinately low."

[67] Madam Justice Rowles, with whom the other members of the panel agreed, said:

> [6] The appellant's argument rests on the proposition that the jury's award for pecuniary loss should be taken to be incontrovertibly correct. Appellant's counsel could refer us to no authority to support that proposition, and I do not agree that it is a correct proposition in law.
>
> [7] This is a case in which the jury had to resolve various conflicts in the evidence, including the opinions provided by the medical doctors. The jury was also required to consider the credibility of the plaintiff, that is, how reliable her evidence was in respect to the nature and duration of the injuries she sustained in the two accidents. There were virtually no facts which were not in dispute. Had the jury award for pecuniary loss been based on facts not in contention, there might be some foundation for the appellant's argument but that is not the case here.

[68] What was said therein is particularly applicable to the case at bar. Also applicable are the words of Madam Justice Baker in ***Holmes v. Hawka*** (1994), 1 B.C.L.R. (3d) 341 (S.C.). An application for a mistrial was made on the ground that the jury verdict was perverse. The jury found that the plaintiff was injured but made no award for non-pecuniary damages. At p.346 Baker J. said:

2003 BCCA 579 (CanLII)

> I am unable to agree with Mr. Arnold's submissions that where, as in this verdict, a jury finds that a plaintiff has suffered injury as a result of the defendant's negligence, and that the plaintiff has suffered pecuniary loss, they must award damages for non-pecuniary loss. In my view the jury's verdict is neither perverse nor conflicting. The plaintiff has the burden of proving every element of a claim, including pain, suffering and loss of enjoyment of life. If a plaintiff offers no evidence of non-pecuniary loss, or the evidence offered is rejected or not believed, or does not meet the standard of proof in the eyes of the finder of fact, the plaintiff cannot succeed on that head of damages.
>
> Considering the evidence in this case, it is possible to conceive of a logical and rational basis for the jury's award of pecuniary damages and its refusal to award non-pecuniary damages.

[69] Those words, in my opinion, are applicable to the case at bar. The awards were made by the jury on the basis of the weight that it gave to the evidence. As noted by Esson J.A. in ***Dubach***, *supra*, McEachern C.J.B.C. in ***Baxter v. Brown*** (1997), 28 B.C.L.R. (3d) 351 (C.A.) at ¶6, said:

> [T]he appellant has struggled valiantly to persuade us that we should interfere with the award on the basis that there was evidence that should have led the jury to award considerably more than the amounts I have mentioned. This Court has held over and over again that these kinds of cases must be won at trial and that we have no authority to, and we cannot, retry the case.

2003 BCCA 579 (CanLII)

[70] I would not accede to the ground of appeal that there should be appellate interference on the basis of inconsistent awards.

[71] I would dismiss the appeal.

“The Honourable Mr. Justice Thackray”

I Agree:

“The Honourable Madam Justice Ryan”

I Agree:

“The Honourable Madam Justice Saunders”

2003 BCCA 579 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Findlay v. George,*
2021 BCCA 12

Date: 20210113
Dockets: CA46004; CA46336

Docket: CA46004

Between:

William Aubrey Findlay

Appellant
(Plaintiff)

And

St. John George also known as John Taylor, deceased

Respondent
(Defendant)

- and -

Docket: CA46336

Between:

William Aubrey Findlay

Respondent
(Plaintiff)

And

St. John George also known as John Taylor, deceased

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Supreme Court of British Columbia, dated March 14, 2019 (*Findlay v. George,* Vancouver Docket M148460), and July 25, 2019 (*Findlay v. George*, 2019 BCSC 1227, Vancouver Docket M148460).

2021 BCCA 12 (CanLII)

Counsel for the Appellant (via videoconference):	G.J. Kehler
Counsel for the Respondent (via videoconference):	D. De Baie
Place and Date of Hearing:	Vancouver, British Columbia November 13, 2020
Place and Date of Judgment:	Vancouver, British Columbia January 13, 2021

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Dickson

2021 BCCA 12 (CanLII)

Summary:

The appellant suffered post-traumatic stress from his involvement in a motor vehicle collision. He sued the other driver for damages. A jury dismissed the action, finding the appellant did not prove liability against the other driver. The appellant challenges the jury's verdict, seeking a new trial. On appeal, he alleges the judge wrongly excluded evidence from the jury, namely: (1) a portion of a witness statement provided by someone (now deceased) who observed the collision; and (2) information relating to the other driver's medical condition, recorded in documents completed by the respondent and a physician 13 months prior to the collision. Held: Appeal dismissed. The judge did not err in excluding an ambiguous and misleading part of the witness statement. With respect to the medical information, the judge's assessment of probative value and prejudicial effect is entitled to significant deference and the appellant has not established overriding error.

On completion of the trial, the respondent sought double costs based on the appellant's rejection of a pre-trial settlement offer. The trial judge declined to award double costs. The respondent appeals that decision, alleging a misapprehension of evidence, the consideration of irrelevant factors, and a failure to give meaningful effect to the objective underlying double costs. Held: Appeal dismissed. Awarding double costs is a discretionary determination, entitled to considerable deference on review. The respondent has not established overriding error in the judge's analysis.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] These reasons address two appeals: one from a jury's verdict dismissing a claim in negligence; the second from an order denying double costs.

[2] In January 2013, the appellant was driving a logging truck on a snow-covered highway. A pickup truck, travelling in the opposite direction, collided with the back of his trailer. Tragically, the driver of the pickup truck died.

[3] The appellant attempted to assist the other driver at the scene. As a result, he suffered post-traumatic stress that he says has profoundly affected his life. He sued for damages. The trial proceeded before a jury in March 2019. The jury dismissed the claim, finding the appellant did not prove liability against the respondent. On appeal, the appellant asks that the verdict be set aside. He says the judge wrongly excluded evidence from the jury that could have resulted in a different outcome.

2021 BCCA 12 (CanLII)

[4] After the dismissal, the defence applied for double costs based on the appellant's refusal to accept a pre-trial settlement offer. The trial judge awarded single costs only. That ruling is also under appeal, on grounds that the judge committed errors in principle in reaching his conclusion.

[5] For the reasons that follow, I would dismiss both appeals.

Background

Negligence Action

[6] The collision occurred in January 2013. It was daylight. The roadway was covered in snow. A witness who observed the collision testified there was a "lot of ice" on the road. The posted speed limit was 90 kilometres per hour.

[7] The appellant (William Findlay) was driving a commercial logging truck, consisting of a tractor and an empty tandem log trailer. The logging truck had a series of "bunks" along its length, to keep the logs from rolling. Two of those bunks were on the tractor. Another two were on the trailer. The outside edges of the bunks extended beyond the width of the tractor. At the rear of the log trailer, the driver's side bunk extended 11.8 inches out from the trailer's wheel. The bunks contained reflective tape. However, the logging truck was also required to have warning flags attached to the bunks. The purpose of such flags is to notify other drivers that the vehicle is over-sized and to make sure it is visible. The flags attached to the rear of the trailer were not bright red or orange. Nor did they meet the required size. According to a witness who inspected the logging truck post-collision, the flags were "tattered and faded, to the point of not – almost being invisible".

[8] The appellant was travelling northbound on Highway 118, approximately 12 kilometres from Granisle. The respondent (St. John George, also known as John Taylor) was travelling in the other direction, driving a GMC Sierra pickup truck. Neither the logging truck nor the respondent's vehicle had mechanical defects.

[9] In his testimony, the appellant described Highway 118 as a "very, very poorly maintained road". On the day in question, it was "kind of slick". The appellant said that

2021 BCCA 12 (CanLII)

just before the collision, he was in the process of slowing down, getting ready to turn right. He thought he was travelling at a speed of about 40 kilometres per hour.

[10] The appellant saw the respondent's vehicle approaching him. There was nothing unusual about the manner of driving. The respondent passed by the tractor. Again, there was nothing about his driving that "concern[ed]" the appellant. The appellant described the pickup truck as being "maybe … [f]our to six feet" away from his vehicle. After the respondent passed the tractor, the appellant did a shoulder check. He heard a loud noise, looked in his mirror and did not see anything. He looked a second time and saw the respondent's vehicle in the ditch. The appellant "slammed on [his] brakes and stopped".

[11] At the location of the collision, the highway had a slight, leftward curve for northbound traffic. The respondent was travelling on the inside of that curve, heading south. There was nothing obstructing each vehicle's view of the other.

[12] At the point of impact, the appellant's northbound lane of travel was 3.87 metres wide, measured from the centre line. The respondent's lane of travel was 4.15 metres wide, measured from that same point. Because of the snow, the lane markings were not visible on the day of the collision. This included the centre line.

[13] The appellant testified that when the two vehicles passed, he had no concerns about how the log trailer was tracking behind his tractor. A witness travelling in a vehicle approximately 20 to 25 car lengths behind the pickup truck said everything looked "normal" as the vehicles began to pass.

[14] The respondent called an expert in collision reconstruction. He opined that at the point of impact, the outer bunk at the rear of the appellant's trailer (driver's side) was in the respondent's southbound lane of travel. The left front of the pickup truck collided with that bunk. The pickup truck "under-rode the outside left rear bunk, so basically the front of the hood caught that bunk, and then it – it went under, and that bunk tore through the upper part of the hood, and pillars". The pickup truck ended up in a ditch across the appellant's (northbound) lane of travel.

2021 BCCA 12 (CanLII)

[15] Photographs of the pickup showed extensive damage to its front, top and driver's side. The damage to the logging truck was primarily to the rear corner of the trailer (driver's side). In his report, the expert opined that the:

> … impact likely happened in the southbound lane. At the point of impact, the [respondent's] pickup appears to be established approximately centrally in its lane. The [appellant's] tractor trailer was approaching impact from a position that was slightly over the center line. At impact, the path of the [appellant's] tractor was directed back towards its lane of travel. However, the outer bunk of the [appellant's] trailer was still approximately 1 meter over the center line. It is likely that the impact to the left side of the [respondent's] pickup induced a counter-clockwise rotation to the vehicle, which is consistent with its measured tire marks.
>
> [Emphasis added.]

[16] The encroachment in the southbound lane measured one metre over the centre line. The front of the respondent's pickup truck was 1.85 metres wide. According to the appellant's calculations, this would have left 1.3 meters to spare in the southbound lane of travel (or approximately 4.3 feet).

[17] An agreed statement of facts filed at trial stated that the respondent's vehicle "collided with the last bunk on the [appellant's] tandem trailer".

[18] Following the collision, the appellant was charged with driving without due care and attention under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. He disputed the charge, had a trial in the Provincial Court and was found guilty of the offence. At the civil trial, the parties agreed to the fact of the conviction going before the jury, with the following explanatory context:

> With respect to the subject accident, the plaintiff, Mr. Findlay, was convicted in the Provincial Court of British Columbia of driving without due care and attention, a traffic violation, contrary to s. 144(1)(a) of the *Motor Vehicle Act*. It was proven beyond a reasonable doubt that the manner of Mr. Findlay's operation of his motor vehicle was in all of the circumstances "a departure from the accustomed sober behaviour of a reasonable person". …
>
> As part of the conviction, the Provincial Court found that a part of the trailer of Mr. Findlay's vehicle had crossed the centre into the southbound lane of travel of the pickup truck driven by the defendant in this lawsuit. The Provincial Court did not determine whether a part of the trailer being across the centre line in fact caused the accident.
>
> [Emphasis added.]

2021 BCCA 12 (CanLII)

[19] The trial on the negligence claim lasted 10 days. The jury dismissed the appellant's claim, finding that he did not prove liability against the respondent. As a result, there was no assessment of damages.

Application for Double Costs

[20] In September 2017, the respondent delivered a formal settlement offer to the appellant for $80,000. The appellant did not accept that offer. Instead, he responded with an offer for $600,000. He later revoked that position and offered to settle for $500,000, plus taxable costs and disbursements.

[21] At trial, and in addition to non-pecuniary damages, appellant's counsel asked the jury to award: $388,382.66 for gross past wage loss (before statutory deductions); $308,694.78 for loss of future earning capacity; $27,566.56 for loss of past housekeeping capacity; $67,000 for loss of future housekeeping capacity; and $50,939.10 in special damages.

[22] The jury dismissed the appellant's claim in its entirety. In June 2019, the respondent applied for costs under the *Supreme Court Civil Rules*. He asked for an assessment at Scale B up to the date of the $80,000 offer, and double costs thereafter. The trial judge awarded the respondent single costs.

Positions at Trial

Negligence Action

[23] For use in the jury charge, each party provided the trial judge with a summary of their position on liability. The appellant argued that the logging truck was "there to be seen". Had the respondent been driving attentively, the collision would not have occurred. The appellant said the respondent "had the time and he had the space to avoid the accident". As such, he was negligent in failing to move to the right when passing the logging truck. The fact that the appellant was convicted of an offence in "traffic court because a part of his trailer was across the invisible centre line" was not determinative of liability. "More than one mistake can go into the making of an accident".

2021 BCCA 12 (CanLII)

[24] The respondent argued for dismissal of the claim on grounds that the appellant did not prove the respondent caused or contributed to the collision. The evidence established that the log trailer was in the respondent's lane of travel at the point of impact. There were no witnesses to the impact and no evidence of negligent or otherwise problematic driving on the part of the respondent. Instead, the respondent was "faced with an emergent situation created by the [appellant's] trailer being in his lane of travel". The appellant led no evidence to show that a reasonable driver in the respondent's position would, or ought to, have seen the trailer in their lane of travel. Nor that a "reasonably skillful driver" would have had the opportunity to avoid a collision.

2021 BCCA 12 (CanLII)

Application for Double Costs

[25] Reasons for judgment on the application for costs are indexed as *Findlay v. George*, 2019 BCSC 1227 ("RFJ").

[26] The appellant acknowledged he was liable for costs based on the jury's verdict. However, he said the respondent failed to justify double costs. Given the evidence known to the appellant when he rejected the $80,000 offer, it was reasonable for him to believe that he could obtain a substantially larger amount of damages at trial. That evidence included medical information about the respondent that the appellant believed would support his theory of liability because it revealed, among other things, that the respondent would "[lose] concentration when driving". In opposing the request for double costs, the appellant also cited his own "precarious financial position" (RFJ at paras. 19–21, 32, 36).

[27] The respondent argued that on the totality of the evidence, including the appellant's conviction under the *Motor Vehicle Act*, it should have been readily apparent to the appellant that there was a significant risk he could not prove liability. Moreover, to the extent that the appellant thought information about the respondent's medical condition would bolster his claim, the respondent let the appellant know before trial that the admissibility of those documents was in dispute. As such, there were no guarantees they would go before the jury.

[28] The trial judge declined to award double costs. His reasons for doing so are briefly stated:

> [39] Here, despite the fact hindsight makes clear the offer ought to have been accepted, I conclude that the plaintiff's rejection of the defendant's offer, when made and to the date of trial, was not unreasonable based upon the following:
>
> 1) the evidence from [the collision reconstructionist] and the two lay witnesses that there was plenty of room within the defendant's lane of travel to pass the plaintiff's trailer without contacting the plaintiff's trailer despite its incursion into his lane of travel;
>
> 2) the overall magnitude of the claim given the commonality of the medical opinions regarding the plaintiff's condition and the economic impact of the injuries he admittedly suffered; and
>
> 3) the uncertainty surrounding the admissibility of the medical records of the defendant which the plaintiff thought would assist the jury in concluding that the defendant failed to react appropriately to reasonably avoid the collision.
>
> 4) Finally, the offer to settle provided no legal or factual analysis on which the plaintiff could consider acceptance or rejection; specifically, there was no analysis of the weaknesses of the plaintiff's position resulting in the defendant's assessment of the case in making the offer.

Issues on Appeal

[29] In challenging the verdict on the negligence claim, the appellant contends that: (1) the trial judge erroneously kept a portion of a witness statement from the jury; and (2) the judge wrongly deprived the jury of evidence about the respondent's medical condition, associated symptoms, and their potential impact on his driving.

[30] On the appeal from the costs order, the respondent also raises two issues. He says: (1) the trial judge "misdirected" himself on facts and factors relevant to the costs analysis; and (2) he gave inadequate weight to the purpose of double costs. In support of his costs appeal, the respondent applies to introduce fresh evidence, namely, correspondence between the parties relating to the September 2017 exchange of settlement offers.

Discussion

Appeal from Jury's Verdict – Excluding the Witness Statement

[31] Two people travelling behind the respondent witnessed the collision: Kenneth Gowan and Glen Taylor. Mr. Gowan was driving a pickup truck. Mr. Taylor was his

2021 BCCA 12 (CanLII)

passenger. By the time of trial, Mr. Gowan had died. The appellant applied to admit a statement Mr. Gowan gave to police at the scene of the collision. From the appellant's perspective, the statement "could provide evidence … that the [respondent] had plenty … or lots of room to pass by" the full length of the logging truck.

2021 BCCA 12 (CanLII)

[32] The respondent opposed the application. He acknowledged that in light of Mr. Gowan's death, the appellant satisfied the admissibility criteria of "necessity" under the principled exception to the rule against hearsay. However, he contested the statement's "threshold reliability". Among other things, the respondent contended that an answer provided in the statement responded to a "leading" question and was too "ambiguous" to leave with the jury. The problematic portion of the statement is underlined below:

> [Mr. Gowan] Ok. … It, ah, this is a guess but it happened close to about 9:15, maybe 9:25 at the most. My friend Glen and I were driving down the road the ah victim … passed us about 2 kilometres maybe before the accident happened. I didn't see the point of impact itself but I saw the 2 vehicles approaching each other and it looked like there was plenty of space and then all of a sudden the pickup ah … hit the logging truck[,] went out of control and ah crossed the road and rolled … once (inaudible)
>
> …
>
> [Police officer] Ok. Um … so … you said that ah the pickup when it was ah … it was southbound, it appeared that it had lots of room to go by the trailer or the logging truck.
>
> [Mr. Gowan] yeah, yeah neither myself nor Glen thought much about it and all of a sudden Glen was saying whoa, whoa, whoa and … I saw it at the same time but I never actually saw the point of impact so I don't, I just don't know how it happened because it looked like there was plenty of room but neither myself nor my friend were even thinking about accident.
>
> [Emphasis added.]

[33] The trial judge admitted Mr. Gowan's statement, but not the underlined passages. Citing *R. v. Bradshaw*, 2017 SCC 35, the judge was satisfied that the bulk of the statement met the test for threshold reliability. The statement was made within 30 to 40 minutes of the collision; it was made to a police officer in circumstances where the truth would be expected in light of Mr. Gowan's "non-biased" observations; and the judge found that the "gravity of the accident [gave] rise to a presumption that the

investigating police officer was expecting the truth …". As such, cross-examination would be unlikely to change Mr. Gowan's evidence.

[34] However, the judge excluded the impugned passages on grounds that "the answer given [by Mr. Gowan] was in response to a leading question referencing the [log] trailer; the answer given was ambiguous, and, in the result, could be misleading, even with proper instructions". As explained in his ruling:

> [24] Mr. Gowan, in his initial description of the events … was clear that he did not see the point of impact, but saw the two vehicles approaching each other, and it looked like there was plenty of space, and "then all of a sudden the pickup hit the logging truck, went out of control, and crossed the road and rolled over once".
>
> [25] Only in response to the question posed next by the constable … that it appeared that he had lots of room to go by the trailer or logging truck, did Mr. Gowan seem to agree … responding, "yeah, yeah", but then clarifies that he nor to his knowledge his friend Glen actually saw the point of impact, so he did not know what happened, but it appeared there was plenty of room.
>
> [Emphasis added.]

[35] The appellant says the trial judge erred in his admissibility ruling by wrongly characterizing the police officer's question as "leading". The officer did not pose a question that suggested an answer or assumed a state of facts that was in dispute: *R. v. E.M.W.*, 2011 SCC 31 at para. 9. Moreover, the appellant says this evidence carried substantial probative value for his claim. Not only did it confirm his theory that there was ample room for the respondent's vehicle to pass by the entirety of the logging truck, this portion of the statement captured the fact that the collision surprised Mr. Gowan. It did not make sense to him in light of the space he saw between the logging truck and the respondent's vehicle as they were approaching each other. The appellant says a jury could have inferred from that fact that the respondent must have done something unexpected or unusual to cause or contribute to the collision, or that he failed to take evasive action that was reasonably open to him (appellant's factum at para. 64).

[36] The respondent says the police officer's question to Mr. Gowan *was* a leading question and introduced a fact into the statement that Mr. Gowan himself had not spoken to, namely, that there was "lots of room" between the entire length of the logging truck and the respondent's vehicle. As a result, it was not possible to know from his

2021 BCCA 12 (CanLII)

answer of “yeah, yeah” to the officer’s question whether Mr. Gowan was agreeing to “lots of room” to pass by the tractor, or “lots of room” to pass by the trailer. Because of Mr. Gowan’s death, the respondent had no opportunity to cross-examine on the difference between the two, and the respondent says the judge was right to find that this portion of the witness statement carried the realistic potential of misleading the jury. It implied that Mr. Gowan was able to see the positioning of the two vehicles while the respondent’s vehicle was alongside the trailer, and to describe the distance between them. Yet, in his answer to the officer’s question, Mr. Gowan made it clear that he “never actually saw the point of impact”.

2021 BCCA 12 (CanLII)

[37] A hearsay admissibility ruling is subject to review on a standard of correctness, if what is at issue is the legal test or the standard for admissibility applied by the trial judge. However, the actual assessment or weighing of relevant factors in applying that test attracts deference: *R. v. Moir*, 2020 BCCA 116 at para. 82.

[38] The appellant does not contest the judge’s ruling on grounds that he wrongly instructed himself on the test for admissibility or applied an incorrect legal standard. Rather, his argument focuses on the conclusion that the portion of the statement excluded from evidence was ambiguous because of the nature of the officer’s questioning. Furthermore, he contests the judge’s determination that, even with proper instructions, the impugned passages could mislead the jury. In my view, those conclusions were reached after a weighing of relevant factors and a consideration of the evidence in the context of everything else before the judge. Accordingly, they attract deference.

[39] I am not persuaded the trial judge committed an error in principle, let alone an overriding error, or was clearly wrong in excluding part of Mr. Gowan’s statement. The question posed by the police officer may not have been leading, in the technical sense, but it did misstate what Mr. Gowan said to the officer. Prior to the excluded portion, Mr. Gowan told the officer that he “saw the 2 vehicles approaching each other and it looked like there was plenty of space” (emphasis added). In repeating that observation back to him, the officer described it this way: “you said that … the pickup … it appeared

that it had lots of room to go by the trailer or the logging truck" (emphasis added). That is not what Mr. Gowan said. He described seeing "plenty of space" as the vehicles approached each other, not "lots of room" to move alongside the tractor and the trailer. In fact, as noted, Mr. Gowan told the officer that he "never actually saw the point of impact". As such, he could not give evidence about the amount of space between the log trailer and the respondent's vehicle. He said he would be "guessing" as to where the pickup and the logging truck "hit".

[40] In that context, it was open to the judge to find that the impugned portion of Mr. Gowan's statement was ambiguous, of insufficient reliability to leave with the jury, and that it carried the realistic potential of prejudicing the fact-finding process. He was justifiably concerned that a finding of there being "lots of room" to travel by the log trailer, arising from Mr. Gowan's statement, would be grounded in the police officer's casting of what Mr. Gowan had said to him, rather than Mr. Gowan's personal observation. As the judge noted in his discussions with counsel on the admissibility *voir dire*, it was the officer's question that "threw" the log trailer "into the mix", not anything mentioned by Mr. Gowan. It was "only at the instance of the police that all of a sudden the trailer [came] into it …".

[41] I am also of the view that had the judge admitted the entirety of Mr. Gowan's statement, it would have made no difference to the verdict: *Gray v. ICBC*, 2010 BCCA 459 at para. 30. As such, even if the admissibility ruling reflects an error of sufficient magnitude to displace the deferential standard of review, it does not warrant a new trial.

[42] In deciding admissibility, the judge took the evidence of Glen Taylor into account. By the time of the ruling, Mr. Taylor had testified at trial. The judge described his evidence as conforming "in large measure" with the description of events provided by Mr. Gowan.

[43] Mr. Taylor was Mr. Gowan's passenger. He said they were "roughly 20, 25 car lengths" behind the respondent when the collision occurred. As they approached the logging truck, Mr. Taylor could see the trailer, the "stakes … the trailer bed, and the tires". He saw the respondent "pass by the front end of the truck … and the driver

2021 BCCA 12 (CanLII)

wheels of the … tractor" (emphasis added). From Mr. Taylor's perspective, it "just looked like normal two vehicles passing one another. Everything looked normal as far as passing".

[44] In response to a question posed by counsel, Mr. Taylor admitted to being "surprised" by the accident. He described how, immediately following the collision, Mr. Gowan's vehicle was able to travel southbound past the (now stopped) logging truck in the respondent's lane of travel:

> A … I mean, understanding the truck had stopped and -- and the accident was right here at the back of the trailer, all the debris was on the highway right here, and yet we wound through it and we had two feet on my side to the snowbank and two feet on Ken's side to the logging truck, so all told there would be ten feet at least of highway that we can go through no problem at all, maybe 12 feet.
>
> …
>
> A I mean that -- that part -- you know, you think about it later more so than you do right at the -- right at the accident you don't think of things like that, but you do -- your mind plays that whole game of remembering.

[45] The excluded portions of Mr. Gowan's statement did not add anything to the evidence that was not otherwise available to the appellant through the testimony of Mr. Taylor (as well as the testimony of the appellant, who said there was four to six feet between the two vehicles). This factor mitigates the prejudicial effect of the judge's ruling: *Wright v. Sun Life Assurance Company of Canada*, 2019 BCCA 18 at para. 88.

[46] In fact, Mr. Taylor's evidence was more robust than that of Mr. Gowan on the question of whether there was sufficient room to get by the log trailer. Neither witness was able to describe the point of impact; however, Mr. Taylor's observation that everything appeared "normal" when the vehicles began to pass each other went beyond that of Mr. Gowan's, and visually tracked the respondent's vehicle as it passed the driver's wheels of the tractor. Mr. Gowan's evidence described only the circumstances as the vehicles were "approaching each other".

[47] Mr. Taylor also described being able to proceed through the southbound lane after the fact. As such, his evidence offered support for the appellant's sought-after inference that was not available through Mr. Gowan, namely, that there was room to

2021 BCCA 12 (CanLII)

pass by the entire length of the logging truck in the respondent's lane. Indeed, that was precisely the submission made on behalf of the appellant before the jury. In addition to highlighting Mr. Gowan's reference to "plenty of space" when the vehicles were approaching each other (which *was* admitted into evidence), appellant's counsel emphasized Mr. Taylor's testimony that there was:

> … nothing abnormal about the passing. He was watching, he didn't see at the point of impact, but he did see the vehicles pass, and he saw nothing abnormal, nothing that caught his eye …
>
> …
>
> They drove through the -- the actual scene of the accident, and driving cautiously, what he called I believe the debris, and he said that his belief was that there was lots of room. I believe he said there was ten feet, maybe more, like 12 feet of room, that -- where they drove through as they go through the -- the debris, and I believe -- it will be my submission that again that was a very good guess, because when you look at the numbers that we got from the engineer today, that's about what the distance was in that lane of travel. That's the available distance of the lane of travel that Mr. George was in.
>
> …
>
> Well, the things that [the appellant, Mr. Gowan and Mr. Taylor] came to was <u>he had plenty of room to pass</u>, and I submit that that's important. Those are the occurrence people, that's not the people who sit down and do calculations three years later.
>
> [Emphasis added.]

[48] I note that when the trial judge reviewed the evidence on liability for the jury, he described Mr. Taylor's evidence in generous terms. He told the jury that when Mr. Taylor saw the two vehicles "side by side", "cab to cab", Mr. Taylor "noted there was plenty of space between the two of them". The reference to "plenty of space" came from Mr. Gowan, not Mr. Taylor. In his testimony, Mr. Taylor was not able to "tell the court anything about the distance between the two vehicles at that moment". The judge's mingling of this evidence inured to the benefit of the appellant.

[49] In my view, the excluded portion of Mr. Gowan's statement did not deprive the appellant of an evidentiary foundation from which to argue that there was sufficient space for the respondent to get by the logging truck, or materially impair his ability to make that submission. Accordingly, I would not accede to this ground of appeal.

2021 BCCA 12 (CanLII)

Appeal from Jury's Verdict – Excluding the Medical Information

[50] The appellant also challenges a decision by the trial judge to exclude medical information relating to the respondent.

[51] Prior to trial, the appellant served the respondent with a Notice to Admit (Rule 7-7(1), *Supreme Court Civil Rules*). The Notice attached two applications for a "Disabilities Designation" signed by the respondent in 2011. The appellant sought an admission that the disability applications "contain[ed] an accurate recording of the [respondent's] condition as at the dates of each document".

[52] The first of the applications was dated June 8, 2011, and included a "Physician Report" stating the respondent had been diagnosed with, among other things, bilateral deafness (1996), bilateral carpal tunnel syndromes (past redemption) (2000), and hepatitis C (1992). Section 4 of the application included an "Assessor Report", the purpose of which was to document the respondent's "impairments and their impact on performance of Daily Living Activities". Under the heading "Cognitive and Emotional Functioning", the Assessor Report indicated that the impairments had "moderate impact" on the respondent's "Attention/concentration *(e.g. distractible, unable to maintain concentration, poor short term memory)*" (italics in the original).

[53] The second of the disability applications was dated December 13, 2011. The Physician Report listed the same diagnoses as the first. It also stated that the respondent was "getting weaker. He is more unsteady & has had a dozen or so falls in the last few weeks". "Significant deficits" with cognitive and emotional function were noted to include "Attention or sustained concentration". Under the heading "Additional Comments", it was stated that the respondent "is losing concentration when driving". The Assessor Report noted "moderate impact" in the area of "Attention/concentration". The respondent's "impairment" was likely to continue for two years or more, with an "estimated duration" of "lifetime":

> He is being treated for [a particular medical condition] successfully according to the blood tests. But the illness is taking its toll as it does. He will continue to deteriorate slowly.

2021 BCCA 12 (CanLII)

[54] The respondent delivered a Reply to the Notice to Admit. He admitted that the disability applications "contain[ed] an accurate recording of the [respondent's] condition as at the dates of each document". He also admitted the authenticity of the documents.

[55] At trial, the appellant sought to have the disability applications put before the jury for the truth of their contents. From his perspective, the documents contained evidence that the respondent was "suffering from a condition or an illness which might explain why he failed to avoid the trailer of the [appellant's] vehicle". More specifically, that the respondent "lacked – suffered from fatigue, a lack of concentration when driving". The appellant was prepared to call the physician named in the applications to speak to the "legibility" of those records (not to "expand" on them, or to "give [an] opinion"), but he did not consider it necessary to do so.

[56] The respondent objected to admissibility, contending that the disability applications were not relevant (or material) to a live issue at trial. In support of the objection, respondent's counsel emphasized that the appellant's pleadings did not cite the respondent's medical condition as a cause of the collision: "If what [the appellant] really wanted to do is say that the [respondent's] medical condition caused or contributed to the motor vehicle accident, that ought to have been a very specific particular. They [should have] said operating a motor vehicle on a highway when his ability to drive was impaired by his medical condition. [That's] missing." The respondent also argued that even with such a pleading, there was "no evidence to support … an inference that the [respondent's] medical condition was in any way causally connected to the collision that occurred". The absence of an evidentiary link weighed against admissibility.

[57] In response to the latter contention, the appellant said expert opinion evidence was not necessary:

> … it is open to lay people, in fact a jury, to take these fairly simple basic facts that are contained within these records, lack of concentration, fatigue and so on that's permanent and – and make inferences and make conclusions or not, but it's information that should be available to them.

2021 BCCA 12 (CanLII)

[58] The trial judge declined to admit the disability applications. He found that the appellant's pleadings were not "specific enough to embrace a medical condition that would alert [the respondent] to the fact that such was an issue they had to address at trial". This included a pleading that the respondent's ability to drive was "impaired by alcohol, drugs and fatigue or any one or more of the alcohol, drugs and fatigue". Had the appellant pleaded that one or more aspects of the respondent's physical health supported a liability finding, the defence may have considered it necessary to marshal evidence about his medical state "more proximate to the accident".

[59] The judge also expressed concern about admitting the records without a substantiated evidentiary nexus between the respondent's medical condition and the fact of the collision. Without such evidence, the appellant's causation theory was "mere speculation". Ultimately, it was the judge's view that:

> [18] … placing the medical records sought to be tendered as evidence for the jury to consider, regardless of what instruction I give them as to the limited use of which they can make, has a prejudicial effect which will outweigh the probative value of what reasonably could be made of the commentary contained within.
>
> [Emphasis added.]

[60] The appellant says the judge erred in keeping the disability applications from the jury. Moreover, doing so was fatal to successfully advancing his claim in negligence.

[61] First, the appellant submits that by admitting to the accuracy and authenticity of the documents, the respondent conceded the truth of their contents. He also conceded that the disability applications were relevant and admissible at trial. The respondent could only pull back from that position by seeking leave to withdraw his "admission of fact" under Rule 7-7(5). He did not do so and it was not open to him to "re-litigate the admissibility and relevancy" of the evidence (appellant's factum at para. 79). Furthermore, without withdrawal of the admission, the judge should have considered himself bound to place the documents before the jury.

[62] Second, and in the alternative, the appellant contends that the judge committed overriding error in finding that the prejudicial effect of this evidence outweighed its probative value. Months before the collision, a physician recorded that the respondent

2021 BCCA 12 (CanLII)

was losing concentration when driving. He also opined that the respondent's health would continue to deteriorate. That evidence was "logically relevant to the issue of who, or what, caused the [collision]" and "worthy of being heard by the jury" (appellant's factum at para. 87). The appellant says a juror "with even a modicum of common sense" would recognize that a medical condition that causes a loss of concentration while driving could provide a logical explanation for the collision.

[63] The appellant says there was no prejudice in admitting the disability applications. Starting in May 2017, the appellant applied for more than one production order relating to the respondent's medical records. Respondent's counsel was aware of those applications and the resultant orders. There was more than sufficient time to prepare a defence.

[64] In response to this ground of appeal, the respondent contends that the appellant did not raise Rule 7-7(5) and its implications for the admissibility analysis with the trial judge. Citing *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 44, the respondent says the appellant should not be allowed to raise this issue for the first time on appeal (respondent's factum at paras. 22–23).

[65] In any event, the Reply to the Notice to Admit acknowledged only that the disability applications accurately recorded the respondent's medical "condition" at the time they were completed and were authentic. The respondent says he did not admit to the truth of all of the facts and opinions stated in the applications, including all of the recorded symptoms associated with the diagnosed medical "conditions"; their impact on daily functioning; their frequency or duration; or, importantly, the things the respondent told the physician about his circumstances. Finally, and most significantly, the disability applications carried minimal (if no) probative value vis-à-vis live issues at trial. There was no evidence connecting the information recorded in the documents to the respondent's driving at the time of the collision. As such, the judge was right to hold that the prejudicial effect of this material outweighed its probative value.

[66] The respondent is correct: the appellant did not argue below that the Notice to Admit was determinative of admissibility. However, I do not consider it necessary to

2021 BCCA 12 (CanLII)

decide whether that should preclude him from raising the argument on appeal. In my view, even if granted leave to pursue this issue, the appellant could not establish that the judge erred in law by not viewing himself bound to allow the disability applications into evidence.

2021 BCCA 12 (CanLII)

[67] First, the respondent's position that the admission was not as extensive as the appellant suggests has merit. The respondent admitted that the disability applications "contain[ed] an accurate recording" of the respondent's "condition as at the dates of each document". However, the term "condition" was not defined. Nor did the Notice to Admit specify which of the statements, observations, opinions or other notations in the disability applications formed part of the admission. The contents of the documents were not particularized as facts.

[68] As a result, it is not clear to me that admitting the respondent's "condition" was "accurately record[ed]" in the disability applications extended beyond the formal medical diagnoses and captured everything noted therein, or, even if it did, whether that admission was to the truth of the notations as facts. These include the stated deficits, impairments or symptoms associated with the medical diagnoses; the impact of those impairments on daily functioning; their severity or duration; the likelihood of improvement; and the respondent's self-reports about his physical health. As cautioned in *Morrissey v. Lydiard* (1993), 35 B.C.A.C. 299, when a party relies on a Notice to Admit as proof of the truth of the contents of one or more documents, seeking to elevate those contents to the status of admitted facts (in whole or part), the contents should be stipulated as facts for the purpose of the admission. See also, *Wunsche v. Wunsche* (1994), 114 D.L.R. (4th) 314 (Ont. C.A.).

[69] Adherence to the *Morrissey* standard is especially important when dealing with clinical records, a consultant's report, or a physician's notes (the functional equivalent of what was at issue in this case). Ordinarily, when these sorts of records are admitted into evidence on a stand-alone basis, the trier of fact can make only limited use of them in light of their hearsay nature. As noted by Metzger J. in *Seaman v. Crook,* 2003 BCSC 464, observations made by a physician and treatments prescribed by them, as recorded

in the documents, are generally admissible as facts. Any *diagnoses or opinions*, however, are admissible solely for the fact they were made. Without something more, the diagnoses or opinions are not admissible for their truth (at paras. 14–15). See also *Healey v. Chung*, 2015 BCCA 38 at paras. 19–21. The cautionary language of this Court in *Samuel v. Chrysler Credit Canada Ltd*., 2007 BCCA 431, is apposite: "[c]linical records should not be admitted into evidence, by consent or otherwise, unless counsel identify the specific purpose for particular portions of the records" (at para. 39; emphasis added).

[70] Second, and in any event, I do not accept that the admission, even if it was as extensive as the appellant suggests, precluded the trial judge from exercising his gatekeeping role and keeping the disability applications from the jury. In other words, the Notice to Admit was not determinative of admissibility.

[71] This Court has held that a trial judge is not bound to act on a formal admission if the evidence called at trial does not support the admission: *Boscoe v. Connelly* (1987), 5 A.C.W.S. (3d) 249 (C.A.). Likewise, it seems to me that where there is a dispute over the scope of an admission concerning documents; a trial judge has questions about the preconditions to admissibility; or it is unclear what use can properly be made of the documents, the party seeking to tender that evidence must be prepared to meet those concerns: *Morrissey*; *Wunsche*.

[72] This includes, logically, any concern that the prejudicial effect of the impugned evidence outweighs its probative value. The appellant cites *Desharnais v. Parkhurst and Romanowski*, 2013 BCCA 113, for the proposition that securing admissions through a Notice to Admit will "normally" dispense with the need to establish the preconditions to admissibility (at para. 94). I agree. However, where an admission—as here—is unclear and the parties disagree on its scope and legal effect, the general rule must allow for a flexible application. Moreover, dispensing with the preconditions to the admissibility of documents does not necessarily mean that the entirety of those documents is then available for the truth of their contents.

2021 BCCA 12 (CanLII)

[73] As I see it, the respondent did not withdraw from his admission. Instead, the objection to admissibility was that the "condition" of the respondent, *although accurately recorded in the disability applications as at the date of those documents*, carried no probative value because of the lack of a demonstrated nexus between the "condition" and the collision. Moreover, because of the absence of a nexus, the documents, if placed before the jury on a stand-alone basis, would have prejudicial effect. In my view, the Reply to the Notice to Admit did not preclude the respondent from invoking the evidentiary gatekeeping role of the trial judge on this basis.

[74] I accept the appellant's position that if the respondent was objecting to admissibility on the basis of relevance, or he was unsure of the scope of the admission, he should have been clear about that from the beginning and flagged it in his Reply (Rule 7-7(2)(c)). However, he did tell the appellant of his opposition to admissibility prior to the commencement of trial. Furthermore, in response to another of the appellant's sought-after admissions, the Reply was explicit that, from the respondent's perspective, there was "no reliable evidence with respect to the medical condition of the [respondent] immediately prior to the accident" (emphasis added). As such, the appellant ought to have known that the materiality of pre-collision medical information involving the respondent was in issue.

[75] I am satisfied that, notwithstanding the admission, the trial judge retained discretion to determine admissibility and to keep the disability applications from the jury if he considered their admission improper. Even where parties have consented to documents being put before a jury, that factor will not always be "determinative" of whether they should have been entered into evidence: *Han v. Park*, 2015 BCCA 324 at para. 32. The parties received full opportunity to make submissions on admissibility, addressing both the logical and the legal relevance of the evidence. The judge considered those submissions and, ultimately, he used his discretion to exclude the disability applications. This he was entitled to do.

[76] A judge's decision to disallow evidence after weighing its probative value and prejudicial effect is entitled to considerable deference, provided it is not "premised on a

2021 BCCA 12 (CanLII)

wrong legal principle or the result of a palpable or overriding error": *Houston v. Kine*, 2011 BCCA 358 at para. 14. Finally, if the judge erred in keeping the disability applications from the jury, a new trial is not warranted if a properly instructed jury, acting reasonably, would necessarily have reached the same result had the evidence been admitted: *Tsoukas v. Segura*, 2001 BCCA 664 at paras. 73–74, citing *Anderson v. Maple Ridge (District)* (1992), 71 B.C.L.R. (2d) 68 at 77.

[77] I would not give effect to the appellant's alternative submission that the trial judge's weighing of probative value and prejudicial effect reveals overriding error. A close review of questions posed to appellant's counsel on the admissibility *voir dire* reveals that the judge had significant concern about the absence of evidence linking the statements in the documents to the respondent's driving at the time of the collision. The following excerpts from the dialogue with counsel are lengthy, but they make clear the issue that was troubling the judge:

> … what do you say to [the respondent's] point that the mere fact of a medical condition, there needs to be something more? I think I raised this when I was questioning you that in the absence of something else, if this was corroborative of some other evidence that would explain a course of action taken by the defendant that might -- in the face of conflicting evidence weigh the scale one way or the other, but what is the link between his medical condition as we know it in December of 2012 -- '11, pardon me, to some 13 months later that allows the trier of fact to simply say, well, his health wasn't the best and that's a possible explanation?
>
> …
>
> … this is a very long bow for a jury to stretch to say, well, we know he had problems with concentration, we know he was deaf, we know he can't pick things up that [weigh] over five kilograms, ergo it is possible.
>
> Anything's possible, just as you could say, well, he had heart problems and surely you don't suggest that if he'd had heart problems from time to time and was on heart medication that absent a medical opinion saying there was a heart attack at the time of the accident that -- absent anything else you can say, well, he had heart problems. Maybe that explains the accident.
>
> …
>
> … how does this jury know … 13 months later that [the respondent] was still having concentration problems? The only permanence that is ascribed to the conditions are those that are set out and noted as permanent …
>
> …
>
> It's not for [the jurors] to come up with an explanation. It's for them to weigh evidence and determine on the basis of the evidence whether somebody has

2021 BCCA 12 (CanLII)

> proven the case, not to speculate as to the many -- many may be overstating it, but a variety of possible explanations for this. And as I say, I'm concerned about the length of time.
>
> …
>
> … this is a point in time separate from the accident. I appreciate what you're saying. It's a CPP disability form and it says, yes, the permanent symptoms are going to last more than two years, hence the disability, the permanent disability, but I am having a lot of difficulty with the proposition that just a symptom absent something that causally connects that symptom to the issue of negligence is something that just leaves open for the jury to infer negligence.
>
> …
>
> We just pick a point in time and we assume that things either got worse or stayed as they are described in that document and that was what was prevailing and it was at that moment in time because of the curve, that despite the fact that there's no other indication of his driving being erratic or him doing anything with these people following for I don't know how long, that this goes into evidence to leave the jury with the thought that maybe he just missed the corner.

[78] The appellant's response to the concern about an insufficient causative connection was that the judge underestimated the probative value of the disability applications, standing on their own, and the inferences available from them. The appellant said the jury could infer, without expert opinion or any evidence of distracted or abnormal driving, that the respondent had a propensity for lost concentration while driving and that it manifested itself while passing the logging truck. "If you already have the underlying fact that you have difficulty with concentration or difficulty with driving, then you have difficulty with driving and that is an explanation. It doesn't – an expert would add nothing to it at all".

[79] I agree with the trial judge that the probative value of the disability applications, standing alone, was minimal.

[80] Contrary to the judge's view, I accept that these records passed the logical relevance threshold on the pleadings as framed by the appellant. In *R. v. Arp*, [1998] 3 S.C.R. 339, the Supreme Court made it clear that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'. … As a consequence, there is no minimum probative value required for evidence to be relevant" (at para. 38; internal reference omitted; emphasis

2021 BCCA 12 (CanLII)

added). The pleadings put the respondent's physical condition in issue, with a specific allegation of "fatigue" while driving. They also alleged driving without due care and attention.

[81] However, I am satisfied it was nonetheless reasonably open to the judge to find that without something more than broadly stated diagnoses, symptoms, impairments and self-reports, *recorded 13 months prior to the collision*, an inference that a loss of concentration while driving must have caused or contributed to the collision would be speculative. This is so *even if* the Court gives the appellant the benefit of the doubt on the scope of the admission obtained pursuant to the Notice to Admit and assumes for the purpose of this appeal that the respondent admitted to the truth of the documents' contents. (I note that statements made by the respondent about his own mental and physical health, as recorded in the disability applications, would have been admissible for their truth as statements against interest in any event: *Bancroft-Wilson v. Murphy*, 2009 BCCA 195 at para. 9.)

[82] In *R. v. Hall*, 2018 MBCA 122, Mainella J.A. explained that the prejudicial effect of evidence is assessed:

> [127] … by identifying the dangers of the evidence and considering how real those dangers are to the fairness of the trial …. Prejudice, however, does not refer to the mere fact that the evidence supports the moving party's case to the prejudice of the respondent ….
>
> [128] Some of the dangers otherwise admissible evidence may cause to the fairness of a trial are undue arousal of the jury's emotions, distraction, unnecessary delay or repetition, unfair surprise to a party and usurpation of the role of the jury ….
>
> [Internal references omitted; emphasis added.]

[83] I would add to this the risk of improper use through conjecture or speculative reasoning. As aptly stated by Doherty J.A. in *R. v. Figueroa,* 2008 ONCA 106, "[w]hile it is for the jury to choose among reasonable inferences available from the evidence, the jury cannot be invited to draw speculative or unreasonable inferences" (at para. 35).

[84] As I read the reasons on the admissibility *voir dire*, this was the judge's predominant concern about admitting the disability applications as stand-alone

2021 BCCA 12 (CanLII)

evidence. To establish liability, the appellant wanted the jury to infer that the respondent lost concentration while driving past the logging truck, and, as a result, that he either did not see the last of the bunks on the trailer or was not paying enough attention to take precautionary measures by moving to the right. The judge was concerned that the jury could not reasonably draw that inference from the contents of the applications. I appreciate that the line between a permissible inference and impermissible speculation is often difficult to determine. However, it was not unreasonable for the judge to conclude that records created 13 months before the collision, in which the respondent had reported (or a physician had inferred) that he was "losing concentration when driving", did not provide a sufficiently reliable grounding for the sought-after inference.

[85] Other than the one reference to "losing concentration" (without a causal explanation), there was nothing in the disability applications explicit to impairment of the respondent's ability to drive. In both applications, the physician described the respondent's medical circumstances as having "moderate impact" on his ability to maintain concentration. However, he offered no particularity on how often a loss of concentration was occurring (frequent, sporadic or rare); how it manifested itself; its duration or degree; or the extent to which the respondent's driving was *actually* affected, if at all. Critically, the documents shed no light on whether there was a loss of concentration at the time of the collision; the likelihood of that having occurred; or even the extent of any propensity in this regard. In his charge to the jury, the judge properly said that before drawing an inference, there must be a "solid base of proven facts. … No issue should be decided on the basis of a guess, no matter how shrewd that guess may be". Neither party takes issue with the propriety of that instruction.

[86] As noted, a decision to disallow evidence after weighing its probative value and prejudicial effect is entitled to considerable deference on appeal: *Houston* at para. 14. The trial judge is in a far better position than this Court to assess prejudicial effect as informed by the pleadings, the parties' theories of the case, the evidence, and the strength of the inferences sought from that evidence. Although another judge might have allowed the disability applications into evidence, the fact that this judge chose not

2021 BCCA 12 (CanLII)

to—standing on its own—is not sufficient to displace the deferential standard of review. I see no error in principle here, or a palpably wrong admissibility determination.

[87] In any event, I am satisfied that a properly instructed jury, acting reasonably, would have reached the same result on liability even with this evidence.

[88] Mr. Taylor testified that the respondent passed Mr. Gowan's vehicle two or three miles before the collision. He said there was nothing "unusual" about the respondent's driving when managing that pass. After he passed, and while Mr. Gowan and Mr. Taylor followed the respondent towards the logging truck, "everything went great". Again, there was nothing of concern about the respondent's driving. Similar to Mr. Gowan, he was driving under the speed limit. Mr. Taylor could see the respondent pass by the front end of the logging truck and "[e]verything looked normal". There was nothing in the evidence surrounding the respondent's driving to suggest that he was distracted, not paying attention, failing to keep a proper lookout, driving unsafely, or that he had time to take evasive measures, but failed to do so. There was no evidence to suggest that his pickup truck was anywhere other than appropriately in his lane of travel, where one might reasonably expect a vehicle to be. None of the civilian witnesses could testify about the positioning of the logging truck and the pickup immediately prior to impact. They did not see the vehicles collide. The appellant called no expert evidence to indicate that the respondent was operating his vehicle without due care and attention in light of the conditions of the road or vis-à-vis the logging truck.

[89] On the other hand, there *was* expert evidence that the outer bunk at the rear of the log trailer had encroached on the southbound lane of travel at the point of impact, providing a plausible explanation for the collision arising from the ***appellant's*** failure to keep to the right while passing an oncoming vehicle on a curved and icy roadway. The warning flags attached to the rear of the trailer were not bright red or orange. There was testimony that they did not meet the required size. They were "tattered and faded, to the point of not—almost being invisible".

[90] The appellant admitted, as a fact, that he had been found guilty of operating his logging truck in a manner that "[departed] from the accustomed sober behaviour of a

2021 BCCA 12 (CanLII)

reasonable person". He was driving without due care and attention. He further admitted that the Provincial Court found a part of his trailer had crossed into the southbound lane of travel. Again, there was no such evidence relating to the respondent's driving.

[91] In the context of this factual matrix, I do not see how the disability applications—reflecting observations made of the respondent, or symptoms reported by him, more than a year before the collision—would have taken the jury from dismissal to liability on a balance of probabilities. I say this given the cryptic nature of many of the notations in the applications; no explanation of their meaning; only one reference to "losing concentration when driving", without explanatory context; and the absence of evidence, in the form of expert opinion or otherwise, showing a causal or even temporal connection between the medical conditions, their symptoms and the collision. As noted in *Samuel*, the notes found in medical-related records are often "meaningless to [a] jury without explanatory *viva voce* evidence" (at para. 9).

[92] Because of the inherent hardship associated with a new trial, the resultant uncertainty, delay and added costs, an appellant who seeks a retrial in a civil case is required to put a "strong case" forward: *de Araujo v. Read*, 2004 BCCA 267 at paras. 50–52. Generally, a new trial will not be ordered unless it is plainly required in the interests of justice: *Mazur v. Lucas*, 2010 BCCA 473 at paras. 45–46; *Tsoukas* at paras. 71–75.

[93] In my view, the appellant has not put forward a strong case for a new trial. Accordingly, I would not accede to this ground of appeal.

Appeal from Denial of Double Costs

[94] Under Rule 9-1(5)(b) of the *Supreme Court Civil Rules*, a judge may "award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of [an] offer to settle". In making this order, the judge may consider: (1) whether the settlement offer was one that ought reasonably to have been accepted; (2) the relationship between the terms of that offer and the final judgment; (3) the relative financial circumstances of the parties; and (4) any other factor considered appropriate (Rule 9-1(6)).

2021 BCCA 12 (CanLII)

[95] In *Bains v. Antle*, 2019 BCCA 383, Dickson J.A. explained that whether an offer ought reasonably to have been accepted is considered "without the benefit of hindsight":

> [34] … In other words, only the circumstances in existence at the time of the offer are relevant, not the award made at trial: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26; *Bailey v. Jang*, 2008 BCSC 1372 at para. 24. The question is not whether the offer itself was reasonable, but whether it was unreasonable to refuse it: *Cottrill* at para. 30. In answering this question, the court may consider the recipient's subjective reasons for rejecting the offer, but must also decide whether those reasons are objectively reasonable: *C.P. v. RBC Life Insurance Co.*, 2015 BCCA 30 at para. 97.
>
> [35] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, this Court set out several factors that may be considered in assessing the reasonableness of refusing an offer. They include: the timing of the offer; whether it had some relationship to the claim; whether it could easily be evaluated; and whether some rationale for it was provided.
>
> [36] The relationship of the offer to the claim is relevant because it speaks to whether a plaintiff should be penalized for proceeding to trial in hopes of achieving more than what was offered. It is not unreasonable for a plaintiff to refuse an offer that is a fraction of the amount sought, provided the plaintiff had reasonable confidence in her claim: *Cottrill* at para. 32; see also *Tisalona* [*v. Easton*, 2017 BCCA 272] at para. 102; *Wafler v. Trinh*, 2014 BCCA 95 at paras. 53, 64–65. In several decisions below, the court has considered this relationship to be important where there was objective evidence supporting a plaintiff's claim for loss of earning capacity although the claim was ultimately rejected at trial. For example, in *Payne v. Lore*, 2010 BCSC 1313, Justice Wedge found that, had the plaintiff's claim for future income loss been successful, the defendants' offer would have fallen well short of the award at trial and, therefore, it was not unreasonable for the plaintiff to refuse the offer: at paras. 28–29. In *Parker v. Martin*, 2017 BCSC 1161, Justice Ball noted that by the time the offer in question was received, the plaintiff had retained expert medical witnesses whose opinions supported his belief that there was a "real and substantial possibility of future income loss": at para. 26.
>
> [37] A further relevant consideration under Rule 9-1(6)(a) may be whether the plaintiff knew her claim was largely dependent on the court's assessment of her credibility: *Wafler* at para. 73; *Gehlen v. Rana*, 2011 BCCA 219 at paras. 50–51. This is because there is more risk in proceeding to trial where a claim lacks objective evidence and, therefore, refusal of a reasonable offer may be unreasonable.

[96] Granting or denying double costs engages a broad discretion. The parties agree that a deferential standard of review applies. An appellate court may only interfere with a costs order if the party seeking to have the order set aside demonstrates an error in principle or that the award is plainly wrong: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 23; *Bains* at para. 30.

2021 BCCA 12 (CanLII)

[97] The respondent says the trial judge committed errors in principle. For one, his finding that the appellant possessed evidence of "plenty of room" in the respondent's lane of travel when passing the logging truck reflects a misapprehension of the evidence (RFJ at para. 39). Second, when considering the "overall magnitude of the claim", the judge was wrong to conclude that if the appellant succeeded in proving liability, in whole or in part, his damages would likely have exceeded the $80,000 offer. The appellant was seeking a cumulative $730,000, plus non-pecuniary damages; however, the respondent led expert evidence that the appellant's degree of disability was less than asserted and his future losses would not have been as substantial as claimed. Assuming a division of liability substantially in favour of the respondent, the aggregate damages award would likely have been less than or close to $80,000.

[98] The respondent says it was an error for the judge to include in his costs analysis the "uncertainty" surrounding the admissibility of the respondent's medical information. Those records carried no probative value because of their remoteness in time from the collision; they would not have affected the result; and the appellant ought to have known this. To the extent that the appellant's decision to reject the $80,000 relied on the disability applications, the rejection was unreasonable.

[99] The respondent also contends that as a matter of legal principle, there is no requirement that a settlement offer include a legal or factual analysis in support of the offer, explaining the perceived weaknesses with the other party's case. The trial judge was wrong to treat this as a requirement. The respondent's rationale for offering $80,000 should have been obvious to the appellant, especially in light of the appellant's conviction under the *Motor Vehicle Act*. In the alternative, the respondent applies to tender fresh evidence on this point, consisting of an email sent to appellant's counsel the day before delivery of the settlement offer, with a rationale for the $80,000:

> I don't find your client to be a very sympathetic witness. Moreover, his negligence resulted in the death of my client. We will argue for a dismissal of the action with costs.
>
> In the grand scheme of things, I do not foresee a jury … rewarding him with a large sum of money – even in the *unlikely* event that a small degree of negligence was apportioned against our deceased client. …
>
> [Italics in the original.]

2021 BCCA 12 (CanLII)

[100] Finally, the respondent contends the judge erred by failing to give sufficient weight to the underlying objective of Rule 9-1(5)(b). This rule is designed to encourage settlement wherever possible by requiring litigants to carefully assess the strengths and weaknesses of their case before trial: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74. A careful pre-trial assessment in this case should have led the appellant to recognize that his negligence claim was based on irrelevant considerations and an inadequate review of the available evidence. In not awarding double costs, the trial judge has undermined the purpose of Rule 9-1(5)(b).

[101] In my view, the respondent's challenge to the costs award does not provide a principled basis on which to displace the significant deference owed to the judge's ruling.

[102] It is apparent from the RFJ that the trial judge understood the respondent's bases for claiming that the rejection of the settlement offer was unreasonable (see paras. 10–19, 26). In considering the respondent's position, the judge correctly instructed himself on the application of Rule 9-1(5)(b), including the non-exhaustive factors for consideration under 9-1(6). He turned his mind to the guiding legal principles, with explicit reference to *C.P. v. RBC Life Insurance Co.*, 2015 BCCA 30, and *Cottrill v. Utopia Day Spas and Salons Ltd.,* 2019 BCCA 26 (RFJ at paras. 23–24). Those decisions set out the purposes of Rule 9-1(5), emphasized by the respondent in the appeal. The judge was alive to the rule's objectives (at para. 23), as well as his obligation to exercise his discretion "judicially" (at para. 38).

[103] The judge conducted his costs analysis based on information known to the appellant at the time of the offer, before the admissibility rulings kept some of that evidence from use at trial (RFJ at paras. 25, 39). This included the witness statement of Mr. Gowan, in which he responded affirmatively to the question of whether there was "lots of room to go by the trailer or the logging truck" (emphasis added). It also included evidence from Glen Taylor at the appellant's Provincial Court trial. There, Mr. Taylor testified that when the pickup truck passed the cab of the logging truck, there was "ample room" between them, "five to six feet". (He did not provide this same estimate of

2021 BCCA 12 (CanLII)

distance at the civil trial). Prior to rejecting the settlement offer, the appellant also had a copy of the report prepared by the collision reconstructionist who testified at trial and the documents he reviewed in preparing his report. From measurements contained in that material, the appellant calculated that the respondent had 1.3 metres of additional space in his lane of travel when moving past the log trailer.

[104] It was not improper for the judge to consider the availability of this material, even though some of it did not make its way before the jury. Whether a party unreasonably rejected a settlement offer is not determined with reference to the trial's outcome: *Cottrill* at para. 29. I also do not agree that the judge misapprehended this evidence or incorrectly took the "uncertainty surrounding the admissibility of the [respondent's] medical records" into account. The respondent interprets the evidence differently and considers the admissibility rulings to have been a *fait accompli*, but that does not mean the trial judge erred in principle by giving weight to the appellant's pre-trial lens, including the inferences the appellant considered available to a jury. In my view, the respondent has brought a post-trial perspective to these aspects of his submission.

[105] Finally, I am not persuaded the trial judge erred in considering the "overall magnitude" of the appellant's damages claim or the absence of any "legal or factual analysis" supporting the offer as delivered to the appellant. Neither of these factors were determinative, and this Court has recognized the legitimacy of both in a double costs analysis: *Bains* at paras. 35–36.

[106] The $80,000 represented only a fraction of what the appellant was seeking, and the judge accepted, based on the "commonality" of the medical evidence available to the parties, *as known by him*, that even a partial liability finding may have resulted in damages beyond the $80,000 (RFJ at paras. 9, 34). An articulation of the rationale behind the $80,000 would have provided a more substantial informative context from which to assess the objective reasonableness of the rejection. The respondent has attempted to fill this gap through the fresh evidence application; however, in my view, that evidence should not be admitted. The affidavit in support of the application acknowledges that the email sent the day prior to formal delivery of the offer was

2021 BCCA 12 (CanLII)

available prior to the respondent's submissions on the costs hearing and could have been made available to the trial judge. As such, the fresh evidence does not meet the due diligence criteria for admissibility: *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759. In any event, the explanation contained in that email offers no real analysis of either party's case.

[107] The trial judge was in the best position to assess the reasonableness of the decision to reject the respondent's offer. He sat through the admissibility *voir dires*, as well as the 10-day trial, with opportunity to develop a "deep appreciation" of the evidence available to the appellant at the time the offer was rejected: *Bains* at para. 38. Applying a deferential standard of review, I would not interfere with the judge's exercise of discretion to award single costs.

Disposition

[108] For the reasons provided, I would dismiss the appeal from the jury's verdict.

[109] I would also dismiss the application to adduce fresh evidence on the appeal from the costs order and dismiss that appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Dickson"

2021 BCCA 12 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Harder v. Poettcker,*
2016 BCCA 477

Date: 20161201
Docket: CA43352

Between:

James Harder

Respondent
(Plaintiff)

And

Lee Poettcker

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated November 26, 2015 (*Harder v. Poettcker*, 2015 BCSC 2180, Vancouver Registry M103503).

Counsel for the Appellant:	R.W. Parsons and S. Hoyer
Counsel for the Respondent:	J.R. Kendall and V.J. LeBlanc
Place and Date of Hearing:	Vancouver, British Columbia October 12, 2016
Place and Date of Judgment:	Vancouver, British Columbia December 1, 2016

Written Reasons by:
The Honourable Mr. Justice Willcock

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

2016 BCCA 477 (CanLII)

Summary:

The jury in this personal injury case apportioned liability, 85% to the plaintiff and 15% to the defendant, and awarded some special damages but no damages for pain and suffering and loss of amenities of life. The trial judge found the jury's answers to the damages questions to be conflicting, dismissed an application to enter judgment, and ordered that the trial would continue in front of him without a jury. On appeal the appellant sought an order effecting the jury's apportionment liability and an order that damages be retried by a jury. Held: appeal allowed. The judge erred in the exercise of his discretion in the circumstances of this case by refusing to enter partial judgment in relation to the jury's answers to the distinct liability issues. It was not open to the judge to assess damages rather than ordering a retrial of that issue. Paradoxically, the Court of Appeal can direct the trial judge to assess damages and it is just in this case to do so.

2016 BCCA 477 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] The respondent, James Harder, was injured in a motor vehicle accident on February 13, 2009 as a result of the negligence of the appellant. At the conclusion of a nine-day trial in 2015, a jury found both the respondent and the appellant to have been negligent and apportioned 85% of liability to the respondent and 15% to the appellant. Special damages and the loss of housekeeping capacity to the date of trial were assessed at $5,100 but the jury made no award for general damages. The trial judge, for reasons indexed at 2015 BCSC 2180, found the jury's conclusions to be conflicting and dismissed the appellant's application to enter judgment on the terms of the jury verdict. He ordered a retrial to take place before him, without a jury. This is an appeal from those orders.

The Judgment Appealed From

[2] The application for judgment required the trial judge to consider Rules 12-6(7) to 12-6(12) of the *Supreme Court Civil Rules*:

> **Judgment impossible on jury findings**
>
> (7) If, after any redirection the court considers appropriate, a jury answers some but not all of the questions directed to it, or if the answers are conflicting, so that judgment cannot be pronounced on the findings, the action must be retried.

> **Only partial judgment possible on jury findings**
>
> (8) If the answers of the jury entitle either party to judgment in respect of some but not all of the claims for relief in the notice of civil claim, the court may pronounce judgment on those claims and the remaining claims must be retried.
>
> **Jury failing to reach verdict**
>
> (9) If the jury fails to reach a verdict in accordance with the *Jury Act*, the action must be retried.
>
> **Retrial**
>
> (10) A retrial under subrules (7) to (9) may take place at the same or subsequent sittings as the court may direct.
>
> **Continuing trial without jury**
>
> (11) If, for any reason other than the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.
>
> **Trial may continue without jury**
>
> (12) If, by reason of the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose lawyer's conduct, is complained of, may continue the trial without a jury.

[3] The jury's answers were clearly conflicting in the sense described by Justice Mackenzie in *Balla v. I.C.B.C.*, 2001 BCCA 62 at para. 12, in these terms:

> [12] …It is illogical to conclude that a plaintiff was injured and suffered out of pocket expenses but did not sustain any pain, suffering and loss of enjoyment, however transitory, as a result of the injury. The finding of injury and the award for special damages cannot be reconciled. Without any award for non-pecuniary damages, the answers present a clear conflict.

[4] Despite that fact, the appellant submitted partial judgment was possible on the jury findings and judgment should be entered on the 85/15 apportionment of liability. The trial judge considered himself to be bound by the decision of Gary Weatherill J. in *Kalsi v. Gill*, 2014 BCSC 1833, to the effect that Rule 12-6(8) does not permit severance of the issues of liability and damages. Because the respondent's credibility was weighed in the determination of both liability and damages, he concluded those issues should not be severed and decided by different triers of fact.

2016 BCCA 477 (CanLII)

[5] The respondent, who had requested a jury trial in the first instance, consented to the retrial proceeding before a judge alone. The trial judge held:

> [24] I think for a number of reasons that the retrial should be before me. I heard all of the evidence and the submissions of counsel. Given the fact that it would be a lengthy time until the matter is retried before a jury, and given the age of the plaintiff and the question of cost to the parties, I think it is appropriate that I conduct a retrial based on the evidence I have heard and I so order. Accordingly, I exercise my discretion under the governing rule that the retrial take place before me without a jury.
>
> [25] I have heard the submissions of counsel and a recording of those submissions is available to me to refresh my memory. Counsel may make further submissions in writing on liability and damages provided they do not repeat what I have already heard in the submissions to the jury.

2016 BCCA 477 (CanLII)

Grounds of Appeal

[6] The appellant says the trial judge erred in concluding that:

a) Rule 12-6(8) precluded him from entering partial judgment in relation to the apportionment of liability; and

b) Rule 12-6(11) gave him a discretion to order a retrial to be heard by him alone, and in exercising of that discretion.

Argument

Partial Judgment

[7] The appellant argues *Kalsi* was wrongly decided insofar as it employed “an unduly constrained interpretation” of Rule 12-6(8). The trial judge in *Kalsi* did not identify a purpose supporting his restrictive interpretation of the sub-rule, did not engage in an appropriate interpretive analysis, and erred in concluding that sub-rule (8) serves one narrow purpose: to “fill a hole” in a verdict deemed inconclusive because the jury had failed to answer one or more questions arising from the prayer for relief.

[8] He says the sub-rule, properly interpreted, favours entry of partial judgment. It is the culmination of many steps taken to expand the jurisdiction of trial judges to enter partial judgment, which they did not possess at common law. The 1906

Supreme Court Rules (Marginal Rule 433c(2)) gave judges the power to enter partial judgment "as to those of the causes of action as to which the findings are sufficient to entitle the party to judgment" (emphasis added). The 1976 *Supreme Court Rules* are said by the appellant to have enlarged the court's jurisdiction by permitting judges to enter partial judgment in relation to "claims" (a term the appellant says has a wider ambit).

[9] The appellant argues Rule 12-6(8), which permits judgment to be entered in relation to "some … of the claims for relief in the notice of civil claim":

a) reflects the paramount principle that, where possible, a jury's disposition of issues should be sustained and given its fullest effect without judicial intervention;

b) preserves to the extent possible an election to have the jury serve as the sole arbiter of fact;

c) eliminates the spectre of a litigant using the opportunity of an overly broad retrial order to obtain and tender evidence which it should have called the first time;

d) promotes trial fairness by ensuring that a party will not be unnecessarily prejudiced by having to prove their whole case a second time; and

e) by narrowing the claims to be retried, furthering the legislature's broader objectives in securing the just, speedy, and inexpensive resolution of disputes.

[10] The appellant says the trial judge should exercise the discretion to enter partial judgment where a claim that may be sustained is "separate and distinct" from the impugned finding. He submits there is no reason the discretion to enter partial judgment should not have been exercised in this case. Factors that may render a partial judgment unfair or unjust, such as the possibility of inconsistency, confusion, or uncertainty are not significant here.

2016 BCCA 477 (CanLII)

[11] In answer, the respondent notes, first, whether or not sub-rule (8) permits judgment to be entered in relation to a claim, this Court should not readily interfere with the trial judge's discretionary decision not to give partial judgment. He notes the trial judge, at para. 22, stated that the "issues … are largely dependent on credibility", and says this Court must not overlook the trial judge's advantage in assessing the degree to which credibility is a factor in addressing each of the claims for relief in the notice of civil claim. Citing *Fast v. Moss*, 2005 BCCA 571, and *Balla*, he says we should defer to the trial judge's assessment of this question.

[12] The respondent refers us to cases where courts (including this Court) have considered it to be inappropriate to grant judgment on an issue turning on a finding of credibility where another issue also turning on credibility must be retried: *Fast*; or where the issues are too "interwoven" to permit the entry of distinct judgments: *Gasoline Products Co. Inc. v. Champlin Refining Co.* (1931), 283 U.S. 494 (S.C.).

[13] He disputes the view that the jurisdiction of the court to enter partial judgment has been consistently expanded. He submits the last change in the Rules, in July 2010, which permitted judgment to be entered in relation to "claims for relief in the notice of civil claim" (as opposed to simply "claims"), narrowed the court's discretion.

[14] The respondent says cases where the jury verdict permits an order for judgment against one defendant but requires the whole case against another defendant to be retried (such as *ICBC v. Patko*, 2009 BCSC 266) do not give rise to the same risks of inconsistent outcomes or require one party's credibility to be assessed on distinct occasions.

[15] He distinguishes the Ontario case of *Bedford v. Crapper*, [1949] 3 D.L.R. 153 (Ont. C.A.), where conflicting answers undermined a jury's assessment of damages but not the underlying decision on liability, on the basis that the statute there considered provided: "a new trial may be ordered upon any question without interfering with the decision upon any other question." Further, he submits, there was no indication in that case that credibility was in play. That is also said to be true of *Rusche v. I.C.B.C.*, [1992] B.C.J. No. 87, 4 C.P.C. (3d) 12 (S.C. Chambers),

2016 BCCA 477 (CanLII)

where the trial judge acceded to the plaintiff's submission the jury's failure to award any nominal damages could not be reconciled with its finding that a trespass had occurred, and continued the trial and fixed an amount for nominal damages.

[16] The respondent defends the judgment in *Kalsi*, arguing that the trial judge in that case considered the language in sub-rule (8), and noted that it makes no reference to circumstances involving conflicting answers and that the sub-rule refers to "claims for relief" as opposed to "claims" in general. He is said to have placed specific weight upon the fact that only sub-rule (7) addresses conflicting jury answers, and it provides that when the answers are conflicting "the action must be retried."

[17] The respondent says the trial judge in *Kalsi* was correct to conclude that the effect of entering judgment on some of the findings of the jury would be to sever the issues of liability and damages with each issue being decided by a different trier of fact, and to consider that to be an outcome generally to be avoided. He says decisions in relation to pre-trial severance applications highlight the perils of severing liability from quantum assessments where credibility is in issue: *Cochrane v. Insurance Corp. of British Columbia*, 2005 BCCA 399; *Beddow v. Megyesi*, [1992] B.C.J. No. 16; *Rajkhowa v. Watson*, 2000 NSCA 50; *Smiley v. Wolch*, [1997] B.C.J. No. 2377; *Macri v. Miskiewicz*, [1993] B.C.J. No. 1408; *Redlack v. Vekved*, [1993] B.C.J. No. 3092.

Judge Alone Order

[18] The appellant further submits the trial judge had no jurisdiction to consider the plaintiff's application under Rule 12-6(11) to continue the trial without a jury, and he erred in law in doing so.

[19] He says in *Leslie v. Parmar*, 2006 BCCA 256, this Court, considering the scope of a trial judge's jurisdiction under (former) Rule 41(7), a sub-rule identical in all material respects to Rule 12-6(12), held at paras. 23-24:

> [T]he plain words of Rule 41(7) are fatal to the success of the application that was brought by the respondent before the trial judge. This rule by its terms

2016 BCCA 477 (CanLII)

> clearly contemplates that any such application must be brought prior to the conclusion of the trial proceedings before the jury. That necessarily follows in my opinion from the language "may continue the trial without a jury". In this case, the trial had proceeded before the jury, evidence was led, counsel made final addresses to the jury, the judge charged the jury and the jury rendered a verdict. At that stage, the trial proceeding was over, subject only to "tidying up" some matters of detail relating to numerical issues and costs. At that stage of matters in this case, there was nothing left to "continue". The application brought before Loo J. was simply not available to the respondent on the extant facts.
>
> In the factual circumstances of this case, the learned trial judge was without any jurisdiction to properly consider the application of the respondent alleged to be brought under Rule 41(7). It was too late for such an application to be advanced. Loo J. ought to have dismissed the application as unfounded in law and her failure to do so was error in law. It follows that the appeal ought to be allowed and the application brought under Rule 41(7) should stand dismissed.
>
> [Emphasis added by the appellant.]

[20] The appellant says *Leslie* determined that under Rule 12-6(12) once a verdict is rendered and the jury has been discharged, the trial judge no longer has jurisdiction to withdraw the case from the jury and continue the trial. He says the trial court's jurisdiction under Rule 12-6(11) must be similarly circumscribed. The concept of a "continuation" is said to be antithetical to that of a "retrial", which contemplates a fresh re-examination of the issues. Sub-rules (7) to (10) contemplate retrials, rather than continuations.

[21] The respondent says the rule has properly been considered by trial judges to permit them to continue a trial after an inconsistent or perverse jury verdict. In *I.C.B.C. v. Sun*, 2003 BCSC 1175, the judge determined that a jury's answers with respect to one of the 25 defendants was conflicting. The court declared a mistrial with respect to that one defendant and, with the plaintiff's consent, relying on former Rule 41(6), continued the trial against that defendant as a judge alone. Similarly, in *ICBC v. Patko,* after the jury returned an inconsistent verdict against one defendant, the judge, relying on Rule 41(6) (with the consent of the plaintiff, who had required the jury), continued the trial of the plaintiff's claim against that defendant. And in *Rusche*, after the jury returned its verdict and awarded nothing for nominal

2016 BCCA 477 (CanLII)

damages, the trial judge acceded to the request of the plaintiff, continued the trial and fixed damages himself.

[22] He relies upon dicta in *Chapelski v. Bhatt*, 2009 BCSC 1260 at para. 28, to the effect that "Rule 41(6) cannot apply in a situation such as this where the jury has yet to deliver any verdict and the trial is continuing as opposed to a retrial taking place." He says the corollary is that what is now sub-rule (11) can only apply after the delivery of the jury's verdict when a retrial is ordered.

[23] The respondent seeks to distinguish *Leslie* on the basis that it addressed former Rule 41(7), now sub-rule (12) which applies where a party or counsel at trial has misconducted themselves. He submits that conduct complained of under sub-rule (12) must occur during trial in the presence of the jury and the rule can only be invoked prior to the verdict. Sub-rule (11), however, is engaged "for any reason other than the misconduct of a party or a party's lawyer"; encompasses a broader range of reasons to order a retrial; and may be invoked both before and after a verdict.

[24] He further argues that *Leslie* was wrongly decided, is a judgment *per incuriam*, and we ought not to follow it. He says this Court in *Leslie* adopted reasoning of Skipp J. in *Crookshanks v. Adamic*, [1997] B.C.J. No. 1625 (S.C.), that ought not have been accepted. Justice Skipp is said to have concluded erroneously, at para. 6 of his judgment, that both Rules 41(6) and 41(7) "would appear to be triggered by misconduct of a party or of counsel", whereas only the former was triggered by misconduct and the latter was triggered for any reason other than misconduct. Further, he argues Skipp J. does not appear to have referred to or considered *Cuthbertson v. Moryson* (1982), 34 B.C.L.R. 397 (S.C. Chambers) where Justice Spencer held, at para. 2:

> In my opinion, R. 41(6) which appears for the first time in the 1976 revision of the rules is to be read in the context of R. 41 as a whole. It is to be applied where, under subr. (2), a judgment is impossible on the jury finding or where under subr. (3) only a partial judgment is possible. In either of those instances resort may be had to subr. (6) and the trial judge may be asked to pronounce judgment either on those questions which the jury has not answered or, in the case of conflicting answers to various questions, on the case as a whole.

2016 BCCA 477 (CanLII)

[25] In response to the argument that the concept of a "continuation" is distinct from a "retrial" the respondent says the plain language of the rule evidences that a continuation of the trial is an option once the judge has "declared a retrial". A continuation is not mandatory, but a plain reading of sub-rule (11) permits the trial judge to "continue" the trial where a retrial would otherwise be necessary. He argues that to hold otherwise would be to have no regard for the plain wording of sub-rule (11), the operative parts of which say "if … a trial with a jury would be retried, the court … may continue the trial without a jury."

[26] Last, the respondent says the trial judge had inherent jurisdiction to regulate the practice and procedure of his trial. The Rules are additional to, and not in substitution of, these powers arising out of inherent jurisdiction: *R & J Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59 at para. 14.

Discussion

Partial Judgment

[27] In *Kalsi,* Weatherill J. concluded that sub-rule (8), which applies when the answers of the jury entitle either party to judgment in respect of some but not all of the claims for relief in the notice of civil claim, is inapplicable when the jury gives inconsistent answers to questions posed of it. In such a case only sub-rule (7) is applicable. He wrote of the relevant sub-rules:

> [28] There is a clear difference in wording of the two rules that sheds some light on the issue. Rule 12-6(7) demands a retrial when either:
>
> a) a jury answers some but not all of the questions directed to it, or
>
> b) the jury's answers are conflicting so that judgement cannot be pronounced on the findings.
>
> [29] Conversely, Rule 12-6(8) allows partial judgment when a jury's answer entitles a party to judgment in respect of some but not all of the claims of relief. It does not contemplate partial judgment when the jury's answer is conflicting.

[28] This approach suggests the sub-rules are mutually exclusive, but that cannot be the case. Sub-rule (8) is applicable when the answers of the jury entitle either party to judgment in respect of some of the claims for relief in the notice of civil claim

2016 BCCA 477 (CanLII)

but there are "remaining claims [that] must be retried." It must, therefore, be applicable when a jury answers some but not all of the questions directed to it.

[29] The concluding words of sub-rule (7), which provide that in the event not all questions are answered, "the action must be retried", must be read as directing a retrial only when no judgment can be pronounced.

[30] I would rephrase the description of the relevant sub-rule from the passage at paras. 28-29 of *Kalsi* quoted above as follows:

> [28] There is a clear difference in wording of the two rules that sheds some light on the issue. Rule 12-6(7) demands a retrial when, as a result of either:
>
> a) the jury's failure to answers some of the questions directed to it, or
>
> b) the jury's conflicting answers
>
> judgment cannot be pronounced.
>
> [29] Conversely, Rule 12-6(8) allows partial judgment when a jury's answer entitles a party to judgement in respect of some but not all of the claims for relief. It is inapplicable when as a result of the jury's conflicting answers no judgment can be pronounced.

[31] Sub-rule (8) is not expressly stated to be <u>inapplicable</u> where the jury has given inconsistent answers to some questions but one of the parties claims to be entitled to judgment in respect of some claim for relief. On its face, it is applicable wherever judgment may be pronounced in respect of some claim for relief.

[32] The trial judge in *Kalsi* took some comfort in the judgments in *Balla*, *Banks v. Shrigley*, 2001 BCCA 232, and *Binnie v. Marsollier,* 2001 BCCA 543, but should not have done so. He noted at para. 32, referring to these cases, that:

> Re-trials were ordered in all three pursuant to Rule 41(2) (now Rule 12-6(7)). There was no mention of the potential application of Rule 41(3) (now Rule 12-6(8)).

[33] However in *Balla*, *Banks*, and *Binnie* there were no liability issues, the only questions posed of the juries related to the quantum of damages. When inconsistent answers were given in response to those questions, there remained no claim in relation to which the plaintiff was entitled to judgment. Judgment was not possible. In none of these cases did the potential application of sub-rule (8) arise.

2016 BCCA 477 (CanLII)

[34] Because granting judgment in relation to liability and remitting damages to a new trial would effectively sever liability and quantum issues, the trial judge in *Kalsi* weighed the factors usually considered on pre-trial severance applications. He held:

> [33] …While a trial judge has discretion to order severance of issues (Rule 12-5(68)), severance should only occur when there are extraordinary, exceptional or compelling reasons to do so and only when the issue to be tried separately is not interwoven with other issues (*King v. On-Stream Natural Gas Ltd. Partnership,* [1990] B.C.W.L.D. 1596 (S.C.)). Further, severance of issues of liability and damages is particularly undesirable (*Dosanjh v. Romanda,* [1974] 6 W.W.R. 559 (B.C.S.C.)). Unless compelling reasons exist to do so, courts generally are reluctant to order severance of liability and damages. That is especially so where, as here, the plaintiff's credibility is an important issue in the case (*Beddow v. Megyesi* (1992), 63 B.C.L.R. (2d) 158 (S.C.)).

2016 BCCA 477 (CanLII)

[35] In my opinion, it was an error to apply the criteria considered in relation to Rule 12-5 when considering whether the parties were entitled to judgment under Rule 12-6. Severance of issues may lead to protracted and expensive litigation and gives rise to a risk of inconsistent and embarrassing outcomes. While there must be compelling reasons to order severance of issues before trial, different considerations arise after an inconsistent jury verdict. When a jury trial produces an unsatisfactory result the parties are not faced with a choice between one trial or two. They will have two trials. The question is whether a more just, speedy and inexpensive result can be obtained by entering judgment in relation to some of the claims made and retrying only the remainder of the claims.

[36] Sub-rule (8) calls for consideration, first, of the question whether a party is apparently entitled to judgment in respect of some but not all of the claims for relief in the notice of civil claim; and, second, whether in the circumstances that relief should be granted. There should be no predisposition against granting the judgment to which the parties are entitled. To the contrary, in my view, the parties should be presumptively entitled to an order for judgment on a claim unambiguously addressed by the jury.

[37] This view is consistent with the observation of Justice Taggart in *LeBlanc v. Penticton (City)*, [1981] 5 W.W.R. 289; 28 B.C.L.R. 179 (C.A.) at para. 27, that the

sub-rule in question (then 41(2)) does not require a retrial in every case where there are conflicting answers, but only in those cases where, because of the conflicting answers, judgment cannot be pronounced on the findings. I would say, similarly, that a retrial is only necessary in relation to those claims for relief that have not been addressed by the jury or cannot be answered because of inconsistency in the verdict.

[38] I agree with the appellant's argument that there are strong policy reasons for reading the Rules in such a manner, so as to permit the judge to save whatever verdict may be salvageable from problematic answers.

[39] In my view the first question, whether either party is entitled to judgment in respect of some but not all of the claims for relief in the notice of civil claim, must be answered in the affirmative. The respondent in his notice of civil claim alleges negligence on the part of the appellant. The appellant in his response to civil claim pleads contributory negligence and relies on the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333. The respondent seeks, in addition to damages, such other relief as the court seems just. In light of the pleadings and the jury's answers to questions put to them, the parties are entitled to an order apportioning liability for damages, to be assessed in proportion to the degree to which the jury found each at fault unless it is not in the interests of justice in the circumstances to grant partial judgment.

[40] The manner in which we should answer that question, whether, in the circumstances, partial judgment should have been granted, hinges, in part, upon whether the trial judge exercised a discretion in this case and, if so, the degree of deference owed to that decision. In addressing this question we must bear in mind the observations of LeBel J. in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 43:

> 43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v.*

2016 BCCA 477 (CanLII)

> *Pelech*, [1987] 1 S.C.R. 801, at p. 814 15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

[41] The scope of deference for discretionary decisions was canvassed in *Cochrane v. Insurance Corp. of British Columbia* in the following passages:

> [20] A case frequently referred to in this jurisdiction on appellate review of the exercise of judicial discretion is *Creasey v. Sweny,* [1942] 3 W.W.R. 65, 57 B.C.R. 457 (C.A.) [cited to W.W.R.], in which McDonald C.J.B.C. said, at 66:
>
> > To reverse in this case, I think I would be to depart from the practice laid down through long years, not only in the other Courts, but in this Court itself. I feel fortified in the view I have expressed not only by the cases cited but by the judgment of the Lord Chancellor in *Osenton & Co. v. Johnston* (1941) 110 L.J.K.B. 420, 57 T.L.R. 515, referred to by my brother Sloan during the argument. There the Lord Chancellor said at 424:
> >
> > > "The law as to the reversal by the Court of Appeal of an order made by the Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations…then the reversal of the order on appeal may be justified."
>
> [21] In *Taylor v. Vancouver General Hospital*, [1945] 3 W.W.R. 510, 62 B.C.R. 42 (C.A.) [cited to W.W.R.], Bird J.A. succinctly stated the scope of appellate review on the exercise of discretion (at 517):
>
> > … [A]n Appellate Court will not assume to substitute its own discretion for the discretion already exercised by the Judge, or otherwise to interfere with such an order, unless it reaches the clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice [citations omitted].

2016 BCCA 477 (CanLII)

[42] The trial judge's reasons touch only briefly on the question whether an order on apportionment of liability may be made. The consideration of that issue in its entirety is found at para. 22 of the judgment:

> [22] I have concluded that I am bound by the considered decision of my brother Weatherill J. in *Kalsi*. Although severance may be ordered in many cases before trial, this is not an appropriate case to have issues that are largely dependent on credibility decided by different triers of fact.

[43] In my view, for the following reasons, we should not defer to that decision.

[44] First, to the extent the trial judge was bound by comity to follow *Kalsi,* which in my view erroneously reads the relevant sub-rules, the foundation for the judgment is undermined.

[45] It is unclear whether the trial judge considered *Kalsi* to leave him with a discretion to enter partial judgment in relation to liability alone, but he did expressly address the role of the assessment of credibility in the case and appears to have weighed that in the balance. If *Kalsi* leaves room for the exercise of a discretion it is too small. The judgment in *Kalsi* suggests that an order apportioning liability in these circumstances should not be granted in the absence of extraordinary, exceptional or compelling reasons. In my view, that test is inconsistent with the rule and results in the relevant factors being given inappropriate weight.

[46] Second, I am of the view, for reasons set out below, that the trial judge erred in concluding it was open to him to grant judgment in relation to liability and quantum without a jury. That erroneous view must have played a significant role in the decision not to accept the jury's apportionment of liability, because the trial judge was of the view that doing so would not necessitate a new trial. That misapprehension of the consequences of his order further vitiates the decision not to enter partial judgment.

[47] Last, I agree with the appellant's submission that factors that may render a partial judgment unfair or unjust, such as the possibility of inconsistency, confusion, or uncertainty are not significant in this case. The liability case was not complicated.

2016 BCCA 477 (CanLII)

The appellant was backing his vehicle out of a parking spot into a T-intersection in a parking lot when the respondent, turning left in the intersection, drove into the back of the appellant's vehicle. The appellant, a passenger in the appellant's vehicle, an independent witness and the respondent testified. There was relatively little conflict in the evidence. Neither driver noticed the other vehicle moving toward a collision until immediately before, or at, the moment of impact. Neither the parties nor the witnesses could testify with confidence to the speed of the appellant's vehicle. The respondent claimed to be moving very slowly at impact. He testified the appellant suggested at the scene that he would pay to repair the damage to his own vehicle, leading the respondent to understand he took responsibility for the accident. The appellant denied making that statement, testifying that there was a telephone discussion after the fact about responsibility for the accident and he told the respondent he would let the Insurance Corporation of British Columbia decide the issue. In any event, even the respondent did not suggest there was an express admission of liability. The witnesses gave generally consistent accounts about how the accident happened.

[48] In his instructions to the jury, the trial judge discussed the jury's role in assessing credibility but the only specific conflicts in the evidence he identified related to the extent of the appellant's damages and he properly instructed the jury that the tasks of considering liability and apportioning liability were distinct from the assessment of damages.

[49] Not only was there no significant conflict in the evidence with respect to the accident, counsel did not invite the jury to reject as unworthy of credit either party's respective account of how the accident happened.

[50] In my view, in the circumstances of this case, the parties were entitled to have an order entered effecting the jury's apportionment of liability and the objectives of the Rules would be served by the granting of the order sought by the appellant.

2016 BCCA 477 (CanLII)

Continuation

[51] Sub-rules (11) and (12) are applicable when an event occurs that would require a trial with a jury to be retried. They permit a judge in limited circumstances to continue the trial. They are applicable in cases where a trial "would be retried" and inapplicable in circumstances where the Rules provide, as they do in sub-rules (7) and (8), that an action (or part thereof) "must be retried".

[52] Both sub-rules (11) and (12) speak of a continuation and, by implication, speak to events that have occurred to prevent the case from being completed. Neither rule by its plain reading appears to contemplate a judge substituting his own judgment for that of the jury following the closure of the parties' cases and the verdict:

> **Continuing trial without jury**
>
> (11) If, for any reason other than the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.
>
> **Trial may continue without jury**
>
> (12) If, by reason of the misconduct of a party or the party's lawyer, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose lawyer's conduct, is complained of, may continue the trial without a jury.

[53] The respondent says this Court's consideration of the precursor of sub-rule (12) in *Leslie* is not determinative because sub-rule (12) clearly has nothing to do with the failure of a jury to answer questions, can only refer to misconduct before the jury's verdict, and therefore can only refer to events that occur in the course of a trial. Sub-rule (11), on the other hand, is broad enough to encompass errors by the jury and the circumstances described in sub-rules (7) and (8) that might demand a retrial. I would not accede to that argument.

[54] The decision in *Leslie* is clearly founded upon the view that it cannot be said that a trial is continuing after a jury has rendered a verdict. As Hall J.A. noted at para. 23:

2016 BCCA 477 (CanLII)

> [23] …This rule by its terms clearly contemplates that any such application must be brought prior to the conclusion of the trial proceedings before the jury. That necessarily follows in my opinion from the language "may continue the trial without a jury".

[55] I am of the opinion that the same may be said of both sub-rules (11) and (12). The contrary view expressed by Catliff J. in *Rusche* does not convince me otherwise.

[56] I would not accede to the argument that the judgment in *Leslie* was *per incuriam* or founded upon an erroneous view expressed by Skipp J. in *Crookshanks v. Adamic*. Justice Hall recognized in *Leslie* that the question of the required timing of an application under the relevant rule had not been settled by any previous authority from this Court and addressed the issue as of first instance. The passages from the decision in *Cuthbertson v. Moryson* the respondent says ought to have been considered by this Court in *Leslie*, were obiter. They were made by Spencer J. in a judgment *dismissing* an application to set aside a jury verdict. No authority was cited by Spencer J. for the proposition in question and it cannot be said to be a persuasive authority that was not considered in *Leslie.*

[57] In *Chapelski,* cited by the respondent, Hinkson J. (as he then was), referring to what was then Rule 41(6), now Rule 12-6(11), noted the same distinction drawn in *Leslie* between a continuation and a retrial:

> [24] Counsel for the defendants argued that this rule contemplates the situation where a trial continued after the discharge of the jury. Such a situation would not, in my view, be a retrial.

[58] In my view, the scheme established by the Rules, as described in *Leslie*, provides for the retrial of claims in the circumstances described in sub-rules (7) and (8), after problematic jury verdicts and for the continuation of trials before a judge alone in *distinct circumstances that would otherwise have required a retrial*, described in sub-rules (11) and (12). The Rules do not permit a judge alone to continue a case after a jury verdict.

2016 BCCA 477 (CanLII)

[59] I would not accede to the argument that, notwithstanding the Rules, the trial judge had inherent jurisdiction to assess damages after rejecting the jury's verdict as inconsistent. The manner in which the judge should proceed in the face of an inconsistent or perverse verdict is set out in the Rules. As Justice Karakatsanis observed in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, citing the analysis of Justice McLachlin (as she then was) in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725:

> [23] It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures...

[60] That rule is reflected in the judgments in *Brophy v. Hutchinson*, 2003 BCCA 21; *Lines v. W & D Logging Co. Ltd.,* 2009 BCCA 107; and *Fan v. Chana*, 2011 BCCA 516, where Justice Levine noted at para. 61: "It is inappropriate to invoke inherent jurisdiction to justify a decision that is contrary to the principles guiding the application of the Rules."

[61] The limits to that broad proposition have been considered recently by this Court in *Bea v. The Owners, Strata Plan LMS 2138*, 2015 BCCA 31, where the distinction between rules that purport to restrict the court's core functions and rules that describe how discretion should be exercised is canvassed. In my view, it is consistent with the judgment in that case to find that the rules in question here, which have the effect of structuring the court's exercise of its powers, do not restrict the court in the exercise of its core functions and effectively preclude the judge from substituting his assessment of the evidence for that of the jury.

Conclusion

[62] Paradoxically, although the Rules did not permit the judge to assess damages following the discharge of the jury, there is authority for the proposition that this Court may remit the matter to the trial judge for such an assessment.

[63] In *Johnson v. Laing*, 2004 BCCA 364, the trial judge dismissed an application to reject a jury verdict despite the fact the award was clearly inordinately low. The jury was dismissed, an order was entered and the plaintiff was told his only option

2016 BCCA 477 (CanLII)

was to appeal. This Court accepted the appellant's submission that, given s. 9(1)(c) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, provides that the Court may make or give any additional order that it considers just, we may order a trial judge to assess damages in a personal injury case where it is just to do so and unjust to require a second lengthy and costly retrial before another jury. Southin J.A. dealt with the question as follows:

> [154] The appellant submits that the Court may remit the case to the court below for the learned trial judge to assess the damages or that the Court may do so itself.
>
> [155] For their part, the respondents submit that the Court may do so itself, but if the Court remits the cause to the court below, it must be for a new trial by jury...
>
> [156] This question turns on s. 9(1) of the *Act* which does differ in its wording from the provisions *in pari materia* in the 1959 Rules and the provisions in force when the authorities cited by the respondents in paragraph 25 were decided.
>
> [157] I have concluded, although not without some hesitation, that s. 9(1)(c) does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.
>
> [158] Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.

[64] In *Fast*, this Court suggested that the order made in *Johnson* should rarely be made and should not be used to override a party's right to a jury trial. Justice Lowry held:

> [15] In my respectful view, however, the unusual disposition of the appeal from an unreasonable jury verdict in that case, that was seen to be dictated by the circumstances, should not be seen as a determination that this Court should no longer order that an action be retried where a jury's verdict on an assessment of damages cannot stand. Much of the importance that has long been attached to litigants being entitled to have a jury adjudicate their dispute, if they wish, would be lost.

2016 BCCA 477 (CanLII)

[65] That approach is reflected in the earlier judgment of Southin J.A. in *Networth Industries Ltd. v. Cape Flattery (The)* (1998), 61 B.C.L.R. (3d) 357 (C.A.), where she stated at para. 7:

> …If there have been errors in the charge, in the admission of evidence, or the rejection of evidence which are of such significance as to justify interference with the jury's conclusions, the proper course, except in extraordinary circumstances, is to remit the whole case for a new trial. There is a reason for that. When a litigant chooses to have his case tried by a jury, it is by a jury it must be tried.

[66] In this case, however, it should be borne in mind that the plaintiff respondent sought a jury trial and is now content to have the trial judge assess damages (over the objection of the appellant). The plaintiff will recover a small percentage of his damages. There has been one lengthy trial. Justice and efficiency both demand that the assessment of damages be expedited. It is clearly in the parties' interests to have damages assessed expeditiously on the basis of the evidence led at trial.

[67] I would allow the appeal, order that judgment be entered apportioning liability between the appellant and the respondent in proportion to their fault as determined by the jury and remit the question of damages to the trial judge for assessment.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Goepel"

2016 BCCA 477 (CanLII)

CanLII

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130

Date:	1995-07-20
File number:	24216
Other citations:	24 OR (3d) 865 — 184 NR 1 — 126 DLR (4th) 129 — 84 OAC 1 — 25 CCLT (2d) 89 — 30 CRR (2d) 189 — [1995] CarswellOnt 396 — EYB 1995-68609 — JE 95-1495 — [1995] SCJ No 64 (QL) — [1995] ACS no 64 — 56 ACWS (3d) 495
Citation:	Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, <https://canlii.ca/t/1frgn>, retrieved on 2021-05-08
Most recent unfavourable mention:	Nazerali v. Mitchell, 2018 BCCA 104 (CanLII) […] In addition, **Hill is distinguishable** in the sense that the award of aggravated damages was upheld solely on the basis of the defendant's misconduct, including events which took place after the trial (see paras. 192 to 195). […]

Hill *v.* Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

Morris Manning and
the Church of Scientology of Toronto *Appellants*

v.

S. Casey Hill *Respondent*

and

The Attorney General for Ontario, the Canadian Civil Liberties Association, the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, the Book and Periodical Council, the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association *Interveners*

Indexed as: Hill *v.* Church of Scientology of Toronto

File No.: 24216.

1995: February 20; 1995: July 20.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Application -- Libel and slander -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Whether Crown attorney's action for damages "government action" -- Whether Charter applies -- Canadian Charter of Rights and Freedoms, s. 32(1).

Libel and slander -- Common law of defamation -- Canadian Charter of Rights and Freedoms -- Whether common law of defamation complies with values underlying Charter -- Whether "actual malice" rule should be adopted.

Libel and slander -- Defences -- Qualified privilege -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Whether defence of qualified privilege available.

Libel and slander -- Damages -- General damages -- Aggravated damages -- Punitive damages -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Counsel and Church found jointly liable for general damages -- Church found liable for aggravated and punitive damages -- Whether cap should be imposed on general damages in defamation cases -- Whether damage awards should stand.

The appellant M, accompanied by representatives of the appellant Church of Scientology, held a press conference on the courthouse steps. M, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent, a Crown attorney. The notice of motion alleged that the respondent had misled a judge and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or his imprisonment. At the contempt proceedings, the allegations against the respondent were found to be untrue and without foundation. He thereupon commenced an action for damages in libel against the appellants. Both appellants were found jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000. This judgment was affirmed by the Court of Appeal. The major issues raised in this appeal are whether the common law of defamation is consistent with the *Canadian Charter of Rights and Freedoms* and whether the jury's award of damages can stand.

Held: The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The respondent's action for damages does not constitute government action within the meaning of s. 32 of the *Charter*. The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. Reputation is an integral and fundamentally important aspect of every individual; it exists for everyone quite apart from employment. The appellants impugned the character, competence and integrity of the respondent himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. The fact that the respondent's suit may have been funded by the Ministry does not alter his constitutional status or cloak his personal action in the mantle of government action. Further, even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack.

The common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. In its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or

alter it. The common law strikes an appropriate balance between the twin values of reputation and freedom of expression. The protection of reputation is of vital importance, and consideration must be given to the particular significance reputation has for a lawyer. Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. Further, reputation is intimately related to the right to privacy, which has been accorded constitutional protection. The "actual malice" rule should not be adopted in Canada in an action between private litigants. The law of defamation is not unduly restrictive or inhibiting. Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of individuals to protect their reputation.

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. The privilege is not absolute, however, and can be defeated if the dominant motive for publishing the statement is actual or express malice. Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes any indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created. Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. The fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.

The traditional common law rule with respect to reports on documents relating to judicial proceedings is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. Prior to holding the press conference M had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. The fact that the proper documents were not filed until the next morning should not defeat the qualified privilege which attached to this occasion. M's conduct, however, far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against the respondent. As an experienced lawyer, M ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on the respondent's professional integrity. M failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated. The press conference was held on the courthouse steps in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed the respondent in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize M's conduct as amounting to actual malice, it was certainly high-handed and careless and exceeded any legitimate purpose the press conference may have served. His conduct therefore defeated the qualified privilege that attached to the occasion.

When properly instructed, jurors are uniquely qualified to assess the damages suffered by the plaintiff. An appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure. General damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation. No cap should be placed on general damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. Second, at the time the cap was placed on non-pecuniary damages in personal injury cases, their assessment had become a very real problem for the courts and for society as a whole, which is not the case with libel actions. The award of $300,000 by way of general damages was justified in this case. Both appellants published the notice of motion. All persons

who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort, and it would thus be wrong in law to have a jury attempt to apportion liability for general damages between the joint tortfeasors. The reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion, Scientology was aware that the allegations it was making against the respondent were false, yet it persisted with the contempt hearings, as did M. At the conclusion of the hearings, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. Although M withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself, and Scientology did not withdraw its plea until the hearing of the appeal. Finally, the manner in which the respondent was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. The factors that a jury may properly take into account in assessing aggravated damages include whether there was a withdrawal of the libellous statement made by the defendant and an apology tendered, whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time the libel was published. In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. Every aspect of this case demonstrates the very real and persistent malice of Scientology.

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. Unlike compensatory damages, punitive damages are not at large, and consequently courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose, as they did in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive.

Per L'Heureux-Dubé J.: Cory J.'s reasons were generally agreed with, except with respect to the scope of the defence of qualified privilege. The common law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the *Charter*. There is accordingly no need to amend or alter it or, in particular, to adopt the "actual malice" rule. The defence of qualified privilege, however, is not available with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken. The defence is available only with respect to reports of judicial proceedings. While there is a right to publish details of judicial proceedings before they are heard in open court, such publication does not enjoy the protection of qualified privilege if it is defamatory.

Cases Cited

By Cory J.

Not followed: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); **referred to:** *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229; *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170; *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211; *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654;

Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Re British Columbia Government Employees' Union*, 1983 CanLII 572 (BC SC), [1983] 6 W.W.R. 640; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Sweeney v. Patterson*, 128 F.2d 457 (1942), cert. denied 317 U.S. 678 (1942); *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *Boucher v. The King*, 1950 CanLII 2 (SCC), [1951] S.C.R. 265; *Cherneskey v. Armadale Publishers Ltd.*, 1978 CanLII 20 (SCC), [1979] 1 S.C.R. 1067; *United States of America v. Cotroni*, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *Globe and Mail Ltd. v. Boland*, 1960 CanLII 2 (SCC), [1960] S.C.R. 203; *Derrickson v. Tomat* (1992), 1992 CanLII 8669 (BC CA), 88 D.L.R. (4th) 401; *De Libellis Famosis* (1605), 5 Co. Rep. 125a, 77 E.R. 250; *King v. Lake* (1679), Hardres 470, 145 E.R. 552; *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Vogel v. Canadian Broadcasting Corp.*, 1982 CanLII 801 (BC SC), [1982] 3 W.W.R. 97; *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; *Barr v. Matteo*, 360 U.S. 564 (1959); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986); *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011; *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1; *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743; *Adam v. Ward*, [1917] A.C. 309; *McLoughlin v. Kutasy*, 1979 CanLII 39 (SCC), [1979] 2 S.C.R. 311; *Horrocks v. Lowe*, [1975] A.C. 135; *Taylor v. Despard*, 1956 CanLII 124 (ON CA), [1956] O.R. 963; *Netupsky v. Craig*, 1972 CanLII 19 (SCC), [1973] S.C.R. 55; *Douglas v. Tucker*, 1951 CanLII 54 (SCC), [1952] 1 S.C.R. 275; *Sun Life Assurance Co. of Canada v. Dalrymple*, 1965 CanLII 9 (SCC), [1965] S.C.R. 302; *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339; *Canadian Newspapers Co. v. Canada (Attorney General)*, 1988 CanLII 52 (SCC), [1988] 2 S.C.R. 122; *Walker v. CFTO Ltd.* (1987), 1987 CanLII 126 (ON CA), 59 O.R. (2d) 104; *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975; *Ley v. Hamilton* (1935), 153 L.T. 384; *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229; *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267; *Jill Fishing Ltd. v. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (QL); *Cassell & Co. v. Broome*, [1972] 1 All E.R. 801; *Blackshaw v. Lord*, [1983] 2 All E.R. 311; *Sutcliffe v. Pressdram Ltd.*, [1990] 1 All E.R. 269; *Carson v. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577; *Lawson v. Burns*, 1976 CanLII 1499 (BC SC), [1976] 6 W.W.R. 362; *Kerr v. Conlogue* (1992), 1992 CanLII 924 (BC SC), 65 B.C.L.R. (2d) 70; *Egger v. Chelmsford*, [1965] 1 Q.B. 248.

By L'Heureux-Dubé J.

Not followed: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); **referred to:** *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836; *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326.

Statutes and Regulations Cited

Act to amend the Courts of Justice Act, 1984, S.O. 1989, c. 67, s. 4.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 32(1).

Constitution Act, 1982, s. 52.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(1).

Crown Attorneys Act, R.S.O. 1990, c. C.49.

Criminal Code, R.S.C., 1985, c. C-46, ss. 490(15), 504.

Libel and Slander Act, R.S.O. 1990, c. L.12.

Marriage Act, R.S.O. 1980, c. 256, s. 20(2).

Ministry of the Attorney General Act, R.S.O. 1990, c. M.17.

Authors Cited

Australia. Law Reform Commission. Report No. 11. *Unfair Publication: Defamation and Privacy*. Canberra: Australian Government Publishing Service, 1979.

Barrett, David A. "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 *Cal. L. Rev.* 847.

Barron, Jerome A. "Access to the Press -- A New First Amendment Right" (1966-67), 80 *Harv. L. Rev.* 1641.

Bezanson, Randall P. "Libel Law and the Realities of Litigation: Setting the Record Straight" (1985), 71 *Iowa L. Rev.* 226.

Bollinger, Lee C. "The End of New York Times v Sullivan: Reflections on Masson v New Yorker Magazine", [1991] *Sup. Ct. Rev.* 1.

Brown, Raymond E. *The Law of Defamation in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1994 (loose-leaf).

Canadian Daily Newspaper Association. Response to *A Consultation Draft of the General Limitations Act* (September 1991).

Carter-Ruck on Libel and Slander, 4th ed. By Peter F. Carter-Ruck, Richard Walker and Harvey N. A. Starte. London: Butterworths, 1992.

Christie, George C. "Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches" (1976), 75 *Mich. L. Rev.* 43.

Epstein, Richard A. "Was *New York Times v. Sullivan* Wrong?" (1986), 53 *U. Chi. L. Rev.* 782.

Gatley on Libel and Slander, 8th ed. By Philip Lewis. London: Sweet & Maxwell, 1981.

Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings, 4th ed. By Richard O'Sullivan. London: Sweet & Maxwell, 1953.

Hawreluk, David. "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 *L. Soc. Gaz.* 119.

Ireland. Law Reform Commission. *Report on the Civil Law of Defamation*. Dublin: Law Reform Commission, 1991.

Lepofsky, M. David. "Making Sense of the Libel Chill Debate: Do Libel Laws `Chill' the Exercise of Freedom of Expression?" (1994), 4 *N.J.C.L.* 169.

Leval, Pierre N. "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" (1988), 101 *Harv. L. Rev.* 1287.

Lewis, Anthony. "*New York Times v. Sullivan* Reconsidered: Time to Return to `The Central Meaning of the First Amendment'" (1983), 83 *Colum. L. Rev.* 603.

London, Martin. "The `Muzzled Media': Constitutional Crisis or Product Liability Scam?". In *At What Price? Libel Law and Freedom of the Press*. New York: Twentieth Century Fund, 1993.

McLellan, A. Anne, and Bruce P. Elman. "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361.

Salmond and Heuston on the Law of Torts, 20th ed. By R. F. V. Heuston and R. A. Buckley. London: Sweet & Maxwell, 1992.

United Kingdom. *Report of the Committee on Defamation*. London: H.M.S.O., 1975.

Veeder, Van Vechten. "The History and Theory of the Law of Defamation" (1903), 3 *Colum. L. Rev.* 546.

Waddams, S. M. *The Law of Damages*, 2nd ed. Toronto: Canada Law Book, 1991 (loose-leaf).

APPEAL from a judgment of the Ontario Court of Appeal (1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129, affirming a judgment of the Ontario Court of Justice (General Division) awarding the respondent damages for libel against the appellants. Appeal dismissed.

Bryan Finlay, *Q.C.*, and *Christopher J. Tzekas*, for the appellant Morris Manning.

Marc J. Somerville, *Q.C.*, and *R. Ross Wells*, for the appellant the Church of Scientology of Toronto.

Robert P. Armstrong, *Q.C.*, and *Kent E. Thomson*, for the respondent.

Lori Sterling and *Hart Schwartz*, for the intervener the Attorney General for Ontario.

Robert J. Sharpe and *Kent Roach*, for the intervener the Canadian Civil Liberties Association.

Edward M. Morgan, for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council.

Peter W. Hogg, *Q.C.*, and *Brian MacLeod Rogers*, for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association.

The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 CORY J. -- On September 17, 1984, the appellant Morris Manning, accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

2 At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal: (1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129.

I. Factual Background

3 As in all actions for libel, the factual background is extremely important and must be set out in some detail. At the time the defamatory statements were made, Casey Hill was employed as counsel with the Crown Law Office, Criminal Division of the Ministry of the Attorney General for the Province of Ontario. He had given advice to the Ontario Provincial Police ("OPP") regarding a warrant obtained on March 1, 1983 which authorized a search of the premises occupied by Scientology. During the execution of the search warrant on March 3 and 4, 1983, approximately 250,000 documents, comprising over 2 million pages of material, were seized. These documents were stored in some 900 boxes at an OPP building in Toronto.

4 Immediately following the seizure, Scientology retained Clayton Ruby to bring a motion to quash the search warrant and to seek the return of the seized documents. Casey Hill, who had gained experience and special skill in the area of search and seizure, acted as counsel for the Crown.

5 The litigation commenced on March 7, 1983 and continued throughout 1983 and 1984. On July 11, 1984, Osler J. ruled that solicitor-and-client privilege applied to 232 of the seized documents he had reviewed and ordered that they remain sealed pending further order of the court. Several sealing orders and endorsements were ultimately made by Justices of the Supreme Court of Ontario.

6 Throughout this period, Casey Hill dealt frequently with Clayton Ruby and other counsel for Scientology in connection with various matters ranging from the trivial to the significant. They were invariably resolved in a spirit of co-operation and professional courtesy, even in those situations where the parties proceeded with contested motions.

7 In March of 1983, Scientology retained Charles Campbell to make an application to Rosemarie Drapkin, the Deputy Registrar General of the Ministry of Consumer and Commercial Relations, requesting that its president, Earl Smith, be granted the authorization to solemnize marriages pursuant to s. 20(2) of the *Marriage Act*, R.S.O. 1980, c. 256. One year later, Scientology commenced an application for judicial review of Rosemarie Drapkin's failure to approve that application.

8 Rosemarie Drapkin believed that it would help her to assess the application if she could review the seized documents. To that end, Kim Twohig, a solicitor in the Civil Division of the Crown Law Office, approached Casey Hill in July 1984. He advised her that there was a motion outstanding before Osler J. for an order quashing the search warrant and that access would only be granted if a court order was obtained pursuant to s. 490(15) (formerly 446(15)) of the *Criminal Code*, R.S.C., 1985, c. C-46. He explained that there had been several interim rulings in this matter and stated that "this was probably the type of case where the judge hearing such an application would want notice given to Scientology".

9 During the last week of July 1984, Casey Hill travelled to Nassau to meet with the Attorney General of the Bahamas in respect of an ongoing criminal investigation. In the course of a telephone conversation, Kim Twohig conveyed to Casey Hill the urgent need she had to gain access to the documents as a date had been fixed to hear Scientology's application for judicial review. Casey Hill testified that he told Kim Twohig that her *Criminal Code* application would have to be served on the Crown Law Office, Criminal Division in the usual fashion to obtain its consent.

10 Kim Twohig prepared the necessary materials, including the notice of motion and an affidavit of Rosemarie Drapkin, and obtained the requisite consent from James Blacklock of the Crown Law Office, Criminal Division. The application was then filed in Weekly Court on July 30, 1984 with the assistance of Jerome Cooper, a solicitor with the Ministry of Consumer and Commercial Relations. No notice was given to Scientology. The following day, a consent order granting access to all of the seized documents was issued by Sirois J. in chambers without submissions from counsel.

11 In her testimony at the trial of this action, Kim Twohig agreed that she alone made the decision not to provide notice to Scientology of her application. She testified that she assumed that the presiding judge would determine whether notice was necessary or appropriate. It was only later that she realized that the order of Sirois J. might provide access to sealed documents.

12 By letter dated August 22, 1984, Rosemarie Drapkin wrote to Charles Campbell concerning Scientology's application and advised that she had "reviewed certain documents relating to the Scientology organization which were seized pursuant to the search warrant" issued on March 1, 1983. Attached to the letter was a list of 89 documents, some of which had purportedly been sealed by order of Osler J. It was this information which raised the concern of Scientology and its legal advisers.

13 In response, Clayton Ruby wrote a somewhat precipitous and very aggressive letter to the Solicitor General of Ontario dated August 28, 1984. In it he accused the OPP of acting "as if there were no rule of law" and of "simply ignoring solicitor/client privilege and making a mockery of the courts". He called for a "full investigation" and demanded disciplinary action be taken "against everyone involved". Clayton Ruby was not aware of the order of Sirois J. at that time. He simply assumed that those involved had acted improperly.

14 As early as September 5, 1984, Clayton Ruby, along with other counsel and representatives of Scientology, decided that what had occurred was "disgraceful and shocking" and constituted contempt. They arrived at this conclusion without having taken any steps to ensure the accuracy of their impressions.

15 In a letter addressed to Casey Hill dated September 6, 1984, Clayton Ruby asked for Casey Hill's assistance in obtaining information regarding the circumstances under which the order of Sirois J. had been granted and why Scientology had not received notice of the application. He requested a response within five days. It should be noted that at the time this letter was written, Clayton Ruby was a Bencher of the Law Society and Vice-Chairman of the Law Society's Discipline Committee.

16 The letter implied that there could be disciplinary proceedings brought before the Law Society of Upper Canada and that a contempt action might be instituted. Not surprisingly, it was given serious consideration by Casey Hill and others at the Ministry of the Attorney General. Hill sought the advice of his Director, Howard Morton. Morton wrote a letter to Ruby stating that in light of the serious nature of the allegations, he would not be able to reply within the five-day period imposed by Ruby.

17 On September 6 and 7, 1984, Michael Code (then an associate of Clayton Ruby) telephoned Casey Hill, Jerome Cooper and Kim Twohig to find out how access to the privileged documents had been obtained. They all conveyed a similar version of the past events and assured him that the sealed documents were not opened but rather that unsealed copies must have been examined. Code conceded in cross-examination that everyone he spoke to was cooperative.

18 On September 11, 1984, however, without making any further inquiries and without awaiting the reply from Casey Hill and Howard Morton, Ruby retained the appellant Morris Manning to advise Scientology in respect of possible contempt proceedings. On September 13, 1984, representatives of Scientology met with Morris Manning, Charles Campbell, Clayton Ruby, Michael Code and an articling student at Ruby's office. A decision was made to commence an application for criminal contempt against both Casey Hill and Jerome Cooper. Morris Manning testified that a critical piece of information which prompted him to bring the contempt application was the characterization by Michael Code of Casey Hill's attitude during their conversation. Casey Hill had allegedly said that if the Church missed sealing all copies of the privileged documents it was "too bad". In Morris Manning's opinion, this demonstrated a contemptuous attitude towards the court. He reached this conclusion without ever speaking to Casey Hill or any of the others involved in the incident such as Rosemarie Drapkin, Kim Twohig, James Blacklock, Jerome Cooper or Detective Inspector Ormsby, the senior officer of the OPP responsible for the investigation of Scientology. Nor had Morris Manning interviewed those representatives of Scientology who were directly involved in the sealing of the documents.

19 The evidence adduced at the contempt hearing clearly established that Casey Hill played no part in the application before Sirois J. and had nothing to do with the execution or filing of the consent on behalf of the Attorney General for Ontario. In fact, he was only informed of any difficulties associated with the order of Osler J. in late August 1984, when he received a telephone call from Detective Inspector Ormsby. At that time, Ormsby advised him that Rosemarie Drapkin had attended at the OPP building in which the seized documents were held with the order of Sirois J., but that she was denied access to the sealed documents. The sealed documents were never opened. What Rosemarie Drapkin may have seen were unsealed copies of the sealed documents that were probably located in different boxes than the sealed originals.

20 Between September 13 and 17, 1984, Morris Manning prepared a notice of motion for the contempt application returnable in Weekly Court some time in early January 1985. During this time, he did not make any attempt to determine what was being done with the seized documents or to ascertain whether any continuing breach of privilege was occurring.

(A) *The "Enemy Canada" File*

21 Long before he gave advice to the OPP in connection with the search and seizure of documents which took place on March 3 and 4, 1983, Casey Hill had become a target of Scientology's enmity. Over the years, he had been involved in a number of matters concerning Scientology's affairs. As a result, it kept a file on him. This was only discovered when the production of the file was ordered during the course of this action. The file disclosed that from approximately 1977 until at least 1981, Scientology closely monitored and tracked Casey Hill and had labelled him an "Enemy Canada". Casey Hill testified that from his experience, persons viewed by Scientology as its enemies were "subject to being neutralized".

(B) *The Press Conference*

22 In the file of Charles Campbell there was a note dated September 10 or 11, 1984 which made reference to a press conference to be held the following Monday, September 17, 1984. It appears, then, that before it had even consulted Morris Manning, Scientology intended to call a press conference

23 The press conference was organized by Earl Smith. He contacted a number of media organizations, including CFTO-TV, CBC television and *The Globe and Mail* and invited them to the event which was to be held in front of Osgoode Hall. Morris Manning was appearing on that day before the Court of Appeal in an unrelated matter and attended the press conference in his barrister's gown.

24 He testified that he answered a number of questions concerning the contempt proceedings and then, at the request of the media, read a passage from the notice of motion for the television cameras. Copies of the notice of motion were distributed to the media along with a typewritten document, prepared by Scientology, entitled "Chronology of Events Leading to Contempt Motion".

25 The notice of motion in essence alleged that Casey Hill had participated in the misleading of Sirois J. and that he had participated in or aided and abetted others in the opening and inspection of documents which to his knowledge were sealed by Osler J.

26 On the evening of September 17, 1984, the CFTO broadcast was seen by an audience of approximately 132,000 people. The text of the broadcast is set out in Appendix A to these reasons. The CBC broadcast was seen by approximately 118,000 people. The text is found in Appendix B. The following morning, an article appeared in *The Globe and Mail* entitled "Motion of Contempt Launched by Church". Approximately 108,000 copies of the edition containing this article were distributed. The article is reproduced in Appendix C. All three publications repeated the allegations made in the notice of motion.

(C) *The Felske Memorandum*

27 Patricia Felske is a Scientologist who had attended at the offices of the OPP on a regular basis since March 1983 for the purpose of reviewing the seized materials and ensuring that the privileged documents were sealed. Between August 29, 1984, and September 27, 1984, she, along with other representatives from Scientology, opened the sealed envelopes and verified their contents against photocopies of the documents that Rosemarie Drapkin had examined. Their purpose was to determine whether Ms. Drapkin had been granted access to the restricted materials.

28 On September 17, 1984, the day of the press conference, the Scientology investigation was well advanced and neither then nor later was there any indication that Drapkin gained access to sealed documents. Scientology and Manning nevertheless proceeded with the press conference before any conclusive findings had been made on this issue.

29 On November 2, 1984, Patricia Felske prepared a brief summary of her findings, entitled "Time Track Re: Solicitor and Client Privileged Documents", which she sent to Clayton Ruby, Charles Campbell, Morris Manning and Diane Martin, another of Scientology's lawyers. In it she concluded that "[t]here was no evidence to support any allegation that the sealed envelopes had been tampered with by the OPP" (emphasis added).

(D) *The Contempt Trial*

30 The contempt trial was heard by Cromarty J. for 11 days beginning the next Monday, November 5, 1984. Morris Manning and Charles Campbell had carriage of the proceedings on behalf of Scientology. A number of witnesses were called by them, including Clayton Ruby, Michael Code, Kim Twohig, Rosemarie Drapkin, James Blacklock, Detective Inspector Ormsby and four other members of the OPP who had direct responsibility for the seized documents.

31 Following the presentation of Scientology's case, Cromarty J. dismissed the application on a motion for non-suit on December 7, 1984: 13 W.C.B. 231. He held that there was no evidence that Casey Hill

participated in any stage of the application made before Sirois J. or that he should have been aware of any need for further inquiry into Kim Twohig's actions.

32 From the contents of the Felske Memorandum, which only came to light at the trial of the present action, it is evident that prior to the start of the contempt hearing, Scientology was well aware that no sealed envelopes had been opened. Yet, it still proceeded with a contempt prosecution against Casey Hill.

33 Morris Manning testified that he never received the Felske Memorandum and conceded that if he had been aware of it, he would have been obliged to disclose it to Casey Hill. However, on the weekend prior to the start of the contempt trial, Morris Manning was briefed by Charles Campbell. At trial, both Campbell and Ruby acknowledged that they had received the Felske Memorandum. In addition, Campbell testified that all important information concerning the prosecution was shared with everybody involved. It might be inferred that this would include Manning.

34 Further, Morris Manning met with Patricia Felske and two other representatives of Scientology during the weekend prior to the hearing of the contempt motion. However, he testified that they were not interviewed for the purpose of giving evidence at the contempt trial nor were they called to do so. Cromarty J. characterized the failure to call these individuals as "a most eloquent omission".

35 There was another equally eloquent omission. The OPP officers who were called by Scientology to testify were not asked to produce the sealed envelopes they were directed to bring with them to court. If they had, it would have been obvious that the envelopes had not been tampered with.

(E) *The Attempt to Disqualify Casey Hill from the Search and Seizure Proceedings*

36 As stated earlier, Scientology made an application in March 1983 to quash the search warrant which the OPP had used to seize its documents. This application was commenced before Osler J. prior to September 17, 1984, but was adjourned until the completion of the contempt proceedings. Throughout this time, Casey Hill represented the Crown as lead counsel.

37 The application was resumed on December 18, 1984. By that time, the contempt charges had been dismissed as unfounded and this libel action had been commenced. Casey Hill continued to represent the Crown but made a full disclosure of all the relevant circumstances to Osler J. He submitted that the proceedings involved the interpretation and application of legal principles rather than the exercise of prosecutorial discretion and, as a consequence, his ability to act as responding counsel was not impaired.

38 Scientology, nevertheless, moved to disqualify Casey Hill on the ground that occasions might arise where he would have to exercise a discretion as to the production of a document and as to the significance to be attached to it. Scientology contended that this could reflect adversely upon it and, in due course result in a favourable consideration of Casey Hill's libel suit. Scientology was essentially suggesting that Casey Hill would use his position as Crown counsel to further his private interests. This was a serious attack on his professional integrity which added to the sting of the libel uttered to that point.

39 Osler J. emphatically rejected these arguments. He stated that it was fundamentally important for the Crown to "proceed courageously in the face of threats and attempts at intimidation or in the face of proceedings that have been found to be groundless but have obviously had the effect of harassment".

(F) *Pleas of Justification*

40 On February 18, 1985, Scientology delivered its statement of defence in this action. Notwithstanding the findings contained in the Felske Memorandum prepared by its own members, and the conclusion reached by Cromarty J. in the contempt hearing, Scientology entered a plea of justification.

41 Scientology also put forward as true an allegation that Casey Hill directed and supervised the OPP in the opening and reviewing of 20 boxes of documents which had been sealed by order of Linden J. This was found by the Court of Appeal to constitute a separate allegation of contempt and a further attack upon the integrity of Casey Hill in the performance of his duties as Crown counsel.

42 Scientology maintained its plea of justification throughout the trial and did not withdraw it until the first day of the hearing before the Court of Appeal on December 6, 1993, some nine years after the original libel.

43 Morris Manning delivered his statement of defence on April 1, 1985, and also asserted a plea of justification which he did not withdraw until the week prior to the commencement of the trial. He persisted in this plea despite the decision of Cromarty J. dismissing the motion to commit Casey Hill for contempt and despite the overwhelming evidence indicating that the allegations made against Hill were false.

(G) *The Conduct of Scientology at Trial*

44 Scientology continued its attack against Casey Hill throughout the trial of this action, both in the presence of the jury and in its absence. More than once, it reiterated the libel even though it knew that these allegations were false. Clearly, it sought to repeatedly attack Casey Hill's moral character. Some examples are set out below.

(1) The Cross-Examination of Casey Hill

45 Counsel for Scientology subjected Casey Hill to a lengthy cross-examination which the Court of Appeal correctly described as a "skilful and deliberate attempt at character assassination" (p. 452 O.R.). Counsel suggested that Casey Hill often improperly coached his witnesses and took the same approach with respect to his own testimony at the libel trial. It was insinuated that Casey Hill was an untrustworthy person who would breach his undertakings as he had done in this case in relation to the sealed documents. Attempts were also made to blame him for the failure to give notice to Scientology concerning the application before Sirois J. even though he had been vindicated seven years earlier by Cromarty J.

(2) The "Veiled Threat" Against Clayton Ruby

46 Michael Code testified that during the course of his conversation with Casey Hill on September 6, 1984, the latter had made a veiled threat against Clayton Ruby which he described in the following terms:

> He [Casey Hill] suggests we may receive an ominous reply to Clay's complaints. He is awaiting a report back from the police. What he said to me was something to the effect that there was a police investigation of Mr. Ruby's conduct and basically, you better watch it. [Emphasis added.]

47 When Casey Hill was called in reply, he denied making any such threat or using the word "ominous" during the conversation. Rather, he testified that he had used the word "omnibus" in reference to a combined reply to the letters that Ruby sent to the Solicitor General and to himself.

48 In cross-examination, counsel for Scientology accused Casey Hill of fabricating this version of events. Not only did counsel suggest that Hill had lied on the stand, but the general tenor of his questioning implied that Hill was so unprincipled that he would use the power of the state to intimidate an opposing lawyer.

(3) The Closing Address to the Jury by Counsel for Scientology

49 During his closing address, counsel for Scientology contended that Casey Hill had demonstrated feigned and insincere emotion when he described his reaction to seeing the publication of the CFTO broadcast on the evening of September 17, 1984. He suggested to the jury that it may have been nothing more than a "skilled performance to tug at your heartstrings" in order to influence the verdict.

(H) *The Events Following the Verdict of the Jury*

50 The day after the jury's verdict, on October 4, 1991, Scientology republished the libel in a press release delivered to the media. A few weeks later, it issued another press release attacking the verdict of the jury as "outrageous" and "so exorbitant and so grossly out of proportion that it was influenced more by *L.A. Law* than Canadian legal tradition". Shortly thereafter, it proceeded with a motion before Carruthers J. to adduce evidence which, it contended, would bear "directly on the credibility and reputation of the plaintiff S. Casey Hill". That motion was later withdrawn.

II. Judgments Below

(A) *Trial by Jury* (Carruthers J. presiding)

51 This action for damages for libel was commenced on December 14, 1984. The trial before Carruthers J. and a jury lasted from September 3, 1991 until October 3, 1991. The questions posed to the jury and their answers were as follows:

SPECIAL VERDICT

QUESTIONS

A. With Respect to the Defendant, Morris Manning

1. Did the CBC broadcast refer to the plaintiff?

A. Yes

2. Did Morris Manning instruct, authorize or consent to the publication of the Notice of Motion at the press conference?

A. Yes

B. With Respect to Both Defendants

3. Are the words complained of in the CFTO and CBC broadcasts on September 17, 1984, the Globe & Mail article on September 18, 1984 and the Notice of Motion defamatory of the plaintiff?

A. Yes

4. If the answer to Question 3 is "yes", what general damages, if any, is the plaintiff, Casey Hill, entitled to from the defendants, The Church of Scientology of Toronto and Morris Manning?

A. $300,000

5. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, Morris Manning, in addition to any general damages already assessed, and if so, in what amount?

A. Nil

6. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, The Church of Scientology of Toronto, in addition to any general damages already assessed, and if so, in what amount?

A. $500,000

7. If your answer to Question 3 is "yes", is he entitled to any punitive damages from the defendant, The Church of Scientology of Toronto, and if so, in what amount?

A. $800,000

52 Following the verdict, the appellants made a motion before Carruthers J. requesting that he completely disregard the jury's assessment of damages because it was "outrageous, exorbitant and entirely out of proportion to the sting of the defamation" ((1992), 1992 CanLII 7516 (ON SC), 7 O.R. (3d) 489, at p. 497). Carruthers J. concluded that the jury was properly instructed as to the object and purpose of each head of damage and that there was evidence upon which the jury could have reached a conclusion that it was entitled to award damages under each of the three heads.

53 Carruthers J. refused to "invade the province of the jury" in order to make his own assessment of the damages (at p. 502). He noted that since both defendants vigorously opposed each of the several motions on behalf of the plaintiff to discharge the jury, it was not open to them to suggest that he fix damages himself.

(B) *Court of Appeal* (1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385

54 The Court of Appeal, in its careful and extensive reasons, rejected the appellants' allegation that the common law of defamation violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. It did so for two reasons. First, the court held that it was nothing more than a "bare assertion" of unconstitutionality which could not support their constitutional challenge (at p. 414). Second, the court held that even if the constitutional challenge could be resolved in the absence of an evidentiary foundation, the appellants failed to show that the action for damages commenced by Casey Hill was a form of "government action" which was necessary in order to attract the application of the *Charter*. The court rejected the argument that Casey Hill's position as a public figure implicated the government in whatever action he pursued. It also dismissed the submission that the government funding of his action was relevant to this question.

55 The Court of Appeal then considered the argument that interpreting the common law in a manner consistent with the *Charter* required the adoption of the "actual malice" standard of liability set out in the reasons of the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, Brennan J. held that public officials could only collect damages for statements concerning their fitness for office in circumstances where they could demonstrate that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). After noting that the common law concept of malice involves an assessment of different factors, such as animosity, hostility, ill will and spite, the court concluded that the adoption of the rule in *New York Times v. Sullivan*, *supra*, would result in a major change to the common law that was neither necessary nor merited. It found that the existing rule was historically based on sound policy reasons which recognized the importance of the protection of the reputation of individuals who assume the responsibilities of public officials.

56 The appellants also submitted that the trial judge erred in ruling that the circumstances of the press conference did not constitute an occasion of qualified privilege and in declining to charge the jury with respect to that defence. The Court of Appeal found that under the common law, qualified privilege attached only to the publication of documents read or referred to in open court. It was opposed to conferring a privilege on a press conference held for the purpose of disseminating to the public details of a pending legal proceeding at a time when no document in connection with that legal proceeding had yet been filed in any court office. In rejecting the argument that this Court's judgment in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, superseded the common law rule, the court stated that, while there is a right to publish details of judicial proceedings before they are heard in open court, "such publication does not enjoy the protection of qualified privilege if it is defamatory" (p. 427).

57 On the subject of general damages, the Court of Appeal examined the libellous statement, the circumstances of its publication and its effect on Casey Hill. It found that "[t]he false statements can be seen as little short of allegations of a criminal breach of trust" (p. 437), "calculated to engender in the minds of those who learned of [them] that they were very serious and entirely credible" (p. 438). Accordingly, they justified a very substantial award of general damages to compensate Casey Hill for the damage to his reputation and the injury to his feelings. This, it was held, should be the result even though he had received several promotions and appointments by the time of trial.

58 With respect to aggravated damages, the Court of Appeal examined the circumstances existing prior to, at the time of and following the publication of the libel. It concluded that the jury was entitled to find that its award for general damages was not large enough to provide adequate solatium to Casey Hill for the aggravation of his injury which was caused by Scientology's malicious libel and reprehensible conduct.

59 The court then turned its attention to the issue of punitive damages and concluded as follows at p. 459:

> What the circumstances of this case demonstrated beyond peradventure to the jury was that Scientology was engaged in an unceasing and apparently unstoppable campaign to destroy Casey Hill and his reputation. It must have been apparent to the jury that a very substantial penalty was required because

> Scientology had not been deterred from its course of conduct by a previous judicial determination that its allegations were unfounded nor by its own knowledge that its principal allegation [that the sealed documents had been opened] was false.

60 The court also observed that it would not interfere with the award of punitive damages on the ground that Scientology persisted in its attack on Casey Hill's reputation even after the jury's verdict.

61 On the question of pre-judgment interest, the court concluded that since the appellants had accommodated counsel for Casey Hill in order to permit him to participate in a Royal Commission, it would be unfair to charge them with prejudgment interest for this period. Also, in considering whether Morris Manning should bear an equal portion of the costs of the trial with Scientology, the court pointed out that much of the trial was devoted to the plea of justification pursued by Scientology alone. Furthermore, the majority of the damages were awarded against Scientology. Therefore, the court concluded that the trial costs should be apportioned, with Morris Manning paying only 30 percent of the assessed costs and Scientology the balance. However, it added that the parties should remain jointly and severally liable for all costs with each having a claim over against the other for any amount paid beyond their apportioned liability.

III. Analysis

62 Two major issues are raised in this appeal. The first concerns the constitutionality of the common law action for defamation. The second relates to the damages that can properly be assessed in such actions.

63 Let us first review the appellants' submissions pertaining to defamation actions. The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract *Charter* scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the *Charter*. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability articulated by the Supreme Court of the United States in the case of *New York Times v. Sullivan*, *supra*.

64 In addition, the appellant Morris Manning submits that the common law should be interpreted so as to afford the defence of qualified privilege to a lawyer who, acting on behalf of a client, reads and comments in public upon a notice of motion which he believes, in good faith, has been filed in court, and which subsequently is filed. Let us consider first whether the *Charter* is directly applicable to this case.

(A) *Application of the Charter*

65 The appellants have not challenged the constitutionality of any of the provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The question, then, is whether the common law of defamation can be subject to *Charter* scrutiny. The appellants submit that by reason of his position as a government employee, Casey Hill's action for damages constitutes "government action" within the meaning of s. 32 of the *Charter*. In the alternative, the appellants submit that, pursuant to s. 52 of the *Constitution Act, 1982*, the common law must be interpreted in light of *Charter* values. I will address the s. 32 argument first.

(1) Section 32: Government Action

66 Section 32(1) reads:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

67 In *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, McIntyre J., with regard to the application of the *Charter* to the common law, stated at pp. 598-99:

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. . . . It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]

68 La Forest J., writing for the majority in *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the *Charter* to the actions of government. He said this at p. 262:

> The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

69 La Forest J. warned that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system" (p. 263). He expressed the very sage warning that this "could strangle the operation of society" (p. 262). See also McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 367, cited in *Dolphin Delivery Ltd.*, *supra*, at p. 597.

70 The appellants argue that at all material times Casey Hill was an agent of the Crown, acting on behalf of the Attorney General of Ontario, and that the defamatory statements which are the subject of the present action were made in relation to acts undertaken by him in that capacity. They further submit that Casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the *Charter*.

71 These submissions cannot be accepted. They have no legal, evidentiary or logical basis of support. Casey Hill's constitutional status for the purpose of the application of the *Charter* should not be determined by the nature of the allegations made against him. Rather, the determination of whether state involvement existed is dependent upon the circumstances surrounding the institution of the libel proceedings.

72 The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such a distinction. Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.

73 In order to establish the requisite government action for *Charter* scrutiny, the appellants argue that it is easy to distinguish between a janitor working in a government building who is simply an employee and a Crown Attorney who is an agent of the state. It is said that when a person who is clearly an agent of the state acts, he or she is acting for or on behalf of the state. I cannot accept this proposition. There are a significant number of public servants who represent the Crown in any number of ways. While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too extensive and the functions of the officials too varied to draw any effective line of distinction. The experience in the United States following the decision in *New York Times v. Sullivan*, *supra*, is instructive in this regard. That case modified the common law in relation to defamation suits brought by public officials and touched off an intense debate with respect to who might be designated as a public official or figure rather

than a private person. See, for example, G. C. Christie, "Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches" (1976), 75 *Mich. L. Rev.* 43.

74 There is no doubt that Crown Attorneys exercise statutory powers as agents of the government. See *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17; *Crown Attorneys Act*, R.S.O. 1990, c. C.49; and the *Criminal Code*, s. 504. Therefore, as McIntyre J. pointed out in *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, at p. 209, they benefit from the protection of any immunity which attaches to their office. However, they may become personally liable when they exceed their statutory powers. By extension, actions taken by Crown Attorneys which are outside the scope of their statutory duties are independent of and distinct from their status as agents for the government. Such was the case here.

75 The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. See *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, at pp. 311-14. Further, the fact that Casey Hill's suit may have been funded by the Ministry of the Attorney General does not alter his constitutional status or cloak his personal action in the mantle of government action. See *McKinney*, *supra*, at p. 269.

76 The private nature of these proceedings is apparent, as well, from the respondent's statement of claim, and particularly from the allegation contained in para. 19 that the defamatory statements:

> . . . constituting as they do statements of the most serious professional misconduct by the Plaintiff, have damaged his professional reputation and brought him into public scandal, odium and contempt, by reason of which the Plaintiff has suffered damage.

77 The position taken by the appellants at trial is also revealing. Scientology argued that Casey Hill was proceeding with the litigation to advance his "secondary private interest", that he was trying to "get back at [Scientology] for prosecuting him for contempt", and that the libel action amounted to "a risk-free opportunity . . . to pick up some easy money".

78 The personal nature of the libel action is also evident in the cross-examination of Casey Hill concerning his work with the OPP. At that time, counsel for Scientology stated that the libel action had nothing "to do with damages suffered by Mr. Hill. It's part of an attack motivated by the attitude towards the Church of Scientology, motivated by the fact that as a result of the contempt prosecution he is removed from prosecuting".

79 In my opinion, the appellants have not satisfied the government action requirement described in s. 32. Therefore, the *Charter* cannot be applied directly to scrutinize the common law of defamation in the circumstances of this case.

80 Even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack. This Court has stated on a number of occasions that it will not determine alleged *Charter* violations in the absence of a proper evidentiary record. See, for example, *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357. In light of the conclusion that the government action requirement of s. 32 has not been met, I need not address this issue. Yet, I feel a brief comment is necessary because of the light it sheds on the manner in which the appellants have conducted themselves in this litigation.

81 The action was commenced in December 1984. By the fall of 1985, the appellants were made aware of the requirement to adduce constitutional evidence. In dismissing the appellants' pre-trial motion with respect to the constitutional issues, O'Driscoll J. clearly indicated that the constitutional questions must be decided upon evidence adduced at trial. The date for trial was fixed in January 1991 and confirmed in June. On September 4, 1991, two days into the proceedings, counsel for Scientology sought to adjourn the trial on the grounds that there was "a possibility of . . . seeking to call expert evidence in regard to the freedom of speech issue in this trial". Counsel conceded that he had not prepared or delivered any reports of experts in respect to

this issue, and indeed, that he had not yet even consulted with experts. He simply wanted the adjournment in order to "explore that area". The request for adjournment was very properly dismissed.

82 There is no government action involved in this defamation suit. It now must be determined whether a change or modification in the law of defamation is required to make it comply with the underlying values upon which the *Charter* is founded.

(2) Section 52: *Charter* Values and the Common Law

(a) *Interpreting the Common Law in Light of the Values Underlying the Charter*

(i) Review of the Decisions Dealing With the Issue

83 This Court first considered the application of the *Charter* to the common law in *Dolphin Delivery*, *supra*. In that case, the issue was whether an injunction to restrain secondary picketing violated the *Charter* freedom of expression. It was held that, pursuant to s. 32(1) of the *Charter*, a cause of action could only be based upon the *Charter* when particular government action was impugned. Therefore, the constitutionality of the common law could be scrutinized in those situations where a case involved government action which was authorized or justified on the basis of a common law rule which allegedly infringed a *Charter* right. However, *Dolphin Delivery*, *supra*, also held that the common law could be subjected to *Charter* scrutiny in the absence of government action. McIntyre J. wrote, at pp. 592-93, that, in light of s. 52(1) of the *Constitution Act, 1982*, "there can be no doubt" that the *Charter*, applies to the common law:

> The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit*". . . . To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act. [Emphasis in *Dolphin Delivery*.]

In emphasizing that the common law should develop in a manner consistent with *Charter* principles, a distinction was drawn between private litigants founding a cause of action on the *Charter* and judges exercising their inherent jurisdiction to develop the common law. At page 603 this was written:

> Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals. [Emphasis added.]

84 Since 1986, this Court has subjected the common law to *Charter* scrutiny in a number of situations where government action was based upon a common law rule: *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654; and *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835. However, *Dolphin Delivery*, *supra*, remains the only case which has closely examined the application of the *Charter* in the context of purely private litigation. Nevertheless, it is helpful to review the different approaches which have been suggested in those cases in order to better appreciate which principles should properly apply in cases of private litigation.

85 In *R. v. Salituro*, *supra*, the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing

social values and with the values enshrined in the *Charter*. At page 670, Iacobucci J., writing for the Court, held:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Further, at p. 675 this Court held:

> Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

86 Unlike the present appeal and the decisions of this Court in *B.C.G.E.U.*, *Swain*, and *Dagenais*, the common law rule in *Salituro* was not alleged to infringe a specific *Charter* right. Rather, it was alleged to be inconsistent with those fundamental values that provide the foundation for the *Charter*. Although the Court in *Salituro* considered whether Parliament had, through the *Evidence Act*, intended to preserve the common law rule, it did not undertake an analysis similar to that which would be required under s. 1 to determine if the *Charter* breach was justifiable. Rather, it proceeded to balance, in a broad and flexible manner, the conflicting values. The reasons examined the origins of the impugned common law rule and the justifications which had been raised for upholding it. These concerns were weighed against the *Charter*'s recognition of the equality of women and, more specifically, against the concept of human dignity which inspires the *Charter*. It was held that the values which were set out in the common law rule did not represent the values of today's society which are reflected in the provisions of the *Charter*.

87 In *B.C.G.E.U.*, *supra*, McEachern C.J.B.C. on his own motion issued an injunction against a union picketing in front of the courthouse: 1983 CanLII 572 (BC SC), [1983] 6 W.W.R. 640. It was held that the common law rule giving rise to the picketing injunction breached s. 2(*b*). The breach was then found to be justified following a traditional s. 1 analysis.

88 Subsequently, in *R. v. Swain*, *supra*, Lamer C.J. observed that the s. 1 analysis, which has evolved since *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, may not always provide the appropriate framework by which to evaluate the justifications for maintaining a common law rule. In *R. v. Swain*, the Crown raised the insanity defence, over objections by the accused, on the basis of the common law rule which authorized such a procedure. That rule was found to violate s. 7 of the *Charter*. At pages 978-79, Lamer C.J. held:

> Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.
>
> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to

> reformulate the common law rule so as to avoid[421] an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*.

Nevertheless, in *R. v. Swain*, the formal s. 1 analysis was undertaken since *Oakes*, *supra*, provided a familiar structure for analysis, the constitutional questions were stated with s. 1 in mind and the Court had the benefit of extensive argument on s. 1.

89 Finally, in *Dagenais*, *supra*, the CBC challenged a publication ban which prevented them from airing one of their programmes. It was held that where the common law rule on publication bans conflicted with *Charter* values, the common law rule must be varied in such a manner as to enable the Court to consider both the objective of a publication ban and the proportionality of the ban's effect on protected *Charter* rights. Without adopting a formal s. 1 analysis, it was held that this approach "clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*" (p. 878).

90 In light of these cases, then, it remains to be determined what approach should be followed when, in the context of private litigation with no government action involved, a common law rule is alleged to be inconsistent with the *Charter*.

(ii) Approach That Should Be Followed

91 It is clear from *Dolphin Delivery*, *supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. As was said in *Salituro*, *supra*, at p. 678:

> The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.

92 Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

93 When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

94 In *Dolphin Delivery*, *supra*, it was noted that the *Charter* sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a *Charter* right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. While criminal cases present the prime example of government action, challenges to government action can also arise in civil cases. The state's obligation to uphold its constitutional duties is no less pressing in the civil sphere than in the criminal. The two cases of *B.C.G.E.U.*, *supra*, and *Dagenais*, *supra*, present a very specific type of "government action" in the civil context. In both cases, the Court was called upon to consider the operations of the Court and to determine the extent of its own jurisdiction to consider matters which were essentially public in nature. The cases did not involve strictly private litigation. Therefore, they must be approached with caution when considering what analysis should be applied in purely private civil litigation.

95 Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the

application of the *Charter* beyond that established by[422] s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.

96 Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature.

97 When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* "challenge" in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

98 Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* "challenge" to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.

99 With that background, let us first consider the common law of defamation in light of the values underlying the *Charter*.

(b) *The Nature of Actions for Defamation: The Values to Be Balanced*

100 There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

(i) Freedom of Expression

101 Much has been written of the great importance of free speech. Without this freedom to express ideas and to criticize the operation of institutions and the conduct of individual members of government agencies, democratic forms of government would wither and die. See, for example, *Reference re Alberta Statutes,* 1938 CanLII 1 (SCC), [1938] S.C.R. 100, at p. 133; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p. 306; and *Boucher v. The King*, 1950 CanLII 2 (SCC), [1951] S.C.R. 265, at p. 326. More recently, in *Edmonton Journal*, *supra*, at p. 1336, it was said:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

102 However, freedom of expression has never been recognized as an absolute right. Duff C.J. emphasized this point in *Reference re Alberta Statutes*, *supra*, at p. 133:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means . . . "freedom governed by law." [Emphasis added.]

See also *Cherneskey v. Armadale Publishers Ltd.*, 1978 CanLII 20 (SCC), [1979] 1 S.C.R. 1067, at pp. 1072 and 1091.

103 Similar reasoning has been applied in cases argued under the *Charter*. Although a *Charter* right is defined broadly, generally without internal limits, the *Charter* recognizes, under s. 1, that social values will at times conflict and that some limits must be placed even on fundamental rights. As La Forest J. explained in *United States of America v. Cotroni*, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469, at p. 1489, this Court has adopted a flexible approach to measuring the constitutionality of impugned provisions wherein "the underlying values [of the *Charter*] must be sensitively weighed in a particular context against other values of a free and democratic society . . .".

104 In *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, for example, s. 319(2) of the *Criminal Code* was found to be justified as a reasonable limit on the appellant's freedom to spread falsehoods relating to the Holocaust and thus to promote hatred against an identifiable group. Dickson C.J. adopted the contextual approach to s. 1 and concluded that, since hate propaganda contributed little to the values which underlie the right enshrined under s. 2(*b*), namely the quest for truth, the promotion of individual self-development, and participation in the community, a restriction on this type of expression might be easier to justify than would be the case with other kinds of expression.

105 In *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452, the obscenity provisions of the *Criminal Code*, s. 163, were questioned. It was held, under the s. 1 analysis, that pornography could not stand on an equal footing with other kinds of expression which directly engage the "core" values of freedom of expression. Further, it was found that the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.

106 Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(*b*). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in *Globe and Mail Ltd. v. Boland*, 1960 CanLII 2 (SCC), [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that `common convenience and welfare of society'". Reliance was placed upon the text *Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings* (4th ed. 1953), at p. 254, wherein the author stated the following:

> It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

See also *Derrickson v. Tomat* (1992), 1992 CanLII 8669 (BC CA), 88 D.L.R. (4th) 401 (B.C.C.A.), at p. 408.

(ii) The Reputation of the Individual

107 The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

108 Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

109 From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code and the Talmud. As the author Carter-Ruck, in *Carter-Ruck on Libel and Slander* (4th ed. 1992), explains at p. 17:

> The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In *Exodus* XXII 28 we find `Thou shalt not revile the gods nor curse the ruler of thy people' and in *Exodus* XXIII 1 `Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness'. There is also a condemnation of rumourmongers in *Leviticus* XIX 16 `Thou shalt not go up and down as a talebearer among thy people'.

110 To make false statements which are likely to injure the reputation of another has always been regarded as a serious offence. During the Roman era, the punishment for libel varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.

111 It was decreed by the Teutons in the *Lex Salica* that if a man called another a "wolf" or a "hare", he must pay the sum of three shillings; for a false imputation of unchastity in a woman the penalty was 45 shillings. In the Normal Costumal, if people falsely called another "thief" or "manslayer", they had to pay damages and, holding their nose with their fingers, publicly confess themselves a liar.

112 With the separation of ecclesiastical and secular courts by the decree of William I following the Norman conquest, the Church assumed spiritual jurisdiction over defamatory language, which was regarded as a sin. The Church "stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animae* of the delinquent". See V. V. Veeder, "The History and Theory of the Law of Defamation" (1903), 3 *Colum. L. Rev.* 546, at p. 551.

113 By the 16th century, the common law action for defamation became commonplace. This was in no small measure due to the efforts of the Star Chamber to eradicate duelling, the favoured method of vindication. The Star Chamber even went so far as to punish the sending of challenges. However, when it proscribed this avenue of recourse to injured parties, the Star Chamber was compelled to widen its original jurisdiction over seditious libel to include ordinary defamation.

114 The modern law of libel is said to have arisen out of the case *De Libellis Famosis* (1605), 5 Co. Rep. 125a, 77 E.R. 250. There, the late Archbishop of Canterbury and the then Bishop of London were alleged to have been "traduced and scandalized" by an anonymous person. As reported by Coke, it was ruled that all libels, even those against private individuals, ought to be sanctioned severely by indictment at common law or in the Star Chamber. The reasoning behind this was that the libel could incite "all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace" (p. 251). It was not necessary to show publication to a third person and it made no difference whether the libel was true or whether the plaintiff had a good or bad reputation. Eventually, truth was recognized as a defence in cases involving ordinary defamation.

115 It was not until the late 17th century that the distinction between libel and slander was drawn by Chief Baron Hale in *King v. Lake* (1679), Hardres 470, 145 E.R. 552, where it was held that words spoken, without more, would not be actionable, with a few exceptions. Once they were reduced to writing, however, malice would be presumed and an action would lie.

116 The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and

recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R. E. Brown writes in *The Law of Defamation in Canada* (2nd ed. 1994), at p. 1-4:

> "(N)o system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation." Some form of legal or social constraints on defamatory publications "are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism." [Footnotes omitted.]

117 Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance. As David Lepofsky suggests in "Making Sense of the Libel Chill Debate: Do Libel Laws `Chill' the Exercise of Freedom of Expression?" (1994), 4 *N.J.C.L.* 169, at p. 197, reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J. in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), who stated at p. 92:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

118 In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. In his essay entitled "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 *L. Soc. Gaz.* 119, David Hawreluk described the importance of a reputation for integrity. At page 121, he quoted Lord Birkett on the subject:

> The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them; but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest . . .

119 Similarly, Esson J. in *Vogel v. Canadian Broadcasting Corp.*, 1982 CanLII 801 (BC SC), [1982] 3 W.W.R. 97 (B.C.S.C.), at pp. 177-78 stated:

> The qualities required of a lawyer who aspires to the highest level of his profession are various, but one is essential. That is a reputation for integrity. The programs were a massive attack upon that reputation. The harm done to it can never be wholly undone, and therefore the stigma so unfairly created will always be with the plaintiff.
>
> When the details of the Vogel affair have faded from memory, what will remain in the minds of many people throughout Canada is a lurking recollection that he was the centre of a scandal which arose out of his conduct in office.

120 Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

121 Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a

person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. In order to undertake the requisite balancing of values, let us first review the change to the existing common law proposed by the appellants.

(c) *The Proposed Remedy: Adopting the New York Times v. Sullivan "Actual Malice" Rule*

122 In *New York Times v. Sullivan*, *supra*, the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that the citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumptions of falsity and malice and place the onus on the plaintiff to prove that, at the time the defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not.

123 At the outset, it is important to understand the social and political context of the times which undoubtedly influenced the decision in *New York Times v. Sullivan*, *supra*. The impugned publication was an editorial advertisement, placed in the appellant's newspaper, entitled "Heed Their Rising Voices". It criticized the widespread segregation which continued to dominate life in the southern states in the late 1950s and early 1960s. Prominent and well respected individuals, including Mrs. Eleanor Roosevelt, lent their name to the advertisement. It communicated information, recited grievances, protested abuses and sought financial support. The group or movement sponsoring the advertisement was characterized by Brennan J. as one "whose existence and objectives are matters of the highest public interest and concern" (p. 266). Black J. described the controversy at the heart of the suit in the following terms at p. 294:

> One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment.

124 The advertisement did not mention by name the plaintiff, who was a white elected commissioner from Montgomery, Alabama. Only 35 copies of the edition of the *New York Times* which carried that advertisement were circulated in Montgomery, and only 394 were circulated in the entire state of Alabama. The trial took place in 1960, in a segregated court room in Montgomery, before a white judge and all-white jury. Damages of $500,000 U.S. were awarded. This would be the current equivalent in Canada of approximately $3.5 million.

125 The Supreme Court, in overturning the verdict, clearly perceived the libel action as a very serious attack not only on the freedom of the press but, more particularly, on those who favoured desegregation in the southern United States. It was concerned that such a large damage award could threaten the very existence of, in Black J.'s words, "an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (p. 294). This concern was intensified by the fact that a second libel verdict of $500,000 U.S. had already been awarded to another Montgomery commissioner against the *New York Times*. In addition, 11 other libel suits, arising out of the same advertisement, were pending against the newspaper.

126 Another motivating factor for this radical change to the common law was the American jurisprudence to the effect that the statements of public officials which came "within the outer perimeter of their duties" were privileged unless actual malice was proved. The rationale behind this privilege was that the threat of damage suits would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties": *Barr v. Matteo*, 360 U.S. 564 (1959), at p. 571. The Supreme Court in the *Sullivan* decision held that analogous considerations supported the protection which it accorded to critics of the government.

(d) *Critiques of the "Actual Malice" Rule*

(i) Comments on the Decision in the United States

127 The "actual malice" rule has been severely criticized by American judges and academic writers. It has been suggested that the decision was overly influenced by the dramatic facts underlying the dispute and has not stood the test of time. See, for example, R. A. Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986), 53 *U. Chi. L. Rev.* 782, at p. 787; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), at p. 767. Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-*Sullivan* era, increased in both number and size of awards. They have, in this way, mirrored the direction taken in other tort actions. See Epstein, *supra*; R. P. Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight" (1985), 71 *Iowa L. Rev.* 226, at pp. 228-29. It has been said that the *New York Times v. Sullivan*, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern. See Christie, *supra*, at pp. 63-64.

128 Perhaps most importantly, it has been argued the decision has shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent. Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm. This is particularly true in cases where the falsity is not seriously contested. See Bezanson, *supra*, at p. 227.

129 Second, it necessitates a detailed inquiry into matters of media procedure. This, in turn, increases the length of discoveries and of the trial which may actually increase, rather than decrease, the threat to speech interests. See D. A. Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 *Cal. L. Rev.* 847, at p. 855.

130 Third, it dramatically increases the cost of litigation. This will often leave a plaintiff who has limited funds without legal recourse. See P. N. Leval, "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" (1988), 101 *Harv. L. Rev.* 1287, at p. 1288; A. Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to `The Central Meaning of the First Amendment'" (1983), 83 *Colum. L. Rev.* 603; M. London, "The `Muzzled Media': Constitutional Crisis or Product Liability Scam?" in *At What Price? Libel Law and Freedom of the Press* (1993), at pp. 17-20.

131 Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse. See L. C. Bollinger, "The End of New York Times v Sullivan: Reflections on Masson v New Yorker Magazine", [1991] *Sup. Ct. Rev.* 1, at p. 6; J. A. Barron, "Access to the Press -- A New First Amendment Right" (1966-67), 80 *Harv. L. Rev.* 1641, at pp. 1657-58.

132 A number of jurists in the United States have advocated a reconsideration of the *New York Times v. Sullivan* standard. These include one of the justices of the Supreme Court who participated in that decision. In *Dun & Bradstreet, Inc.*, *supra*, White J. stated, in a minority concurring opinion with which Burger C.J. concurred on this point, that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation" (p. 767). He went on to state at pp. 767-69:

> In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "(T)here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in `uninhibited, robust, and wide-open' debate on public issues." . . . Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . . Furthermore, when the plaintiff loses, the jury will likely return a

general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests . . .

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "`our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.'" . . .

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results. [Emphasis added.]

133 In the subsequent case of *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986), the majority of the United States Supreme Court refused to grant *certiorari*. Burger C.J. and Rehnquist J. dissented because of their view that the court should re-examine *New York Times v. Sullivan*, *supra*, and "give plenary attention to this important issue" (p. 1187).

(ii) Consideration of the Actual Malice Rule in the United Kingdom

134 The courts in England have refused to adopt the "actual malice" standard. In *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011, the House of Lords considered an action brought by a municipal council against the publisher of a Sunday newspaper. The claim for damages, which was denied, arose from articles concerning the authority's management of its superannuation fund. In his reasons, Lord Keith stated that public interest considerations similar to those underlying the *New York Times v. Sullivan*, *supra*, decision were involved in that it was "of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism" (p. 1017). However, the appropriateness of the "actual malice" standard was not considered and it was not incorporated into the law of England. In fact, Lord Keith stated that if the individual reputation of any of the local councillors had been wrongly damaged by the impugned publication, they could have brought an action for defamation in their personal capacity.

(iii) The Australian Position on Actual Malice

135 The Australian case of *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 (H.C.), considered an action brought by a member of that country's House of Representatives in response to a letter to the editor of a local newspaper which was critical of his views. Although a plurality of the seven judges sitting on the High Court held that the existing law of defamation curtailed the constitutionally protected right to political discussion, it rejected the adoption of the "actual malice" standard, stating at pp. 22-23:

> Even assuming that, in conformity with *Sullivan*, the test is confined to plaintiffs who are public officials, in our view it gives inadequate protection to reputation. . . .
>
> . . . the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

(iv) The Position Taken by International Law Reform Commissions

136 International law reform organizations have also criticized the *New York Times v. Sullivan* rule. The Australian Law Reform Commission's Report No. 11, *Unfair Publication: Defamation and Privacy* (the Kirby Committee Report) (1979), criticized the concept of "public official" on the basis that "a minor elected official or public servant [would be] in a more vulnerable position than a prominent businessman" (p. 252). The

United Kingdom *Report of the Committee on Defamation* (the Faulks Committee Report) (1975), held that the rule "would in many cases deny a just remedy to defamed persons" (p. 169). Finally, the Irish Law Reform Commission's *Report on the Civil Law of Defamation* (the Keane Final Report) (1991), stated that "while the widest possible range of criticism of public officials and public figures is desirable, statements of fact contribute meaningfully to public debate only if they are true" (p. 82).

(e) *Conclusion: Should the Law of Defamation be Modified by Incorporating the Sullivan Principle*?

137 The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

138 The Canadian Daily Newspaper Association indicated, in its response to *A Consultation Draft of the General Limitations Act* (September 1991) at p. 3, that the law of libel is a "carefully-crafted regime" which has "functioned fairly for the media and for complainants for many years". Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of the individuals to protect their reputation. The words of Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, at pp. 745-46, are worth repeating:

> Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

139 None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in *Theophanous*, *supra*, are also not raised in this case and need not be considered.

140 Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

141 In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.

142 Consideration must now be given to the submission made on behalf of Morris Manning that the defence of qualified privilege should be expanded to include reports upon pleadings and court documents that have been filed or are at the point of being filed.

(f) *Should the Common Law Defence of Qualified Privilege be Expanded to Comply with Charter Values*?

143 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

> . . . a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

This passage was quoted with approval in *McLoughlin v. Kutasy*, 1979 CanLII 39 (SCC), [1979] 2 S.C.R. 311, at p. 321.

144 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

145 Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, *supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, 1956 CanLII 124 (ON CA), [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, *supra*, at pp. 323-24, and *Netupsky v. Craig*, 1972 CanLII 19 (SCC), [1973] S.C.R. 55, at pp. 61-62.

146 Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, *supra*, at pp. 13-193 and 13-194; *Salmond and Heuston on the Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at pp. 320-21 in *Adam v. Ward*, *supra*:

> . . . the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

147 In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in *Douglas v. Tucker*, 1951 CanLII 54 (SCC), [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a charge of fraud which had been adjourned until after the election. This Court held that the defendant had an interest in responding to the plaintiff's denial, thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 286).

148 In *Sun Life Assurance Co. of Canada v. Dalrymple*, 1965 CanLII 9 (SCC), [1965] S.C.R. 302, the district manager of the defendant insurance company threatened to resign and take the district agents with him. This Court held that it fell within the scope of the privilege for the company to make certain defamatory comments about the plaintiff in order to dissuade its agents from leaving.

149 The principal question to be answered in this appeal is whether the recitation of the contents of the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

150 The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in *Gatley on Libel and Slander* (8th ed. 1981), at p. 252, in these words:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged.

See, also, *The Law of Defamation in Canada*, *supra*, at pp. 14-35, 14-42; *Carter-Ruck on Libel and Slander*, *supra*, at pp. 140-41.

151 The rationale behind this rule is that the public has a right to be informed about all aspects of proceedings to which it has the right of access. This is why a news report referring to the contents of any document filed as an exhibit, or admitted as evidence during the course of the proceedings, is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. Duff C.J. explained the reasoning for this in *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339, at p. 360:

> The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claims and defence relating only to private transactions; formulated by the parties themselves; in respect of which no judicial action has been taken, and upon which judicial action may never be invoked. It is only when such preliminary statements or the claims or defences embodied in them form the basis or the subject of some hearing before, or some action by, a court or a judicial officer, that their contents can become the object of any real public concern as touching the public administration of justice.

152 In *Edmonton Journal*, *supra*, at pp. 1338-40, I noted that the public scrutiny of our courts by the press was fundamentally important in our democratic society and that s. 2(*b*) protected not only speakers, but listeners as well. This right to report on court proceedings extended to pleadings and court documents filed before trial, since access to these documents served the same societal needs as reporting on trials. Even in private actions, such as those for wrongful dismissal or for personal damages, the public may well have an interest in knowing the kinds of submissions which can be put forward.

153 Both societal standards and the legislation have changed with regard to access to court documents. When the qualified privilege rule was set out in *Shallow*, *supra*, court documents were not open to the public. Today, the right of access is guaranteed by legislative provision, in this case s. 137(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. As well, s. 2(*b*) of the *Charter* may in some circumstances provide a basis for gaining access to some court documents. However, just as s. 137(1) provides for limitations on the right of access to court documents, so too is the s. 2(*b*) guarantee subject to reasonable limits that can be demonstrably justified in a free and democratic society. This Court's reasons in *Canadian Newspapers Co. v. Canada (Attorney General)*, 1988 CanLII 52 (SCC), [1988] 2 S.C.R. 122, provide an illustration of the kind of restriction that has been upheld in relation to information flowing from court proceedings. In that case, the constitutionality of s. 442(3) of the *Criminal Code* was upheld. It imposed a publication ban on the identity of a complainant in sexual assault cases (or any information that might disclose her identity) upon the request of that complainant. There is no need to elaborate further on the scope of access, however, since it does not arise on the facts of this case. It is sufficient to observe that, in appropriate circumstances, s. 2(*b*) may provide the means to gain access to court documents. It follows that the concept of qualified privilege should be modified accordingly.

154 The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference should not defeat the qualified privilege which attached to this occasion.

155 This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

156 The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.

(B) *Damages*

(1) The Standard of Appellate Review

157 The appellants do not contend that the trial judge made any substantive error in his careful directions to the jury. Thus, there is no question of misdirection of the jury or of its acting upon an improper basis or of any jury consideration given to wrongfully admitted or excluded evidence. The sole issue is whether the quantum of the jury's award can stand.

158 Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* (1987), 1987 CanLII 126 (ON CA), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

159 The basis upon which an appellate court can act was very clearly enunciated by Robins J.A. in *Walker*, *supra*. He stated at p. 110 that the court should consider:

> . . . whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

160 The history of this action emphasizes the reasonableness of the jury's verdict. It was the appellants who had always insisted upon the jury assessing damages for the libel. When the jury had retired to consider their verdict, they returned after four hours with the sagacious question: "what if any are realistic maximums that have been assessed by society in recent history?". The trial judge prudently sought the advice of counsel on the question. Counsel for the appellants agreed with the trial judge that no guidance could be given to the jury as to the quantum of damages. The jury was so advised. They deliberated for another five hours and returned the verdict which is the subject matter of this appeal.

161 There can be no doubt that the decision of the trial judge on this issue, which was concurred in by counsel for the appellants, was correct. In Ontario, there is no statutory provision for giving guidelines to a jury on this issue. It is significant that in 1989, when the *Courts of Justice Act* was amended (S.O. 1989, c. 67, s. 4) to permit trial judges and counsel to give guidance to juries concerning damage awards in personal injury actions, no provision was made in the Act pertaining to libel actions or any other type of tort action. It would appear, then, that the legislators specifically left the assessment of damages in libel actions to the jury.

162 The appellants relied upon the case of *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975 (C.A.), to support their position that an appellate court should reduce this award. In that case, however, the English Court of Appeal was acting pursuant to newly enacted legislation. This legislation, passed in 1990, specifically provided that, in cases where the court had the authority to order a new trial on the ground that the damages awarded by a jury were excessive or inadequate, it could, instead of ordering a new trial, substitute a sum for damages which it considered to be proper. This statutory provision led the court in *Rantzen* to modify its approach to the review of a jury's assessment of damages. Therefore, this case is of little use.

163 If guidelines are to be provided to juries, then clearly this is a matter for legislation. In its absence, the standard which must be applied remains that the jury's assessment should not be varied unless it shocks the conscience of the court. With this in mind, let us first consider the jury's assessment of damages.

(2) General Damages

164 It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. See *Ley v. Hamilton* (1935), 153 L.T. 384 (H.L.), at p. 386. They are, as stated, peculiarly within the province of the jury. These are sound principles that should be followed.

165 The consequences which flow from the publication of an injurious false statement are invidious. The television report of the news conference on the steps of Osgoode Hall must have had a lasting and significant effect on all who saw it. They witnessed a prominent lawyer accusing another lawyer of criminal contempt in a setting synonymous with legal affairs and the courts of the province. It will be extremely difficult to correct the impression left with viewers that Casey Hill must have been guilty of unethical and illegal conduct.

166 The written words emanating from the news conference must have had an equally devastating impact. All who read the news reports would be left with a lasting impression that Casey Hill has been guilty of misconduct. It would be hard to imagine a more difficult situation for the defamed person to overcome. Every time that person goes to the convenience store, or shopping centre, he will imagine that the people around him still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

(a) *Should a Cap be Imposed on Damages in Defamation Cases*?

167 The appellants contend that there should be a cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy" of *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267, it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than $100,000.

168 In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.

169 A very different situation is presented with respect to libel actions. In these cases, special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award. Further, a review of the damage awards over the past nine years reveals no pressing social concern similar to that which confronted the courts at the time the trilogy was decided. From 1987 to 1991, there were only 27 reported libel judgments in Canada, with an average award of $30,000. Subsequent to the decision in this case, from 1992 to 1995, there have been 24 reported libel judgments, with an average award of less than $20,000. This later figure does not

include the award in *Jill Fishing Ltd. v. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (S.C.), which involved the assessment of damages for a number of different causes of action. Therefore, there is no indication that a cap is required in libel cases.

170 There is a great difference in the nature of the tort of defamation and that of negligence. Defamation is the intentional publication of an injurious false statement. While it is true that an actual intention to defame is not necessary to impose liability on a defendant, the intention to do so is nevertheless inferred from the publication of the defamatory statement. This gives rise to the presumption of malice which may be displaced by the existence of a qualified privilege. Personal injury, on the other hand, results from negligence which does not usually arise from any desire to injure the plaintiff. Thus, if it were known in advance what amount the defamer would be required to pay in damages (as in the personal injury context), a defendant might look upon that sum as the maximum cost of a licence to defame. A cap would operate in a manner that would change the whole character and function of the law of defamation. It would amount to a radical change in policy and direction for the courts.

171 The courts in England have unequivocally rejected the comparison of libel and personal injury cases. See, for example, *Cassell & Co. v. Broome*, [1972] 1 All E.R. 801 (H.L.), at p. 824; *Blackshaw v. Lord*, [1983] 2 All E.R. 311 (C.A.), at pp. 337, 340; *Sutcliffe v. Pressdram Ltd.*, [1990] 1 All E.R. 269 (C.A.), at pp. 281-82, 289; and *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, *supra*.

172 It is true that in Australia a majority of the High Court held in *Carson v. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577, that some useful reference could be made to personal injury cases in assessing general damages. However, the 4-3 division in the court shows the serious concern which this issue engendered. McHugh J., a member of the minority, wrote (at p. 629):

> Awards in personal injury cases and defamation actions serve different purposes, have different elements and different histories. They are not comparable. I think that it is a mistake to believe that the pain and suffering component of a personal injury award can be isolated from the other components of that award and then compared to an award of compensatory damages in a defamation action.

173 In any event, I would observe that, if the trilogy were to be applied, the value of the cap in 1991 would be approximately $250,000. It follows that even if the appellants' contention on this issue was accepted, the general damages of $300,000 assessed by the jury would come very close to the range said to be reasonable by the appellants.

(b) *Joint Liability for General Damages*

174 Manning complains that the judge erred in refusing to accept his request that the verdict in general damages be rendered separately. He argues that his liability should be limited to the statement he made at the press conference and should not extend to the subsequent circulation of the notice of motion. The trial judge's error, he argues, contributed to the very high award by the jury. This position cannot be accepted.

175 It must be remembered that at trial: a) it was the position of Manning's counsel that Manning and Scientology should be jointly and severally liable for general damages in respect of each of the defamatory statements published by them; b) Scientology admitted that it published each of the defamatory statements at issue in the action; c) Manning admitted that he published each of the defamatory statements with the exception of the notice of motion; and d) the jury specifically found that Manning published the notice of motion.

176 Thus, both Manning and Scientology published the notice of motion. It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. It would thus be inappropriate and wrong in law to have a jury attempt to apportion liability either for general or for special damages between the joint tortfeasors Manning and Scientology. See *Lawson v. Burns*, 1976 CanLII 1499 (BC SC), [1976] 6 W.W.R. 362 (B.C.S.C.), at pp. 368-69; *Gatley on Libel and Slander* (8th ed.), *supra*, at

p. 600. However, this comment does not apply to aggravated damages, which are assessed on the basis of the particular malice of each joint tortfeasor.

(c) *Application of Principles to the Facts Established in this Case*

177 It cannot be forgotten that at the time the libellous statement was made, Casey Hill was a young lawyer in the Crown Law office working in the litigation field. For all lawyers their reputation is of paramount importance. Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel's reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. It matters not that subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher and eventually appointed a trial judge in the General Division of the Court of Ontario. As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt.

178 This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter that he sent and received and in every appearance that he made before the courts of the province of Ontario. He would never know who, as a result of the libellous statement, had some lingering suspicion that he was guilty of misconduct which was criminal in nature. He would never know who might have believed that he was a person without integrity who would act criminally in the performance of his duties as a Crown counsel. He could never be certain who would accept the allegation that he was guilty of a criminal breach of trust which was the essential thrust of the libel.

179 The publication of the libellous statement was very carefully orchestrated. Members of the press and the television media attended at Osgoode Hall in Toronto to meet two prominent lawyers, Morris Manning and Clayton Ruby. Osgoode Hall is the seat of the Court of Appeal and the permanent residence of the Law Society. The building is used as the background in a great many news reports dealing with important cases emanating from the Court of Appeal. In the minds of the public, it is associated with the law, with the courts and with the justice system. Manning went far beyond a simple explanation of the nature of the notice of motion. He took these very public steps without investigating in any way whether the allegations made were true.

180 At the time this press conference was called, Scientology members had been working with the sealed documents for some time and they had not yet discovered any of the sealed documents to have been opened. Yet, Scientology persisted in the publication of this libel against Hill, who was listed in their files as an "enemy".

181 Hill movingly described the effect the reading of the press reports of the press conference had upon him and of viewing the television broadcast. He put it in this way:

> I was sick. I was shocked. I understood from reading it that it related to access to the documents. The type of thing that Mr. Ruby and I had been dealing with over many months, and I was just incredulous.
>
> . . .
>
> I was horrified when I saw it. I had had a long history of dealing with counsel for the Church of Scientology. Small problems, medium-sized problems and very serious problems had been raised between us.
>
> Every effort was made to answer those issues as they came up. When I saw the newscast, I realized that there was really nothing I could do to stop the information from getting out. I thought it was false. I thought it was a very dramatic representation . A well-known lawyer as Mr. Manning was -- and he was gowned.
>
> . . .

And he was standing before the High Court.[436] The indication that I had been involved in opening sealed documents and giving permission was totally false. For me, in seeing it, it was equivalent to saying I was a cheat and that I had obstructed the course of justice. It was an attack on my professional reputation and I had no way of stopping it.

. . .

I also have no way of knowing whether there are people in the community who would be in a position to place some reliance on the fact that regardless of the outcome of the criminal case, Manning, a prominent lawyer, and the Church of Scientology of Toronto, had still expressed a view on September 17th.

182 The factors which should be taken into account in assessing general damages are clearly and concisely set out in *Gatley on Libel and Slander* (8th ed.), *supra*, at pp. 592-93, in these words:

SECTION 1. ASSESSMENT OF DAMAGES

1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

183 There will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed. This can be seen from a further reference to the *Gatley* text at pp. 593-94 where this appears:

1452. Aggravated damages. The conduct of the defendant, his conduct of the case, and his state of mind are thus all matters which the plaintiff may rely on as aggravating the damages. "Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation." "In awarding `aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium. . . that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium."

184 In considering and applying the factors pertaining to general damages in this case it will be remembered that the reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The insidious harm of the orchestrated libel was indeed spread widely throughout the community.

185 The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion before Cromarty J., Scientology was aware that the allegations it was making against Casey Hill were false. Yet, it persisted with the contempt hearings as did Morris Manning. At the conclusion of the contempt hearing, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. The statement of defence alleging justification or truth of the allegation was open for all the public to see. Despite their knowledge of its falsity, the appellants continued to publish the libel. Although Manning withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself. For its part, Scientology did not withdraw its plea of justification until the hearing of the appeal.

Finally, the manner in which Hill was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

186 When all these facts are taken into account there is no question that the award of $300,000 by way of general damages was justified in this case.

(d) *Comparison with Other Libel Cases*

187 At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself". The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

(3) Aggravated Damages

(a) *General Principles*

188 Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:

> Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel*, *supra*, at p. 178; *Kerr v. Conlogue* (1992), 1992 CanLII 924 (BC SC), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard*, *supra*, at p. 975.

191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

(b) *The Application to the Facts of this Case*

192 In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. The existence of the file on Casey Hill under the designation "Enemy Canada" was evidence of the malicious intention of Scientology to "neutralize" him. The press conference was organized in such a manner as to ensure the widest possible dissemination of the libel. Scientology continued with the contempt proceedings although it knew its allegations were false. In its motion to remove Hill from the search warrant proceedings, it implied that he was not trustworthy and might act in those proceedings in a manner that would benefit him in his libel action. It pleaded justification or truth of its statement when it knew it to be false. It subjected Hill to a demeaning cross-examination and, in its address to the jury, depicted Hill as a manipulative actor.

193 It is, as well, appropriate for an appellate court to consider the post-trial actions of the defendant. It will be recalled that Scientology, immediately after the verdict of the jury, repeated the libel, thus forcing the plaintiff to seek and obtain an injunction restraining Scientology from repeating the libel. It did not withdraw its plea of justification until the hearing of the appeal. All this indicates that the award of aggravated damages was strongly supported by the subsequent actions of Scientology.

194 In summary, every aspect of this case demonstrates the very real and persistent malice of Scientology. Their actions preceding the publication of the libel, the circumstances of its publication and their subsequent actions in relation to both the search warrant proceedings and this action amply confirm and emphasize the insidious malice of Scientology. Much was made of their apology tendered at the time of the hearing in the Court of Appeal. There is a hollow ring to that submission when it is remembered that it was not until the fifth day of oral argument before the Court of Appeal that the apology was tendered. Scientology can gain little comfort from such a late and meaningless apology.

195 These damages were awarded solely against Scientology and are based upon the misconduct of that appellant. There is no question of Manning being in any way responsible for these damages. Indeed, there cannot be joint and several responsibility for either aggravated or punitive damages since they arise from the misconduct of the particular defendant against whom they are awarded. See, for example, *Sun Life*, *supra*, at p. 1310; *Egger v. Chelmsford*, [1965] 1 Q.B. 248 (C.A.), at pp. 263 and 265; *Vogel*, *supra*, at p. 171; S. M. Waddams, *The Law of Damages* (2nd ed. 1991), at pp. 11-23 and 11-24. Scientology's behaviour throughout can only be characterized as recklessly high-handed, supremely arrogant and contumacious. There seems to have been a continuing conscious effort on Scientology's part to intensify and perpetuate its attack on Casey Hill without any regard for the truth of its allegations.

(4) Punitive Damages

(a) *General Principles*

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

198 This was the test formulated by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*. In that case, he found that the general damages award of $908,000 was obviously sufficient to satisfy whatever need there was for punishment and deterrence. He found that, in those circumstances, the $50,000 punitive damage award served no rational purpose. The Court of Appeal, in the case at bar, applied the same reasoning and upheld the award of punitive damages.

199 Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

(b) *The Application to the Facts of this Case*

200 There can be no doubt that the conduct of Scientology in the publication of the injurious false statement pertaining to its "enemy" was malicious. Its publication was carefully planned and carried out in a manner which ensured its widest possible dissemination in the most damaging manner imaginable. The allegation made against Hill was devastating. It was said that he had been guilty of breach of trust, breach of a court order and that his conduct and behaviour was criminal. Scientology's actions from the time of publication, throughout the trial, and after the trial decision was rendered constituted a continuing attempt at character assassination by means of a statement which it knew to be false. It was such outrageous conduct that it cried out for the imposition of punitive damages.

201 There might have been some concern that, in light of the award of general and aggravated damages totalling $800,000, there might not be a rational basis for punitive damages. However any lingering doubt on that score is resolved when Scientology's persistent misconduct subsequent to the trial is considered. On the very next day following the verdict, Scientology republished the libel in a press release delivered to the media. It then brought a motion to adduce fresh evidence which it stated would have a bearing "on the credibility and reputation of the plaintiff S. Casey Hill" which, if presented at trial, "would probably have changed the result". Its actions were such that Hill was forced to bring an application for an injunction enjoining Scientology from republishing the libel. In his reasons for granting the injunction, Carruthers J. stated that he was forced to take that action because "no amount awarded on account of punitive damages would have prevented or will prevent the Church of Scientology from publishing defamatory statements about the plaintiff". Even the injunction did not deter Scientology which moved to set it aside. Further, in its notice of appeal of the libel judgment, Scientology alleged that the trial judge had erred in ruling the decision of Cromarty J. in the contempt proceedings was *res judicata* of the issues raised in the libel trial.

202 During the appeal, it was conceded and the evidence and events confirmed that in all likelihood, no amount of general or aggravated damages would have deterred Scientology. Clearly then, this was an appropriate case for an award of punitive damages. Scientology did not withdraw its plea of justification until the first day of the oral argument in the Court of Appeal. Nor was any apology tendered by Scientology until the fifth day of oral argument before the Court of Appeal.

203 The award of punitive damages, therefore, served a rational purpose in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive. Scientology has alleged that the size of the award of punitive damages had a chilling effect on its right to freedom of expression. However as stated earlier, in spite of the slow and methodical progress of this case to trial and appeal, and despite the motion brought six years before the trial which drew attention to the need for evidence, Scientology adduced no evidence as to the chilling effect of the award. In its absence, this argument should not be considered. It may be that different factors will have to be taken into consideration where evidence is adduced and where a member of the media is a party to the action. However, those are considerations for another case on another day.

IV. Disposition

204 The appeal is dismissed with costs.

APPENDIX A

CFTO BROADCAST

The Toronto Church of Scientology has filed charges of contempt of court against two provincial lawyers. The Church believes the lawyers violated a court order by opening sealed documents which were seized last year in a raid on the Church's headquarters. A report from CFTO's Tim Webber:

Webber:

> Eighteen months ago, more than one hundred O.P.P. officers stormed out of three buses and into the offices of the Church of Scientology. They seized hundreds of thousands of documents in two days of searching. Police said they were looking for evidence of tax fraud, consumer fraud and other indictable offences. Many of these seized documents were deemed confidential by the Church. Some they said were confessions between priests and penitents and they convinced a judge to order about two hundred of the documents sealed. Today, lawyers for the Church filed charges alleging that the sealing order has been violated.

Manning:

> The documents were ordered sealed by Mr. Justice Osler, pursuant to a request by counsel, in a very serious matter, and they were opened and revealed to persons whom we say were unauthorized to so do.

Webber:

> The charges are against Jerome Cooper, a lawyer for Consumer and Commercial Relations, and Crown Attorney S. Casey Hill. The documents filed today alleged that the two convinced another Supreme Court Justice to allow the Ministry of Consumer and Commercial Relations to view the sealed documents in the company of O.P.P. officers. One of the lawyers being charged, Jerome Cooper, today told us he had absolutely no comment on the matter. The trial date has already been set for the 17th of January, but lawyers for the Church of Scientology are hoping to convince the defendants and the Court so start even sooner.

APPENDIX B

CBC BROADCAST

The Church of Scientology has filed a suit against two Toronto based Crown Attorneys. The Church had its offices raided by police and documents seized in March of 1983. Lawyers for the Church say those documents were opened and read by persons not authorized to do so.

Manning:

> They were confidential documents which have been ordered sealed by Supreme Court of Ontario Justices which were opened with the permission of counsel for the Crown. And this constitutes, in the opinion of the Church, a contempt of court. We've had a date set in January. But hopefully, we can get a date set earlier with the consent of the Chief Justice of the Trial Division, or the Chief Justice of Ontario on the basis that it's a very important matter. It's important to the administration of justice.

APPENDIX C

GLOBE AND MAIL

The Church of Scientology of Toronto is asking the Supreme Court of Ontario to find a Crown prosecutor and a lawyer with the Ontario Ministry of Consumer and Commercial Relations in contempt of court.

Morris Manning, a lawyer acting for the church, said in an interview yesterday that he has filed a motion asking for S. Casey Hill, a prosecutor with the Ontario Ministry of the Attorney-General, and Jerome Cooper, a lawyer with the Consumer Ministry, to be jailed or fined.

The motion claims that Mr. Cooper misled Mr. Justice Jean-Charles Sirois of the Supreme Court of Ontario into releasing to the Consumer Ministry documents seized by the Ontario Provincial Police in a raid on the Church's headquarters.

The motion says Judge Sirois was not told that many of the documents had been ordered sealed by another Ontario Supreme Court judge while the Church contests the legality of the search warrant used by the O.P.P. in the raid last year.

The motion claims Mr. Hill, who represented the Attorney-General during the search warrant hearings "aided and abetted in the misleading of Mr. Justice Sirois".

A hearing on the motion has been set for January 17.

The following are the reasons delivered by

205 L'HEUREUX-DUBÉ J. -- I have had the advantage of reading the reasons of my colleague Justice Cory and, except on one point, generally agree with them as well as with his disposition of this appeal.

206 First, however, in order to dispel any possible confusion regarding the applicability of the *Canadian Charter of Rights and Freedoms* to the common law, I note that this issue can be easily summarized in the following two principles, both of which were first articulated by McIntyre J. in *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573:

1. The *Charter* does not directly apply to the common law unless it is the basis of some governmental action.

2. Even though the *Charter* does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with *Charter* values. (To the same effect, see *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, and *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836, *per* L'Heureux-Dubé J.)

In other words, the basic rule is that, absent government action, the *Charter* only applies indirectly to the common law.

207 In light of the above, I agree with Cory J. that where the common law is "challenged" on *Charter* grounds, a traditional s. 1 analysis will generally not be appropriate. Instead, "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary" (para. 97). As well, I agree with Cory J. that "the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified" (para. 98). Such an approach is, in my view, consistent with the fact that, absent government action, the *Charter* only applies indirectly to the common law.

208 Applying this approach in the case at hand, I agree with Cory J.'s conclusion that the common law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the *Charter*. Accordingly, I agree with my colleague that there is no need to amend or alter the common law. In particular, I agree that the "actual malice" rule adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should not be adopted into the Canadian common law of defamation.

209 Second, the one issue on which I part company with my colleague concerns the scope of the defence of qualified privilege. Traditionally, this Court has held that the defence of qualified privilege is available with respect to reports of judicial proceedings, but not with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken: *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339. The appellants, however, argue that *Shallow* is no longer good law as it had been overtaken by this Court's more recent decision in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326. My colleague appears to accept this argument. Accordingly, he broadens the scope of the defence of qualified privilege, making it available with respect to reports of pleadings upon which no judicial action has yet been taken. I disagree. In my view, *Shallow* and *Edmonton Journal* are entirely consistent. In this respect, I adopt the following statement from the judgment of the Court of Appeal in the case at hand ((1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385, at p. 427):

> We were urged to extrapolate from *Edmonton Journal* the proposition that the common law of defamation should respect such constitutional forms of expression as the reporting of information pertaining to intended court proceedings by conferring qualified privilege on the occasion of the publication of such reports. With respect, we do not agree. *Edmonton Journal* struck down, in the name of freedom of expression, statutory provisions which sought to inhibit the publication of the details of pending matrimonial and other civil actions. But it by no means follows that the publication of such details should be accorded the mantle of qualified privilege if they are defamatory.

> *Edmonton Journal* and *Gazette Printing* stand together without conflict: there is a right to publish details of judicial proceedings before they are heard in open court, but such publication does not enjoy the protection of qualified privilege if it is defamatory. As Duff J. noted in the extract from p. 364 of *Gazette Printing* set out above, no such privilege is necessary if the statements published are true, and no such privilege is desirable if they are not true.

210 Subject to the above, I would dispose of this appeal as does my colleague Cory J.

Appeal dismissed with costs.

Solicitors for the appellant Morris Manning: Weir & Foulds, Toronto.

Solicitors for the appellant the Church of Scientology of Toronto: Gowling, Strathy & Henderson, Kitchener.

Solicitors for the respondent: Tory Tory DesLauriers & Binnington, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Robert Sharpe and Kent Roach, Toronto.

Solicitors for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council: Davies, Ward & Beck, Toronto.

Solicitors for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association: Blake, Cassels & Graydon, Toronto.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Johnson v. Laing,***
2004 BCCA 364

Date: 20040628
Docket: CA030721

Between:

Kenneth Wesley Johnson

Appellant
(Plaintiff)

And

Allen Tomas Laing, Rentway Ltd. and K.W. Food Distributors Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Oppal

K. R. Beatch and P. K. McMurchy	Counsel for the Appellant
M. P. Ragona, Q.C. and T. C. Jespersen	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia 31st March, 2004
Place and Date of Judgment:	Vancouver, British Columbia 28th June, 2004

Written Reasons by:
The Honourable Madam Justice Southin

Concurred in by:
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Oppal

2004 BCCA 364 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] In this appeal in which the appellant seeks to overturn a jury verdict rendered in January of 2003 of $2,250.00, he having sought damages of nearly $500,000.00 for injuries suffered by him from the negligent driving of the respondent, the issues, as the appellant frames them, are whether the verdict was perverse and whether the learned trial judge, by accepting the verdict and entering judgment thereon, himself committed a reversible error.

[2] Lurking within the issues so framed are other questions:

1. Is a perverse verdict in a civil case an error of law?
2. Is a verdict which is "inordinately" high or low an error of law?

[3] To put it another way, is there any real conceptual difference between that which is "perverse" and that which is "inordinate", or are the two words merely different ways of saying the same thing? To put it yet another way, is attributing different legal outcomes to whichever of the two labels one chooses, specious? Another question is whether, in this context, "perverse" and "unreasonable" are synonymous. I note that *The Shorter Oxford English Dictionary* (1973), in its definition of "perverse", says:

2004 BCCA 364 (CanLII)

> **c.** *spec.* Of a verdict: against the weight of evidence or the direction of the judge on a point of law.

and gives, as the first date for that use, 1854. In ***Allcock v. Hall***, *infra* para. 104, that great judge, Lindley L.J., speaks of a verdict as "unreasonable and almost perverse", from which one can infer that the two words are not synonymous.

[4] Throughout this judgment, the emphases in quotations are mine unless otherwise noted.

THE PROCEEDINGS BELOW

[5] On 1st April, 1997, the appellant, then either 32 or 33, who was riding his bicycle in Abbotsford, was thrown off his bicycle by the respondent Laing driving into him. At the trial, liability was conceded. The appellant asserted that he had suffered a permanent injury to his spine which disabled him from any employment from the time of the accident to the trial, a period of some six years, and permanently impaired his post-trial earning capacity.

[6] The verdict would be reasonable only if the appellant's injuries were trivial and transitory.

[7] But the learned trial judge did not, on the evidence, consider that the plaintiff's injuries were trivial and transitory.

2004 BCCA 364 (CanLII)

[8] In his charge to the jury, to which no exception was taken, he said:

> [23] Now, the issues, as you'll remember, there's no issue of liability for the collision. It also seems clear that the plaintiff suffered injuries, including a back injury, as a result of the collision. You'll remember Dr. Hamm noted complaints of a back sprain the day after the collision. The medical evidence is consistent in describing a present degenerative disk condition likely attributable to the injury. It remains to you, however, to assess how this has affected the plaintiff and the level of disability.

[9] Earlier, in reviewing the evidence, the learned judge had said:

> [11] Now, page 7, I begin with some of the comments that are less general and more specific to this particular case. With respect to the review of the medical evidence, the medical evidence contains evidence from three medical specialists: Dr. McKenzie, an orthopedic surgeon; Dr. Travlos, a specialist in physical medicine and rehabilitation; and Dr. Sweeting, the treating orthopedic surgeon. The evidence from these doctors is consistent in identifying degeneration of the lower spine at the L4-5 and L5-S1 or sacrum level, and you'll remember the evidence locating that in the lower portion of the spine. The condition causes significant back discomfort aggravated by activity and a permanent partial disability restricting the plaintiff from heavier labouring-type employment and some of his previous recreational activities.
>
> [12] Dr. McKenzie and Dr. Sweeting clearly attribute the cause of the back problem to the collision. Dr. Travlos, although acknowledging that the collision might have caused the injury, found it difficult to say that the collision caused the injury because he thought there was a delay in reporting any back pain until December 1997. After

2004 BCCA 364 (CanLII)

> reviewing Dr. Hamm's clinical records before giving evidence, he recognized that there was, in fact, a record of Mr. Johnson reporting a back sprain to Dr. Hamm the day after the collision. He identified this delay in the initial report as a key factor in doubting attribution of the injury to the collision. In cross-examination he acknowledged that this key factor was not present.

[10] The questions put to the jury and their answers were these:

> At what amount, do you assess the damages sustained by the Plaintiff in the following categories?
>
> | | | |
> |---|---|---|
> | 1. | **General Damages** (pain and suffering and loss of activities and enjoyment of life; both past and future) | *$ 2,250* |
> | 2. | **Past Wage loss** (from the date of the collision until today) | *0* |
> | 3. | **Future Loss of Income** (from today forward) | *0* |
> | 4. | **Cost of Future Care** (from today forward) | *0* |

[11] Neither party requested of the judge any different questions. I shall have quite a bit to say hereafter on the question of questions generally and of these questions in particular. Suffice it to say now that if this jury had been asked more explicit questions, that is to say, asked not for a general verdict but a special verdict, either this appeal might well not have been brought or, if brought, its proper resolution would be plain.

2004 BCCA 364 (CanLII)

[12] After the jury returned its verdict, the appellant, in answer to the respondents' motion for judgment, submitted that the verdict was perverse and that either a new trial should be ordered or the learned judge should substitute an award based on his assessment of the evidence.

[13] The learned judge said in his reasons for judgment (2003 BCSC 499):

> [4] The evidence in this case indicated that the plaintiff suffered a degenerative back condition as a result of the collision. A vocational consultant provided evidence that he was not likely to succeed at jobs requiring more than manual labour and that his injuries restricted him from duties that required more than light lifting. The plaintiff had difficulty establishing any substantial earnings for a number of years prior to the accident. Evidence of employment after the incident showed minimal earnings. What he did receive was not reported to the Ministry of Human Resources, who provided him income on the basis of medical disability. This may have influenced the jury in its assessment of wage loss, especially past wage loss. However, it would have been difficult to conclude on the evidence that the back injury did not amount to a loss of employ-ability that would sustain an assessment of future wage loss. The evidence would also indicate that the assessment of general damages was inordinately low.

[14] The learned judge then said:

> [5] The ability of a trial judge to refuse a motion for judgment in accordance with the verdict of the jury is confined to four cases:
>
> 1. Where there is no evidence to support the finding of the jury.

2004 BCCA 364 (CanLII)

> 2. Where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment.
>
> 3. Where the jury answers some but not all of the questions directed to it.
>
> 4. Where the answers are conflicting, so that judgment cannot be pronounced on the findings.

[15] For those propositions, the learned judge cited ***LeBlanc v. Penticton*** (1981), 28 B.C.L.R. 179 (C.A.); ***Nance v. British Columbia Electric Railway Co.***, [1951] 3 D.L.R. 705 (J.C.P.C.); ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674; ***Sheasgreen v. Morgan and Morgan*** (1951), 3 W.W.R. (NS) 677 (B.C.S.C.); ***Balla v. Insurance Corp. of British Columbia*** (2001), 85 B.C.L.R. (3d) 70, 2001 BCCA 62; ***Banks v. Shrigley***, 2001 BCCA 232, [2001] B.C.J. No. 888 (Q.L.) (C.A.); and Supreme Court Rule 41(2), B.C. Reg. 221/90:

> (2) Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.

[16] He then concluded that he could do nothing; the appellant's remedy, if any, was by way of appeal.

2004 BCCA 364 (CanLII)

THE ISSUES BEFORE THE COURT

[17] In addition to the issues as framed by counsel, there are these additional issues upon which, at the conclusion of the hearing in this Court, the Court invited further submissions from counsel:

> 1. Where a jury verdict is perverse or inordinately low, may a trial judge assess damages and substitute his or her own assessment for that of a jury?
>
> 2. On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court:
>
> a. remedy the apparent error by substitution of an assessment of damages for the jury's verdict;
>
> b. remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or
>
> c. order a new trial on a limited issue (for example, assessment of damages).

[18] For my part, I had in mind that, the Supreme Court of Canada having held that, at least for the purposes of s. 686(1)(a)(i) of the ***Criminal Code***, the reasonableness of a verdict involves a decision on a question of law (see ***R. v. Biniaris***, [2000] 1 S.C.R. 381), it would be consistent, assuming in this context that a "perverse" verdict and an "unreasonable" verdict are the same thing, for the reasonable-

2004 BCCA 364 (CanLII)

ness of a jury verdict in a civil case to be similarly classified. In saying it would be "consistent", I am quite well aware that consistency is not a constitutional principle.

2004 BCCA 364 (CanLII)

THE SUBMISSIONS OF COUNSEL

[19] On the issues as framed by counsel, counsel for the appellant submits that the verdict was unreasonable, and counsel for the respondents, not surprisingly, submits that the verdict was reasonable.

[20] On the issues raised by the Court, counsel's submissions have been most helpful and in summary they are these:

On Question 1: The powers of a trial judge to reject a verdict

[21] Counsel for the appellant asserts:

1. that a verdict which is "perverse" or "inordinately low" is properly classified as an error of law on the part of the jury;

2. that no distinction can rationally be drawn between the jury verdict erroneous in law identified in ***ter Neuzen v. Korn***, [1995] 3 S.C.R. 674, which the trial judge is empowered to deal with, and any other verdict which is an error in law;

3. that the true rule thus is that the trial judge can reject any verdict which does not meet the legal standard of reasonableness.

[22] For his part, counsel for the respondents asserts that a verdict which is "perverse" or "inordinately low", even if it is an error of law, is not an error of law capable of correction by the trial judge. Such verdicts, he submits, can only be dealt with on appeal. To put it another way, he submits that the learned trial judge committed no error in the reasons to which I have referred. He says in part:

> 7. The courts have had occasion to consider this particular issue, and it is well settled that a trial judge has no jurisdiction to vary a jury's award of damages on the ground that the amount is inordinately high or low. To do so would be to usurp the function of a jury as the trier of fact.
>
> *Watson v. Fitzpatrick* (1967), 65 D.L.R. (2d) 729, 62 W.W.R. 759 (B.C.S.C.)
>
> *Gobbo v. Rockingham Hardware Ltd.* (1971), 24 D.L.R. (3d) 355 (N.S.S.C. App. Div.),
>
> *Force v. Gibbons* (1978), 93 D.L.R. (3d) 626, 9 B.C.L.R. 144 (S.C.)
>
> *Segreti v. Toronto* [1981] O.J. 197, 20 C.P.C. 110 (Ont. H.C.)
>
> *Cameron v. Excelsior Life Insurance Co.*, [1981] 1 S.C.R. 138
>
> *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 (Ont. Ct. (G.D.)), affirmed by S.C.C. [1952] 2 S.C.R. 1130
>
> *Laufer v. Bucklaschuk* [1998] M. J. 360 (MBQB)

2004 BCCA 364 (CanLII)

> 8. The respondents submit that while it is for the jury to find the fact, it is the function of the court to determine whether or not there is any evidence to support the findings. A trial judge may refuse to accept the verdict of a jury only when he or she considers that there is no evidence to support the findings of the jury, or where the jury gives an answer which cannot in law provide a foundation for judgment. A trial judge has less authority to deal with a perverse verdict than does an Appeal Court.
>
> *Olszynko v. Larocque*, [1998] O.J. No. 5281 (Ont. Ct. G.D.); aff'd. (1999), 127 O.A.C. 162; leave to appeal to SCC denied [1999] S.C.C.A. No. 607), on consideration of Carrothers J. in *Hill v. Church of Scientology of Toronto and Manning* (1992), 7 O.R. (3d) 489 (Ont. Ct. G.D.) and *Canadian National Railways v. Lancia*, [1949] S.C.R. 177.
>
> *Cameron, supra*.

[23] The reader will note that no case from this Court or its predecessor, the Full Court, is cited by counsel for the respondents in this passage.

On Question 2: What steps may the court of appeal take to remedy a jury verdict containing an error of law?

[24] On the points raised in that question, counsel for the appellant says in his factum, in part:

> 46. ... Section 9(1)(c) of the *Court of Appeal Act* provides that the court may make or give any additional order that it considers just. It is submitted that it is just in having a trial judge assess damages in a personal injury case. It is further submitted that it might not be just in requiring a second lengthy and costly

2004 BCCA 364 (CanLII)

> retrial before another jury, with the same attendant unpredictability.
>
> 47. This Court has exercised the authority to remit a matter for assessment of damages by the trial judge. See, for example, *Townsend v. Kroppmanns* [1999 BCCA 682].
>
> * * *
>
> 49. In a personal injury case on the issue of damages for loss of capacity to earn income the preferred course is for the court to assess the damages rather than remit the issue to the trial judge for assessment.
>
> *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at 270.
>
> 50. This Court's authority to vary a jury's quantum assessment of damages is found in section 9 of the *Court of Appeal Act*. The authority is not dependant on the consent of the parties involved.
>
> *Vaillancourt* [*v. Molnar Estate* (2002), 8 B.C.L.R. (4th) 260, 2002 BCCA 685] at paragraph 14.

[25] For his part, counsel for the respondents says on the issues raised under Question 2:

> 31. The respondents respectfully submit that the Court of Appeal does not possess the jurisdiction to remit this matter to the trial judge for reassessment of damages. The respondents further submit that if this Court does order a new trial, it is an implied term of the Order that the second trial will proceed by the same method as the first.
>
> *Guenette v. British Columbia Electric Railway Co.* (No. 2), [1944] 3 W.W.R. 67, [1944] 3 D.L.R. 379, (1944) 60 B.C.R. 261 (S.C.), decided on consideration of *Nantel v. Hemphill's Trade Schools Limited (No. 2)* (1920) 28 B.C.R. 422, [1920] 3 W.W.R. 408 (C.A.)

2004 BCCA 364 (CanLII)

32. On an appeal, the Court may make or give any order that could have been made or given by the court or a tribunal appealed from. Furthermore, the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court.

Section 9(1) and (8) of the Court of Appeal Act

33. Section 27 of the *Court of Appeal Act* specifically provides that the court may direct that there be a new trial or hearing. Section 27 provides a wide discretion to order a new trial, although the court may still look for the "substantial wrong or miscarriage of justice" which was required under Rule 34 of the 1959 Rules.

34. Today's *Court of Appeal Act* does not expressly authorize the court to increase or decrease an award for damages made by a jury. This may be done pursuant to the jurisdiction conferred by section 9(1)(a) of the Act.

Black v. Lemon, [[1983] B.C.J. 1389, 48 B.C.L.R. 145 (C.A.)]

Da Silva v. Dudas (1989), 38 B.C.L.R. (2d) 104; [1989] B.C.J. No. 1318 (C.A.)

35. On an appeal of a jury award, a court will not interfere with an award of general damages unless it is so inordinately low or inordinately high as to be a wholly erroneous estimate of the damage.

Nance v. British Columbia Electric Railway Company, [[1951] 2 W.W.R. 665, [1951] 3 D.L.R. 705, [1951] A.C. 601 (J.C.P.C.)]

36. The respondents respectfully submit that it is not open to the Court of Appeal to simply substitute its own views for those of the jury. An appellate court will not interfere if there is a body of evidence capable of sustaining the jury's verdict. The Supreme Court of Canada has defined the standard of review in *McCannell v. McLean*, [1937] S.C.R. 341:

2004 BCCA 364 (CanLII)

> The verdict of a jury will not be set aside as against the weight of the evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

2004 BCCA 364 (CanLII)

THE COURT OF APPEAL AND ITS POWERS

[26] To answer the questions posed by the Court deserves and, indeed, requires, in my opinion, an extensive and intensive account of the legal history of this Province. The reason is this: The Court of Appeal of British Columbia is a statutory court. It has no inherent jurisdiction. It has only such powers and authority in civil cases as the Legislature of British Columbia confers upon it. The Legislature may grant it broad powers or limited powers. There is no impediment under the ***Constitution Acts, 1867-1982***, to each province conferring on its own Court of Appeal such powers, broad or limited, as to that province's legislature seem expedient, just as there is no impediment, if Parliament thought it appropriate, to adding "unsafe" to s. 686(1)(a) of the ***Criminal Code***.

[27] The Legislature could, if it deemed it advisable, adapt s. 686(1)(a) of the ***Criminal Code*** to civil cases; it could enact that this Court may allow an appeal in any case in which

the judgment appealed from was "unsatisfactory". Indeed, it could decide the Court itself is unsatisfactory and abolish it.

[28] In the last 30 years or so, the Supreme Court of Canada has delivered a number of judgments upon the jurisdiction of this Court in civil cases. But, with the greatest of respect, none of them, to my recollection, has ever asked what jurisdiction did the Legislature of the Province, by the statute establishing and regulating the court, confer upon it. It was not always so.

[29] Thus, in ***McPhee v. Esquimalt & Nanaimo Railway Co.*** (1913), 49 S.C.R. 43, the Court directed its mind to what was then Order 58, Rule 4, of the ***Supreme Court Rules, 1906***. The headnote puts the matter thus:

> In an action to recover damages for injuries sustained by the engineman in charge of the company's steam-shovel in use on the construction of their works, questions were submitted to the jury to which they gave answers negativing contributory negligence by the plaintiff and finding the company negligent in failing to provide a guard on part of the gearing and in leaving it uncovered, but they did not answer one of the questions submitted to them, viz.: "Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them?" The defence resting upon this issue was duly presented at the trial and evidence submitted to support it.

2004 BCCA 364 (CanLII)

[30] This Court set aside the trial judgment and dismissed the action with costs, holding, in effect, that the evidence supported the conclusion that the answer to the question which the jury did not answer was "yes".

[31] Duff J. said at 52-54:

> There was no evidence of express consent or agreement on the part of the plaintiff, and the question for the jury, therefore, was whether in all the circumstances the conduct of the plaintiff amounted to such consent. It was argued by Mr. Taylor that this is a question upon which the jury alone is competent to pass; in other words, that where consent is to be inferred from a course of conduct the employer must, in order to make good this defence, obtain a verdict from a jury or other primary tribunal of fact affirming it. I am quite unable to agree with this contention. There are, undoubtedly, expressions in text-books and judgments which seem to give some countenance to it; but it appears to me to be entirely opposed to principle. By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.
>
> The power given by O. 58, r. 4,
>
> > to draw inferences of fact * * * and to make such further or other order as the case may require,
>
> enables the Court of Appeal to give judgment for one of the parties in circumstances in which the court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the court is satisfied that it has all

2004 BCCA 364 (CanLII)

> the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.
>
> This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously; *Paquin v. Beauclerk* [[1906] A.C. 148], at page 161; and *Skeate v. Slaters*, [30 Times L.R. 290].
>
> The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last mentioned question judicial opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application.

[32] Duff J. then concluded that, looking at the facts of the case as a whole, he could not agree that the construction of them adopted by the Court of Appeal was the only construction they could reasonably bear. He therefore determined that there ought to be a new trial. Sir Charles Fitzpatrick C.J., on this point, said at 46:

> In these circumstances, having regard to the law of British Columbia, I would have been disposed to decide the issue of *volens* here, but I defer to the better opinion of Mr. Justice Duff, in whose conclusions I concur.

[33] Brodeur J. concurred with Duff J.

2004 BCCA 364 (CanLII)

[34] In a later case, ***Gavin v. Kettle Valley Ry. Co.*** (1919), 58 S.C.R. 501, 2 W.W.R. 611, the Supreme Court of Canada also gave consideration to a statutory provision in the ***Supreme Court Act***, R.S.B.C. 1911, c. 58, s. 55, on an appeal from this Court to it.

[35] Unfortunately, the manner of the Supreme Court of Canada doing so led to some distress as appears from ***Wand v. Mainland Transfer Co.*** (1919), 27 B.C.R. 340, in which Martin J.A. said at 346-47:

> It is opportune to observe that in the recent judgment of the Supreme Court of Canada upon that section [***Supreme Court Act***, R.S.B.C. 1911, c. 58, s. 55] in *Gavin v. Kettle Valley Ry. Co.*, *supra*, there is a grave misconception by three of their Lordships as to the course adopted by this Court on that section, which does an injustice to us. In the judgment of Mr. Justice Anglin ([58 S.C.R. at p. 509]; (1919), 2 W.W.R. at p. 614), with which the Chief Justice agrees, it is stated that we "ignored the respondent's statutory right" under that section, "and that a gross error would appear to have been made," and that the
>
> > "appellant (plaintiff) was entitled to the costs of the appeal to the Court of Appeal and was wrongfully deprived of them by that Court, either through inadvertence or possibly because the majority of the Court (MARTIN, GALLIHER and EBERTS, JJ.A.) were of the opinion that the ground indicated by Mr. Justice MARTIN, which had been taken by counsel for the defendant in his objection to the learned judge's charge, sufficed to support the order for a new trial."
>
> And Mr. Justice Mignault proceeds upon a like erroneous assumption and takes us to task ([58 S.C.R. 515]; (1919), 2 W.W.R. at p. 620) for having

2004 BCCA 364 (CanLII)

> "disregarded," as he styles it, "the imperative requirement of the statute." The fact, however, is quite the opposite. Not only did we not act either through "ignorance," or "inadvertence," or in "disregard" of the statute, but we carefully considered it on special motion and applied it to the best of our humble ability, and it is as strange as it is regrettable that their Lordships should have fallen into such a "gross error," to adopt their own expression. The judgment, which was pronounced on October 1st, 1918, by a majority of this Court was based upon the fact that three of the justices (*viz.*, my brothers GALLIHER and McPHILLIPS and myself) were of opinion that there should be a new trial upon a ground which had been duly taken below. Subsequently the question of costs was spoken to in Court by motion on special leave on November 8th, and the respondent moved that the appellant should pay them, and invoked said section 55 in support of his application. Mr. Justice GALLIHER announced that his reasons were the same as mine, and after argument and consideration of said section 55, this unanimous judgment of the Court, extracted from my note-book, was pronounced by the Chief Justice:
>
> > "*Per curiam*: The application should be dismissed as three justices at least (MARTIN, GALLIHER and McPHILLIPS, JJ.A.) were of opinion that there should be a new trial on the point which was raised below."
>
> That furnishes a complete answer to the unwarranted reflections made upon us; no other order could legally have been made in such circumstances.

[36] Macdonald C.J.A., with whom Eberts J.A. agreed, made the same point although in somewhat less outraged terms.

[37] The governing statute is now the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, first enacted by S.B.C. 1982, c. 7.

2004 BCCA 364 (CanLII)

[38] These are the relevant provisions (R.S.B.C. 1996, c. 77) which, for present purposes, are unchanged since the enactment of what I think of as the "new" ***Court of Appeal Act***:

> **Constitution of the Court of Appeal**
>
> **2** (1) The Court of Appeal is continued as a superior court of record having civil and criminal jurisdiction and consisting of the Chief Justice of British Columbia and 14 other justices.
>
> * * *
>
> **Appellate jurisdiction**
>
> **6** (1) An appeal lies to the court
> (a) from an order of the Supreme Court or an order of a judge of that court, and
> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
>
> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.
>
> * * *
>
> **Leave to appeal**
>
> **7** ...
>
> (3) In an order granting leave to appeal under this or any other Act, a justice may limit the grounds of appeal.
>
> * * *
>
> **Powers of Court of Appeal**
>
> **9** (1) On an appeal, the court may
> (a) make or give any order that could have been made or given by the court or tribunal appealed from,
> (b) impose reasonable terms and conditions in an order, and

2004 BCCA 364 (CanLII)

(c) make or give any additional order that it considers just.

(2) The court or a justice may draw inferences of fact.

(3) The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.

(4) The court may exercise its powers
(a) even though only part of an order has been appealed from, and
(b) in favour of any person whether or not the person is a party to the appeal.

(5) If a power is given to a justice by this Act or the rules, the court may exercise the power.

(6) The court may discharge or vary any order made by a justice other than an order granting leave to appeal under section 7.

(7) The court and a justice have the same powers as the Supreme Court in relation to matters of contempt of court.

(8) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal,
(a) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, and
(b) if the appeal is not from the Supreme Court, the Court of Appeal has the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

* * *

New trial or hearing

27 (1) If on the hearing of an appeal it appears to the court that there should be a new trial or hearing, the court may set aside the verdict,

2004 BCCA 364 (CanLII)

> finding or order and direct a new trial or hearing.
>
> (2) If the court considers that the new trial or hearing should be so limited, the court may give final judgment as to part or parts only of the matter in controversy or as to some or one only of the parties and direct a new trial or hearing as to the remaining part or party.

[39] The rules, which were promulgated by B.C. Reg. 303/82, have nothing in them relating to the substantive powers of this Court. In that respect, as I shall show, they are unlike many of the earlier rules which governed this Court and which were given statutory force. See, e.g. ***Court Rules of Practice Act***, R.S.B.C. 1948, c. 293, and ***Taylor v. B.C. Electric Ry. Co.*** (1912), 2 W.W.R. 923 at 924-25.

[40] With all respect to the framers of the 1982 Act, it is couched in such terms as to be unhelpful on what powers the Legislature intended this Court to exercise. Section 686 of the ***Criminal Code***, although it has been the subject of much judicial exegesis, does at least provide for criminal appeals a rational starting point for determining this Court's jurisdiction in any case which comes before it.

[41] I start with the proposition that by enacting the present Act, the Legislature did not intend to diminish the powers of this Court as they had existed since 1907. Whether the

2004 BCCA 364 (CanLII)

Legislature intended to broaden the scope of the Court's power is a very nice question.

[42] If the proposition that the Legislature at least did not intend to diminish the Court's powers is sound, then no judgment of the Supreme Court of Canada decided since the 7th of June, 1982, which attenuates the Court's powers as they then stood is consonant with the present ***Court of Appeal Act***.

[43] In order to determine how matters stood on 7th June, 1982, it is useful to trace the history of this Court and to put that history in the context of the history of this Province, a history of which many members of the legal profession who ought to know better are woefully ignorant.

[44] In 1849, by ***An Act to Provide for the Administration of Justice in Vancouver's Island*** [as it was then called], 12 & 13 Vict., c. 48, the Island was removed from the jurisdiction of the Courts of Upper Canada:

> ...the Process and Acts of the said Courts of *Upper Canada*, shall cease to have Force in and to be applicable to *Vancouver's Island* aforesaid; and it shall be lawful for Her Majesty from Time to Time (and as well before as after such Proclamation) to make Provision for the Administration of Justice in the said Island, and for that Purpose to constitute such Court or Courts of Record and other Courts, with such Jurisdiction in Matters Civil and Criminal, and such equitable and ecclesiastical Jurisdiction, subject to such Limitations and Restrictions, and to appoint and remove, or provide for the Appointment

2004 BCCA 364 (CanLII)

> and Removal of such Judges, Justices, and such ministerial and other Officers, for the Administration and Execution of Justice in the said Island, as Her Majesty shall think fit and direct.

[45] On the 4th April, 1856, a lengthy Order was issued by Her Majesty that there should be a court within the Island called the Supreme Court of Civil Justice of the Colony of Vancouver's Island. Among other terms were these:

> And Her Majesty doth hereby authorize and empower the said Supreme Court to approve and admit such persons as shall have been admitted as Barristers in England, or Ireland, or Advocates in the Court of Sessions of Scotland, or to the degree of Doctor of Civil Law at Her Majesty's Universities of Oxford, Cambridge or Dublin, to act as Barristers, or Advocates, in the said Supreme Court. [No Upper Canadians need apply!]
>
> * * *
>
> And it is hereby further ordered, that whenever any question shall arise before the said Supreme Court, involving any issue or issues, of fact, or whenever it may become incumbent on the said Court to assess the amount of damages to be paid by a Defendant, in any action or suit, it shall be lawful for the Judge of the said Court, in his discretion, upon the petition of either of the parties, to summon a Jury to enquire into the disputed facts, or assess the damages as the case may be, and that such Jury shall consist of such number of persons, and qualified in such manner, as the said Court may, by rule or rules to be made as aforesaid, establish; and that the verdict of such Jury shall be unanimous, and the final judgment of the Court, if satisfied with the verdict, shall be in accordance with such verdict; provided always, that it shall be competent to the Court, if dissatisfied with the verdict, to direct a new trial before a fresh jury.
>
> [R.S.B.C. 1979, looseleaf ed, vol. 7, Appendices, Part B, "Constitutional Documents" at pp. 26, 28-29]

2004 BCCA 364 (CanLII)

[46] The Order empowered the court to make rules, orders and regulations for the practice of the court, but provided that they should "so far as the circumstances of the said Colony may permit, be framed with reference to the corresponding rules and forms in use in Her Majesty's Supreme Courts of Law and Equity at Westminster".

[47] On the 25th April, 1856, David Cameron was appointed Chief Justice and, on 12th February, 1857, he caused to be promulgated Rules of Court to which, on the 6th April, 1857, a Schedule of Forms was added. Although a copy of the Schedule of Forms can be found in the British Columbia Courthouse Library Society library in Vancouver, diligent inquiry has not discovered an extant copy of the Rules.

[48] By ***An Act to Provide for the Government of British Columbia*** in 1858, 21 & 22 Vict., c. 99, the territory described therein, that is the Mainland, was also removed from the jurisdiction of the Courts of Upper Canada and it was declared to be lawful for Her Majesty, by any Order or Orders, to make provision for the administration of Justice within the territory so described.

[49] Pursuant to it, Governor Douglas, on the 19th November, 1858, at Langley, proclaimed:

2004 BCCA 364 (CanLII)

> It is therefore hereby enacted and proclaimed by the Governor of British Columbia that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony, till such time as they shall be altered by Her said Majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper Authorities against all persons infringing and in favor of all persons claiming protection of the same Laws.

[50] Matthew Baillie Begbie was the first judge of the new Supreme Court of British Columbia, he having taken his oaths of office also on the 19th November, 1858.

[51] Of him, Bancroft said, in *The Works of Hubert Howe Bancroft*, vol. 32, "History of British Columbia, 1792-1887" (San Francisco: The History Company, 1887) at 423:

> Probably more than to any one person the commonwealth of British Columbia owes obligation to Mr. Begbie for its healthful ordinances, for the wise and liberal provisions of its government, and for the almost unbroken reign of peace and order during his long term of office. More than any person I have met in my long historical pilgrimage from Darien to Alaska, he was the incarnation of justice, the embodiment of that restraining influence which society is so strangely forced to place upon its members, a man most truly *sans peur et sans reproche*.

2004 BCCA 364 (CanLII)

[52] On 1st September, 1865, David Cameron was succeeded as Chief Justice of Vancouver's Island by Joseph Needham.

[53] When the colony of British Columbia was united with the Island colony in 1866 (see ***The British Columbia Act, 1866***, 29 & 30 Vict., c. 67 (Imp.)), the same date of introduction was applied to the united colony by a proclamation of the then Governor, Frederick Seymour, Ordinance No. 7, of 6th March, 1867.

[54] On the 9th March, 1869, by "An Ordinance to amend the procedure in Civil Cases" (C.S.B.C. 1877, c. 104):

> **2.** The "Common Law Procedure Act, 1852," the "Common Law Procedure Act, 1854," the "Common Law Procedure Act, 1860," and the rules of practice and pleading made in pursuance of the said Acts, or either of them, shall as far as the adoption of the same is practicable, and subject to the provisions hereinafter contained, regulate the practice and procedure of each and every of the Superior Courts of this Colony in all actions and proceedings at law.
>
> **3.** The Sections from 104 to 115, both inclusive, of the "Common Law Procedure Act, 1852," shall not apply.
>
> **4.** The several statutory enactments regulating the practice, pleadings, and procedure of the High Court of Chancery, in force on the 14th day of February, 1860, and the several orders and regulations in force in the said High Court on the said 14th day of February, 1860, shall, as far as practicable, regulate the proceedings of the said Courts and each of them sitting in equity.

2004 BCCA 364 (CanLII)

[55] Needham resigned on the 15th March, 1870. On the 29th March, 1870, the Court of Vancouver's Island and the Court on the Mainland were merged into the Supreme Court of British Columbia and Matthew B. Begbie became, thereupon, the holder of the new position of Chief Justice of British Columbia.

[56] Whether the words "not, from local circumstances, inapplicable", in the proclamation of 1858, and the words "as far as the adoption of the same is practicable" in the Ordinance of 1869, are consonant in meaning, I need not address. It may be that the 1869 Ordinance was meant to allay doubts as to whether the statutes referred to in it fell within the Proclamation and Ordinance No. 7.

[57] The Act of 1854, 17 & 18 Vict., c. 125, made two profound changes in the English legal system:

1. It became possible for issues of fact arising in the common law courts to be decided by a judge without a jury:

> I. The Parties to any Cause may, by Consent in Writing, signed by them or their Attorneys, as the Case may be, leave the Decision of any Issue of Fact to the Court, provided that the Court, upon a Rule to show Cause, or a Judge on Summons, shall, in their or his Discretion, think fit to allow such Trial; or provided the Judges of the Superior Courts of Law at *Westminster* shall, in pursuance of the Power herein-after given to them, make any General Rule or Order dispensing with such Allowance,

2004 BCCA 364 (CanLII)

> either in all Cases or in any particular Class or Classes of Cases to be defined in such Rule or Order; and such Issue of Fact may thereupon be tried and determined, and Damages assessed where necessary, in open Court, either in Term or Vacation, by any Judge who might otherwise have presided at the Trial thereof by Jury, either with or without the Assistance of any other Judge or Judges of the same Court, or included in the same Commission at the Assizes; and the Verdict of such Judge or Judges shall be of the same Effect as the Verdict of a Jury, save that it shall not be questioned upon the Ground of being against the Weight of Evidence; and the Proceedings upon and after such Trial, as to the Power of the Court or Judge, the Evidence, and otherwise, shall be the same as in the Case of Trial by Jury.

I take the implication of the emphasized words to be that a judge's decision as to the weight of the evidence, unlike that of a jury, was to be inviolable.

2. By sections 35-44, something resembling a modern appeal came into being:

> XXXV. In all Cases of Motions for a new Trial upon the Ground that the Judge has not ruled according to Law, if the Rule to show Cause be refused, or if granted be then discharged or made absolute, the Party decided against may appeal, provided any One of the Judges dissent from the Rule being refused, or, when granted, being discharged or made absolute, as the Case may be, or, provided the Court in its Discretion think fit that an Appeal should be allowed; provided that where the Application for a new Trial is upon Matter of Discretion only, as on the Ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed.

2004 BCCA 364 (CanLII)

XXXVI. The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for the Purposes of this Act.

XXXVII. No Appeal shall be allowed unless Notice thereof be given in Writing to the opposite Party or his Attorney, and to One of the Masters of the Court, within Four Days after the Decision complained of, or such further Time as may be allowed by the Court or a Judge.

XXXVIII. Notice of Appeal shall be a Stay of Execution, provided Bail to pay the Sum recovered and Costs, or to pay Costs where the Appellant was Plaintiff below, be given, in like Manner and to the same Amount as Bail in Error, within Eight Days after the Decision complained of, or before Execution delivered to the Sheriff.

XXXIX. The Appeal herein-before mentioned shall be upon a Case to be stated by the Parties, (and in case of Difference, to be settled by the Court or a Judge of the Court appealed from,) in which Case shall be set forth so much of the Pleadings, Evidence, and the Ruling or Judgment objected to, as may be necessary to raise the Question for the Decision of the Court of Appeal.

XL. When the Appeal is from the Refusal of the Court below to grant a Rule to show Cause, and the Court of Appeal grant such Rule, such Rule shall be argued and disposed of in the Court of Appeal.

XLI. The Court of Appeal shall give such Judgment as ought to have been given in the Court below; and all such further Proceedings may be taken thereupon as if the Judgment had been given by the Court in which the Record originated.

XLII. The Court of Appeal shall have Power to adjudge Payment of Costs, and to order Restitution; and they shall have the same

2004 BCCA 364 (CanLII)

> Powers as the Court of Error in respect of awarding Process and otherwise.
>
> XLIII. Upon an Award of a Trial *de novo* by any One of the Superior Courts or by the Court of Error, upon Matter appearing upon the Record, Error may at once be brought; and if the Judgment in such or any other Case be affirmed in Error, it shall be lawful for the Court of Error to adjudge Costs to the Defendant in Error.
>
> XLIV. When a new Trial is granted, on the Ground that the Verdict was against Evidence, the Costs of the First Trial shall abide the Event, unless the Court shall otherwise order.

[58] The first of those changes, that is trial by judge alone, was practicable in British Columbia but, of course, the provisions for appeals were not, as the Supreme Court of British Columbia had only one judge until 11th March, 1870.

[59] It is important, however, to understand the practice which existed in England of seeking a rule from the court in which the trial took place to show cause why a verdict found for one side or the other should not be set aside and a new trial had on the ground that the verdict was against the weight of evidence and on the ground of misdirection.

[60] How this system worked is illustrated by the judgment in the Court of Exchequer, ***Vaughan v. The Taff Vale Railway Co.*** (1858), 3 H. & N. 743, and on appeal from it, pursuant to the new provisions for appeals in the ***Common Law Procedure Act,***

2004 BCCA 364 (CanLII)

1854, to the Exchequer Chamber, (1860), 5 H. & N. 679, [1843-60] All E.R. Rep. 474.

[61] The action had been tried before Bramwell B. at the Glamorganshire Spring Assizes. The issue was whether the defendant railway company was liable for a fire caused on the plaintiff's lands by sparks from one of its engines. The trial judge told the jury, at 746 (3 H. & N.), that "he should be prepared to decide that the defendants were liable, and he directed them that if, to serve his own purposes, a man does a dangerous thing ... he must bear the consequences."

[62] The jury having found for the plaintiff, the defendants, in Easter Term, obtained a rule for a new trial on the ground that "the verdict was against evidence, and that the learned Judge misdirected the jury in telling them that no care or skill used in preventing the escape of fire from the engine would be an answer to the charge of negligence".

[63] On the application to show cause against the rule for a new trial, which came on for hearing before the Barons, including Bramwell B., the court discharged the rule.

[64] The Exchequer Chamber ordered a new trial, holding that the defendants could not be liable unless there was evidence of negligence.

2004 BCCA 364 (CanLII)

[65] In the words of the reporter at 476 (All E.R. Rep.):

> Notice of appeal against the decision of that court in discharging the rule was by leave of the court duly given by the defendants according to the Common Law Procedure Act, 1854. The question for the decision of the Court of Exchequer Chamber was whether or not the defendants were entitled to have a new trial, on the ground that there was no evidence of negligence to go to the jury under the first count of the declaration, assuming it was true, as sworn, that everything had been done, etc. The plaintiffs contending that there was such evidence, and also that if not, the question was not open to the defendants, and also that the judge was wrong in not leaving to the jury any question arising out of the combustible character of the plaintiff's wood. If the court should be of opinion in the affirmative, then the verdict for the plaintiff was to be set aside, and a new trial had.

[66] All this, of course, would have been known to Begbie C.J.

[67] In 1873 and 1875, by, respectively, the ***Supreme Court of Judicature Act, 1873***, 36 & 37 Vict., c. 66, and the ***Supreme Court of Judicature Act, 1875***, 38 & 39 Vict., c. 77, momentous changes occurred in the administration of justice in England.

[68] Those statutes were never expressly adopted in British Columbia so, at this point, it becomes necessary to look at what was adopted in British Columbia from the English Acts.

[69] In 1879, by c. 12 (the ***Judicature Act, 1879***), proclaimed on the 29th April, 1879, the Legislature enacted:

2004 BCCA 364 (CanLII)

> **6.** Subject to any Rules of Court, any Judge of the Supreme Court sitting in the exercise of its jurisdiction, may reserve any case or any point in a case for the consideration of a full Court, or may direct any case or point in a case to be argued before a full Court; and the full Court shall have power to hear and determine any such case or point so reserved or so directed to be argued: Provided that nothing herein, or in any rules or order made under this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury, before whom the same shall come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues.
>
> **7.** Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a non-suit, or to increase or reduce damages, shall be heard before a full Court.
>
> **8.** No order made by the Supreme Court, or any Judge thereof, by the consent of the parties, or as to costs only, which by law are left to the discretion of the Court or Judge, shall be subject to any appeal or rehearing, except by leave of the Court or Judge making such order.
>
> **9.** Every order made by a Judge of the Supreme Court, except orders made in the exercise of such discretion or by such consent as aforesaid, may be reheard, varied, affirmed, or discharged by a full Court, whether the matter in which such order was made was originally or not before the Supreme Court.

[70] Section 6 is taken from s. 46 of the Act of 1873, combined with s. 22 of the Act of 1875.

2004 BCCA 364 (CanLII)

[71] I infer that the concluding words of British Columbia's section 6 were intended both in England and here to ensure that the rights which existed before the ***Judicature Acts*** on a trial by jury should not be diminished. Thus, if the trial judge did not give the jury "a proper and complete direction ... upon the law", the litigant had his remedy on a motion for a new trial.

[72] Section 7 was founded on s. 48 of the Act of 1873:

> **48.** Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a nonsuit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding.

[73] Thus, up to and including the Act of 1879, civil trials in this Province in common law cases had to be by jury.

[74] Rules were promulgated in July 1880 but were superseded on 15th November, 1880, by the Supreme Court Rules generally known as the 1880 Rules, and which are essentially the same as the Rules which were part of the ***Supreme Court of Judicature***

2004 BCCA 364 (CanLII)

Act, 1875. Jury trials were still the norm although, of course, not in causes which before 1873 would have originated in Chancery. Those 1880 Rules provided, in part:

ORDER XXXIX.

MOTION FOR NEW TRIAL.

RULES.

1. Any application for a new trial shall be to a Full Court, which shall for the purpose thereof consist of two or more Judges.

1A. Applications for new trials shall be by motion for an order calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made, if the trial has taken place in Victoria, within four days after the trial, unless a Judge should enlarge the time. If the trial has taken place elsewhere the motion shall be made within sixteen days after the trial, unless a Judge should enlarge the time.

2. A copy of such order shall be served on the opposite party within four days from the time of the same being made, or under special circumstances within such further time as a Judge may order.

3. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Full Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

4. A new trial may be ordered on any question in an action whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

2004 BCCA 364 (CanLII)

* * *

ORDER XL.

MOTION FOR JUDGMENT.

RULES.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

* * *

2. Where at the trial of an action the Judge has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved. The motion shall be made to the Full Court.

3. Where at the trial of an action the Judge abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

* * *

ORDER LVIII.

SITTINGS OF THE COURT; THE FULL COURT; RE-HEARINGS, &c.

RULES.

* * *

2. A Full Court shall consist of not less than two Judges of the Supreme Court sitting together, and shall, besides exercising the jurisdiction assigned to it by the Act, hear and determine appeals, or applications in the nature of appeals,

2004 BCCA 364 (CanLII)

from any judgment, ruling, or order of a single Judge, excepting orders mentioned in Section 8 of the Act; and shall hear and determine Special Cases where all parties agree that the same be heard before a Full Court.

* * *

4. All appeals to the Full Court shall be by way of re-hearing, and shall be brought by notice of motion in a summary way. The appellant may by the notice of motion appeal from the whole or any part of any judgment, ruling, or order, and the notice of motion shall state whether the whole or part only of such judgment, ruling, or order is complained of, and in the latter case shall specify such part.

* * *

7. The Full Court shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power in all cases, except in appeals from a County Court or Mining Court, to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision appealed from. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Full Court.) The said Court shall have power to give any judgment and make any order which ought to have been made, and to make such other order as the case may require. The powers aforesaid may be exercised although the notice of re-hearing or appeal may be to reverse or vary part only of the decision, and such powers may also be exercised in favour of any of the respondents or parties, although they may not have appealed from or complained of the decision. The Full Court shall also have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

2004 BCCA 364 (CanLII)

[75] So far as I have discovered, Order XXXIX, Rule 3, is the first legislative enactment of a curative provision.

[76] Thus, there were two routes to the Full Court - a motion for a new trial under Order XXXIX and an appeal under Order LVIII.

[77] Then, in 1881, by the ***Local Administration of Justice Act, 1881***, S.B.C. 1881, c. 1, sections 6, 7 and 9 of the ***Judicature Act, 1879***, were repealed. We find these provisions in the 1881 Act:

> **22.** Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the Jury before whom the same shall come for trial, with a proper and complete direction to the Jury upon the law and as to the evidence applicable to such issues.
>
> * * *
>
> **28.** The Judges of the Supreme Court shall have power to sit together in the City of Victoria as a Full Court, and any three shall constitute a quorum, and such Full Court shall be held only once in each year, at such time as may be fixed by Rules of Court, and such Court shall constitute a Supreme Court.
>
> **29.** Subject to Rules of Court, such interlocutory or other orders, or judgments of a Judge, as may be specified in such Rules, excepting always orders mentioned in the eighth section of the "Judicature Act, 1879," may, upon the terms mentioned in such Rules, be re-heard, varied, affirmed or discharged by the Full Court.

2004 BCCA 364 (CanLII)

[78] In 1885, by the ***Appellate Jurisdiction Act, 1885***, c. 5 of that year, the Legislature created a tribunal called the "Divisional Court of the Supreme Court of British Columbia". It consisted of any two or more judges and conferred upon them powers of appeal in interlocutory matters.

[79] By the ***Civil Procedure Act, 1888***, c. 4, s. 10, section 2 of the Act of 1885 was repealed and this substituted for it:

> 2. Such tribunal shall be called the Divisional Court of the Supreme Court of British Columbia, and in the exercise of its jurisdiction shall, concurrently with the Full Court, have all the powers and authorities held and exercised by the Full Court in interlocutory matters, including the granting of new trials, and its judgment shall be deemed a judgment of the Full Court, and shall be executed and carried out as such, and no appeal shall lie from the judgment of such Court to the Full Court.

[80] At the time of the consolidation of the Acts of 1888, the Act was renamed the ***Supreme Court Act*** (c. 31) and the relevant section was this:

> **42.** Nothing herein, or in any Act, or in any Rules of Court shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues.

[81] By the British Columbia Supreme Court Rules of 1890:

2004 BCCA 364 (CanLII)

ORDER XXXIX.

MOTION FOR NEW TRIAL.

1. Where in any action, cause, or matter there has been a trial with or without a jury, any motion for a new trial may be made to the Divisional Court, or to the Full Court when practicable under this Order.

2. Every application for a new trial shall be by notice of motion, and no rule nisi, order to show cause, or formal proceeding other than such notice of motion, shall be made or taken. Such notice shall state the grounds of the application.

* * *

5. A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only, or as to the other party or parties.

6. A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision on any other question.

ORDER XL.

MOTION FOR JUDGMENT.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

2. Where at the trial the Judge abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not so set it down and give notice thereof to the other

2004 BCCA 364 (CanLII)

parties within ten days after the trial, any defendant may set down a motion for judgment, and give notice thereof to the other parties.

3. Where, at or after a trial with a jury, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason that the finding of the jury upon the question or questions submitted to them has not been properly entered.

4. Where, at or after the trial before a Judge, with or without a jury, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

5. An application under the two last Rules shall be to the Full Court, unless there is also a motion for a new trial, in which case it may be made either to the Full Court or to the Divisional Court.

* * *

9. Upon a motion for judgment, or for a new trial, the Court may draw all inferences of fact not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

* * *

ORDER LVIII.

THE FULL COURT; RE-HEARING, &c.

1. Excepting from those orders mentioned in section 8 of the "Judicature Act, 1879," an appeal shall lie to the Full Court from every judgment, decree, or order made by a Judge of the Supreme

2004 BCCA 364 (CanLII)

Court, whether final or interlocutory, and whether such judgment, decree, or order be in respect of a matter specified in the Rules of Court or not; but in cases where concurrent jurisdiction is by any Act given to the Divisional Court, the appellant shall not be entitled to an extension of time for bringing on his appeal for hearing before the Full Court.

2. All appeals to the Full Court shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment, ruling, or order, and the notice of motion shall state whether the whole or part only of such judgment, ruling, or order is complained of, and in the latter case shall specify such part. Such notice shall also specify the grounds of appeal.

* * *

5. The Full Court shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. ... The said Court shall have power to give any judgment and make any order which ought to have been made, and to make such further or other orders as the case may require. The powers aforesaid may be exercised although the notice of appeal may be to reverse or vary part only of the decision, and such powers may also be exercised in favour of any of the respondents or parties, although they may not have appealed from or complained of the decision....

* * *

ORDER LIX.

DIVISIONAL COURT.

1. The Divisional Court shall, concurrently with the Full Court, have all the powers and authorities held and exercised by the Full Court in inter-locutory matters, including the granting of new

2004 BCCA 364 (CanLII)

> trials, and its judgment shall be deemed a judgment of the Full Court, and shall be executed and carried out as such, and no appeal shall lie from the judgment of such Court to the Full Court.
>
> 2. Upon an appeal to the Divisional Court when the same shall consist of two Judges only, if there be a division of opinion between the said Judges, no judgment shall be given, but a re-argument of the said appeal shall take place before a Court to consist of not less than three Judges, whose decision shall be the judgment of the Court upon the said appeal.

2004 BCCA 364 (CanLII)

[82] The first volume of the *British Columbia Reports* was published in 1895.

[83] In that volume, the reporter, the system having been established by the Law Society of British Columbia, said: "It has been found impracticable to report these cases in their chronological order, but an endeavour will be made to do so as far as possible." Indeed, the earliest case to be found in the first two volumes of the *British Columbia Reports* was decided in 1867.

[84] The first reported case of the setting aside of the verdict of a jury is ***Gray v. Macallum*** (1892), 2 B.C.R. 104. The trial had taken place before Mr. Justice Drake and a jury, and Begbie C.J. and Crease J., sitting as a Divisional Court, heard a rule *nisi* calling on the defendant to show cause why there should not be a new trial on the grounds that the

verdict was against the weight of the evidence, that there was misdirection, that new and material evidence had been discovered since the trial, and that the evidence of the defendant should not have been received as he was incompetent for want of religious belief. The trial had taken place with a special jury for some 14 days.

[85] As to these matters, Begbie C.J. said, at 106:

> As regards the consideration of the weight of evidence, it is surely unnecessary to do more than barely recall the fact that it is peculiarly the office of the jury, and not of this Court, to weigh the evidence, and that we could not on this ground set aside the verdict unless it were wholly unsupported by evidence, or were contrary to such a body of evidence, or rested on so slight a foundation as to make it obvious that the jury were perverse or invincibly prejudiced.

[86] As to misdirections by the learned trial judge, he said, at 106-107:

> ... some of these have been abandoned, and as to none of them does the objection at the trial appear to have been made with sufficient distinctness. The rule as to this is very well laid down in many cases. I shall only cite three: In *Clark* v. *Molyneux*, 3 Q.B.D. 243, Bramwell, L.J., says: "A summing up is not to be rigorously criticized. A verdict is not to be set aside because in the course of a long and elaborate summing up, the Judge has used inaccurate language; the whole must be considered to see if it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detailed expressions." In *Horler* v. *Carpenter*, 27 L.J.C.P. 4, Willes, J., citing approvingly *Jones v. Provincial Insurance Co.*, says: "Counsel cannot be heard here

2004 BCCA 364 (CanLII)

> to argue points not raised at the trial, and which they advisedly abstained from raising." And in *Whitehouse* v. *Hemmant*, 27 L.J. Ex., p. 297, Pollock, C.B., says: "It does not appear that the document was so presented and so pressed at the trial as to entitle the parties to a new trial on the ground of its rejection * * It is not uncommon for a party at a trial to tender a document (or take objection) with no idea of pressing its acceptance, and merely to produce a certain effect. If a party intends to take advantage of the rejection of evidence (or the overruling of an objection) he should press its reception and make the Judge distinctly understand that he does so. It would be unfair to allow a party to obtain all the advantage of the rejection of a piece of evidence (or the overruling an objection) without running any of the risk of the reception of the evidence (or allowing the objection)."

[87] Thus, this Divisional Court was exercising the same kind of jurisdiction as that which was exercised by the Court of Exchequer in ***Vaughan v. The Taff Vale Railway Co.***, *supra*. It was not exercising a jurisdiction in appeal.

[88] At the same sittings, four judges, Begbie C.J., Crease, Walkem and Drake JJ., heard proceedings arising from a trial by special jury which had been held in 1891 before McCreight J. The plaintiff, who was employed in the defendant's mill, was injured and he pleaded (***Foley v. Webster*** (1892), 2 B.C.R. 137 at 138):

> 12. By reason of the premises, whilst the plaintiff was so employed as aforesaid, performing his work of rolling logs on the said rollway, one of the logs thereon rolled upon him and knocked him down.

2004 BCCA 364 (CanLII)

13. The plaintiff's leg was broken and crushed by the said log, and he was permanently injured and rendered unfit for work, and incurred $95.00 expenses for surgical and medical attendance.

And the plaintiff claims $5,000.00.

[89] Fifteen questions were left to the jury. The critical questions and their answers were these (at 139):

1. Was machinery and build of mill good as regards safety of workmen? A.—No.

2. Were chock blocks sufficient? A.—No.

3. (*a.*) Was slant of rollway dangerous, (*b*.) or did it require sufficient blocks to render it safe? A. (*a*.)—Yes. (*b*.)—Yes.

4. What was the inducing cause or causes of accident, having regard to slant, chock blocks, and alleged negligence? A.—Slant of rollway and defective chock blocks were inducing causes.

5. Could the plaintiff by the exercise of such care and skill as he was bound to exercise have avoided the injury, having regard to the proper discharge of his duties as chainman? A.—No.

6. Did plaintiff complain of the chock blocks to the person or persons who appeared to be the authorized person or persons to whom he should complain? A.—Yes.

7. Did plaintiff know of slant? A.—No.

7*a*. Damages if plaintiff entitled to recover? A.—$5,000.

* * *

10. (*a*) Apart from machinery, was discipline and management of mill good, (*b*) and was want (if any) of such an inducing cause of accident? A.—(*a*) No. (*b*) Yes.

2004 BCCA 364 (CanLII)

[90] On these answers, McCreight J. gave judgment for the plaintiff. The defendant then moved the Full Court either that the judgment as entered on the pleadings be reversed or for a new trial.

[91] Before addressing the merits, Begbie C.J. said at 145-46:

> The first observations I wish to make are addressed to the form of motion before us, viz.: an alternative motion, either that judgment be reversed or a new trial directed. Assuming that this Court has jurisdiction to entertain either branch of the application, if duly brought before us, I do not think that we can entertain both branches at once without more. The difference is more distinctly seen if we refer to the position under the English Judicature Acts, upon which our own is based. Sitting as a Full Court here, we represent the Court of Appeal, which is a part of the Supreme Court in England, but not part of the High Court. Members of the High Court may be members of the Court of Appeal (*e.g.*, the Chief Justice of England), but the two Courts are quite distinct. And these two alternatives presented for our acceptance are also quite distinct: nay, proceed on exactly contrary hypotheses. The motion for reversing the judgment below, and entering it for the defendants, proceeds on the admission by the defendants that the findings are correct, and that the case was properly left to the jury by the trial Judge. It alleges in fact, that there was no error at the trial, either in the Judge or the jury, up to the verdict, but that on the findings thus correctly found by the jury the trial Judge should have given judgment for the defendants. The application for a new trial, on the contrary (except it be founded on the discovery of new evidence), impeaches the conduct at the trial either of the Judge or the jury, or both. The party moving for a new trial must allege that the findings were against the weight of evidence, or without evidence, or else excessive damages, or else that the Judge misdirected the jury in a point of law, or

2004 BCCA 364 (CanLII)

> erred in admitting or rejecting evidence, or some other misconduct. An application of the first nature, which assumes the correctness of all that was done and determined below, up to and including the verdict, and merely contends that the verdict has been misunderstood, can obviously be heard and discussed before a Court of Appeal quite conveniently, without any other notice than that it is to be discussed. But how can an application for a new trial be discussed or intelligently argued unless the respondents be informed of the objection or objections intended to be relied upon? It is an application which requires much "sifting," to use James, L.J.'s words in *Davies* v. *Felix*, 4 Ex. D. 37, and consequently full notice. I think that case, which has been followed in this Court on a former occasion, clearly shows that the latter branch of the present motion cannot be now entertained; in fact, it is now completely out of time. By sec. 61 of c. 31 (code 1888), the only statute under which we can entertain the application for a new trial, such an application is to be brought within eight days, and by sec. 67 the concurrent jurisdiction thereby given to the Full Court is not to enlarge that time. And there has been no application to enlarge the time, supposing Order LVII., r. 4 of 1880 to fit the case. We have, therefore, merely to consider the findings, and, taking them to be correct, to decide whether the judgment is in accordance with them.

[92] Thus, the defendants could not seek a new trial because they had not properly invoked Order XXXIX of the Rules.

[93] An appeal to the Supreme Court of Canada was dismissed: (1892), 21 S.C.R. 580.

[94] On the 14th August, 1890, in England there was enacted ***An Act to amend the Supreme Court of Judicature Acts***, 53 & 54 Vict., c. 44, known as "Mr. Finlay's Act":

2004 BCCA 364 (CanLII)

> **1.** From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury shall be heard and determined by the Court of Appeal and not by a divisional court of the High Court: Provided always, that such motions shall be heard and determined before not less than three judges of the Court of Appeal sitting together.

[95] Thus, at, so to speak, a stroke of the pen, the powers of a common law court sitting *en banc*, powers which as I understand them were not founded on statute but derived from the status of those courts as courts of inherent jurisdiction, to grant new trials or set aside a verdict in a jury trial were transferred to judges of the Court of Appeal.

[96] British Columbia followed suit on the 17th April, 1896 by enacting the ***Supreme Court Amendment Act, 1896***, 59 Vict., c. 14:

> **12.** Subject to the provisions of section 19 of this Act, sections 59, 60, 61, 62, 63, and 64 of the "Supreme Court Act" and section 15 of the "Supreme Court Act Amendment Act, 1894," are hereby repealed, and Rules 688, 688A, 689, 690A, and 690B of the Supreme Court Rules, 1890, are hereby repealed, and the tribunal heretofore called the Divisional Court of the Supreme Court of British Columbia is hereby abolished, and all power, jurisdiction, and authority by said repealed sections and Rules of Court, or by any other law, enactment, or Rule of Court conferred or purporting to be conferred on or heretofore lawfully exercised by the said tribunal is hereby transferred to and vested in the Full Court of the said Supreme Court.

2004 BCCA 364 (CanLII)

[97] In England, the new Court of Appeal was obliged to consider the scope of the powers conferred upon it by the new legislative regime.

[98] So what did the words "by way of rehearing" import?

[99] It is reasonably clear that they were interpreted one way on appeals from a judgment on a trial by judge alone, and another way on appeals from a judgment on a trial by judge and jury.

[100] As to appeals when the trial had been before a judge alone, see ***Coghlan v. Cumberland*** , [1898] 1 Ch. 704 (C.A.), cited by Dickson J. in ***Rathwell v. Rathwell***, [1978] 2 S.C.R. 436, and by Duff J. during his brief tenure as a judge of the Full Court of British Columbia, in ***Voigt v. Groves*** (1905), 12 B.C.R. 170 at 177.

[101] In ***Coghlan v. Cumberland***, the plaintiff, who had brought an action for rescission of a contract, failed at trial before a judge sitting alone, on the ground that he had failed to prove that the representations made to him were untrue. Lord Lindley M.R. began by saying, "and we have to consider whether this decision is right", and went on:

> The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict

2004 BCCA 364 (CanLII)

> by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circum-stances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

[102] The appeal succeeded.

[103] This is what Duff J. said in ***Voigt v. Groves***, *supra*, at 176-77:

> I do not forget the rule relating to the weight to be attached to the finding of the trial judge on questions of fact. Where one's view of the intrinsic credibility of individual witnesses is the controlling factor in a case, and where the estimate of such witnesses based upon their demeanour must largely determine the character of that view, an appeal on questions of fact, although given theoretically, is, generally, in practice an appeal in name only. But one cannot refuse to recognize

2004 BCCA 364 (CanLII)

> that there is a right of appeal on such questions, and that on an appeal from a judgment after a trial by a judge sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial judge as to the credibility of particular witnesses the weight which is justly due to them, one finds that one cannot reconcile his decision with the inferences one draws from admitted facts, from facts proved by credible witnesses, by documents, from circumstances which are common ground, then I think that generally one should not regard oneself as bound by his conclusions:...

[104] As to what the court ought to do with the verdict of a jury, see ***Allcock v. Hall***, [1891] 1 Q.B. 444 (C.A.). Lindley L.J. began thus, at 445-46:

> The impression on the minds of myself and my colleagues is that the verdict was unquestionably wrong. I think the jury misapprehended the nature of the evidence. I have also consulted Hawkins, J., because it is extremely difficult for the Court of Appeal to deal with evidence which comes before them only in writing. The demeanour of the witnesses and other matters are very material in estimating the value of evidence. The learned judge says that his opinion is, and always has been, that the verdict was utterly wrong. Under these circumstances, the question is, What ought the Court of Appeal to do? The Court is always very cautious about setting aside the verdict of a jury. The principle on which it acts is laid down in various cases, the most recent of which is the *Metropolitan Ry. Co.* v. *Wright* [11 App. Cas. 152]. In giving judgment in the Court of Appeal, Lord Selborne, L.C., said: "I have always understood that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the trial is moved for might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to a jury, as to make it unreasonable and almost perverse

2004 BCCA 364 (CanLII)

> that the jury when instructed and assisted properly by the judge should return such a verdict." And in the same case, when before the House of Lords, Lord Herschell states the principle thus: "The case was one unquestionably within the province of a jury; and, in my opinion, the verdict ought not to be disturbed unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find." The same principle was recognised by the Privy Council in *Brown v. Commissioner for Railways* [15 App. Cas. 240]. Can we say that the present case falls within the rule thus laid down - that though the question was unquestionably within the province of the jury, yet the jury, if they had viewed the whole of the evidence reasonably, could not possibly have found such a verdict? In my opinion, the case was brought within that rule. It appears to me that the verdict was so utterly irreconcilable with the evidence, when reasonably considered, that it ought to be set aside.

[105] The issue then too was whether the court should simply order a new trial or whether it should exercise the power of entering judgment for the defendants. On this point, Lord Lindley said, at 446, that the new rule should be construed:

> Order LVIII., r. 4, of the Rules of the Supreme Court, 1883, provides that, "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court," and it goes on to say, "The Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." This rule gives the Court of Appeal a much larger power than the Divisional Court have under Order XL., r. 10, which provides that "upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of facts not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the

2004 BCCA 364 (CanLII)

> questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly."

[106] Lopes L.J. also considered that the omission of the words, "not inconsistent with the finding of the jury", was a most important difference between the powers of a Divisional Court to order a new trial and the powers of the Court of Appeal. Those words have also been omitted in British Columbia.

[107] It is worth noting that:

(1) When, in England in 1907, the Court of Criminal Appeal was constituted, the words of its empowering Act, "unreasonable or unsupported verdict", were taken from ***Metropolitan Railway Co. v. Wright***, *supra*. See ***R. v. Ashford***, [1908] 1 Cr. App. R. 185 at 186.

(2) The ***Criminal Code***, unlike provincial legislation relating to civil appeals, has never, since rights of appeal were first provided for, drawn a distinction in matters of appellate jurisdiction between appeals from jury verdicts and appeals from the verdicts of judges sitting alone. Appellate courts, from one end of the nation to the other, are all constrained in both instances by s. 686(1)(a).

2004 BCCA 364 (CanLII)

[108] Having arrived at the end of the 19th century, we must now embark on the 20th century.

[109] In April 1907, "An Act Constituting a Court of Appeal and Declaring its Jurisdiction", known as the ***Court of Appeal Act, 1907***, S.B.C. 1907, c. 10, received Royal assent.

[110] That Act provided, in part:

> **6.** The Court of Appeal hereby constituted shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province of British Columbia to confer jurisdiction, there shall be transferred to and vested in such Court all jurisdiction and powers, civil and criminal, of the Supreme Court of British Columbia and the Judges thereof, sitting as a Full Court, that were held and exercised prior to the passing of this Act, and all other appellate jurisdiction and appellate powers, statutory and otherwise, and howsoever arising or conferred, that have heretofore been held or exercised by the Supreme Court sitting as a Full Court....
>
> **7.** The Court of Appeal shall further have and exercise such original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.
>
> **8.** For all the purposes of and incidental to the hearing and determination of any matter within its jurisdiction, and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal shall have the power, authority and jurisdiction vested in the Supreme Court.
>
> * * *
>
> **13.** The jurisdiction by this Act transferred to the Court of Appeal shall be exercised (so far as

2004 BCCA 364 (CanLII)

> regards procedure and practice) in the manner prescribed by the "Supreme Court Act" and the Rules of Court, and where no special provision is contained in this Act, the "Supreme Court Act" or Rules of Court, it shall be exercised, as nearly as may be, in the same manner as the same might formerly have been exercised by the Full Court.

[111] The provisions of the ***Supreme Court Act*** and Rules which, by s. 13 of the ***Court of Appeal Act***, were to govern that court's proceedings, were, among others, these:

From the ***Supreme Court Act***, S.B.C. 1903-04, c. 15:

> 85. Except from the orders mentioned in section 89 of this Act, an appeal shall lie to the Full Court from every judgment, order or decree made by the Supreme Court or a Judge thereof, whether final or interlocutory, and whether in respect of a matter specified in the Rules of Court or not.
>
> * * *
>
> 87. ...
>
> (3.) Every appeal from a final judgment, order or decree, shall be deemed to include a motion for a new trial, unless the notice of appeal expressly states otherwise:
>
> (4.) A motion for a new trial shall be taken by way of appeal.
>
> * * *
>
> 88. The appeals mentioned in the last preceding section hereof shall be subject, as to the notice and conditions thereof, to Rules of Court for the time being in force.
>
> 89. No order made by the Court, or any Judge thereof, by the consent of the parties, or as to costs only, which by law are left to the discretion of the Court or Judge, shall be subject to any appeal or re-hearing, except by leave of the Court or Judge making such order.

2004 BCCA 364 (CanLII)

Supreme Court Rules, 1906:

ORDER LVIII.

APPEALS TO THE FULL COURT.

> 1. All appeals to the Full Court shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case or other formal proceeding, other than such notice of motion, shall be necessary....
>
> * * *
>
> 4. The Full Court shall have all the powers and duties as to amendment and otherwise of the Court or Judge appealed from, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. ... The Full Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require....
>
> 5. If upon the hearing of an appeal, it shall appear to the Full Court that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.
>
> 5A. Where excessive damages have been awarded by a jury, if the Full Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

[112] Order LVIII remained unchanged when the Supreme Court Rules were reissued, bearing the legend "Consolidated November 1st, 1912".

2004 BCCA 364 (CanLII)

[113] The reader will note that neither the power upon admitting further evidence to draw inferences of fact nor the power to reduce excessive damages was in the Rules of 1890. I have been unable to discover what led to their insertion in the Rules of 1906 but those powers were carried forward into the hands of the Court of Appeal by the Act of 1907.

[114] On the 20th August, 1925, the Supreme Court Rules of 1906 were repealed and new rules promulgated for both that court and the Court of Appeal. The Court of Appeal Rules of 1925, insofar as they are of substantive effect, were these:

> APPEAL TO BE REHEARING ON NOTICE
>
> 3. All appeals to the Court shall be by way of rehearing and shall be brought by notice of appeal in a summary way. If the defendant desires to appeal from part only of the judgment or order, he shall specify such part, and the notice of appeal shall set out the grounds of appeal.
>
> * * *
>
> POWER OF COURT TO AMEND.
>
> 5. The Court shall have all the powers and duties as to amendment and otherwise of the Court or Judge appealed from, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits,

2004 BCCA 364 (CanLII)

such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the Court, notwithstanding that part only of the decision may have been appealed from, and such powers shall be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.

POWER TO ORDER NEW TRIAL.

6. If upon the hearing of an appeal it shall appear to the Court that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the verdict and judgment shall be set aside and that a new trial shall be had.

EXCESSIVE DAMAGES.

7. Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

* * *

QUESTION OF FACT.

16. When any question of fact is involved in an appeal, the evidence taken in the Court appealed from bearing on such question shall, subject to any special order of any Act, be brought before the Court as follows:-

(*a*.) As to any evidence taken by affidavit, by the production of true copies of the affidavit: Provided that the Court may order the originals to be produced by the Registrar of the Court appealed from:

(*b*.) As to any evidence given orally (unless taken by an official stenographer), by the

2004 BCCA 364 (CanLII)

> production of five copies of the notes of the Judge appealed from, or such other materials as the Court may deem expedient, and if taken by official stenographer, then by his notes:
>
> (*c*.) Where, on appeal to the Court, oral evidence taken or rulings made in the Court appealed from has or have to be considered, and a report of the same has not been made by an official stenographer, or, if made, cannot be procured, it shall be the duty of the appellant, or of his solicitor, to apply to the Judge appealed from for a copy of his notes, for the use of the Court, and in case default is made in this respect, and the hearing of the appeal has, in consequence, to be adjourned, the appellant shall be liable for the costs occasioned by the adjourn-ment, unless it is otherwise ordered by the Court for special reasons.

[115] I digress to note, although it is not relevant to the point now in issue, that by the amendments of 1935 to those Rules (see *The British Columbia Gazette*, 20th June and 29th August, 1935), the Court first required "factums". Whatever may be the plural of the word "factum" in other jurisdictions in Canada, this Court adopted the plural "factums" by its own Rules.

[116] In 1943, new Court of Appeal Rules were promulgated. Rules 3, 5, 6 and 7 were the same as in 1925. The rules dealing with preparation of appeal books had, however, been substantially changed. No doubt this came about because, by

2004 BCCA 364 (CanLII)

1943, shorthand reporters were required on trials in the Supreme Court of British Columbia.

[117] Then again, in 1959, new rules were promulgated, and those relating to the same subject matter as set out in the Rules of 1925 were in these terms:

NOTICE OF APPEAL

> 4. (1) All appeals to the Court shall be by way of rehearing and shall be brought by notice of appeal in a summary way.
>
> * * *
>
> AMENDMENT AND FURTHER EVIDENCE
>
> 7. (1) The Court has the powers and duties in relation to amendment and otherwise of the Judge or Court appealed from, and power to receive, in its discretion, further evidence upon questions of fact by oral examination in Court, or affidavit or deposition sworn or taken by or before an examiner or commissioner.
>
> (2) Further evidence shall not be received without leave of the Court, except
>
> (*a*) upon an appeal from an interlocutory judgment;
>
> (*b*) where no hearing has been held by the Judge or Court appealed from on the merits of the case; or
>
> (*c*) where the evidence is of matters that have occurred or arisen since the date of the decision appealed from.
>
> (3) Where further evidence is received, the Court may
>
> (*a*) draw inferences of fact;
>
> (*b*) give any judgment or make any order that ought to have been given or made; and
>
> (*c*) make any other order as the result of the reception of the evidence.
>
> (4) The Court may exercise the powers and duties conferred and imposed by this Rule

2004 BCCA 364 (CanLII)

(*a*) notwithstanding that part only of a decision is appealed; and
(*b*) in favour of any party to an appeal, whether or not he has appealed from the decision of the Judge or Court appealed from.

* * *

POWER TO ORDER NEW TRIAL

33. If, upon the hearing of an appeal, it appears to the Court that a new trial ought to be had, the Court may, by order, set aside the verdict and judgment and direct a new trial.

34. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned; and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties.

35. A new trial may be ordered on any question (whatever be the grounds for the new trial) without interfering with the finding or decision on any other question.

EXCESSIVE DAMAGES

36. Where excessive damages have been awarded by a jury, if the Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

[118] Two points may be noticed:

2004 BCCA 364 (CanLII)

(1) The express power to draw inferences of fact appears to be confined to those cases in which further evidence was received. It may be that the framers considered that such power existed in cases in which further evidence was not received because of the breadth of the power under Rule 4(1).

(2) Rule 34 brought back into the rules Rule 5 of Order XXXIX of the Rules of 1890 which reflected Rule 3 of Order XXXIX of the 1880 Rules. No such rule had been included in the 1925 Rules.

[119] Finally, we come to where we started, to the present ***Court of Appeal Act*** of 1982. For convenience, I repeat those provisions (amendments made since 1982 are in italics):

[RSBC 1996]

Constitution of the Court of Appeal

2 (1) The Court of Appeal is continued as a superior court of record having civil and criminal jurisdiction and consisting of the Chief Justice of British Columbia and *14* other justices.

* * *

Appellate jurisdiction

6 (1) An appeal lies to the court
(a) from an order of the Supreme Court or an order of a judge of that court, *and*
(b) in any matter where jurisdiction is given to it under an enactment of *British Columbia or* Canada.

2004 BCCA 364 (CanLII)

(2) *If* another enactment of *British Columbia or* Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

* * *

Leave to appeal

7 ...

(3) In an order granting leave to appeal *under this or any other Act*, a justice may *limit* the grounds of appeal.

* * *

Powers of Court of Appeal

9 (1) On an appeal, the court may
(a) make or give any order that could have been made or given by the court or tribunal appealed from,
(b) impose reasonable terms and conditions in an order, and
(c) make or give any additional order that it considers just.

(2) The court or a justice may draw inferences of fact.

(3) The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.

(4) The court may exercise its powers
(a) *even though* only part of an order has been appealed from, and
(b) in favour of any person whether or not *the person* is a party to the appeal.

(5) *If* a power is given to a justice *by this Act or the rules*, the court may exercise the power.

(6) The court may discharge or vary *any* order made by a *justice other than an order granting leave to appeal under section 7*.

2004 BCCA 364 (CanLII)

(7) The court and a justice have the same powers as the Supreme Court in relation to matters of contempt of court.

(8) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal,

(*a*) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, and

(*b*) *if* the appeal is not from the Supreme Court, *the Court of Appeal has* the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

New trial or hearing

27 (1) If on the hearing of an appeal it appears to the court that there should be a new trial or hearing, the court may set aside the verdict, finding or order and direct a new trial or hearing.

(2) *If* the court considers that the new trial or hearing should be so limited, *the court* may give final judgment as to part or parts only of the matter in controversy or as to some or one only of the parties and direct a new trial or hearing as to the remaining part or party.

[120] I note these differences from the rules of 1959:

(1) the words "all appeals ... shall be by way of re-hearing" have disappeared;

(2) the power to draw inferences of fact, which had been limited to cases in which further evidence was received, was no longer so limited.

2004 BCCA 364 (CanLII)

THE ISSUES RAISED BY THE COURT

Question 1: Where a jury verdict is perverse or inordinately low, may a trial judge assess damages and substitute his or her own assessment for that of a jury?

[121] Implicit in this question is the question of what may a trial judge do if the verdict is "inordinately high".

[122] If it were open to me to lay down a law on the use of words, I would say that the question should be simply, "What may a trial judge do if the verdict of the jury is on any question put to it unreasonable?"

[123] "Unreasonable" does not mean "I do not agree with it"; it means lacking in reason. As Lord Russell of Killowen put it in ***Secretary of State for Education and Science v. Metropolitan Borough of Tameside***, [1976] 3 All E.R. 665 at 703:

> History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, 'unreasonably' is a very strong word indeed, the strength of which may easily fail to be recognized....

[124] To pose the question thus is also to make it consonant with s. 686(1)(a) of the ***Criminal Code*** which, as I noted at paragraph 107, was itself derived from a judgment of the House

2004 BCCA 364 (CanLII)

of Lords on appellate powers under the ***Judicature Acts*** in civil appeals from jury verdicts.

[125] The question at issue was, in my opinion, settled by the judgment of this Court in ***LeBlanc v. Penticton (City)*** (1981), 28 B.C.L.R. 179, [1981] 5 W.W.R. 289, which is founded on Rule 41 of the 1976 Rules, which may be compared with the provisions *in pari materia* in the present rules:

1976 - Rule 41

> (1) No application for judgment is necessary except where an enactment or these rules otherwise provides. (MR 463.)
>
> (2) Where, after such redirection as the Court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried. (New.)
>
> (3) Where the answers of the jury entitle either party to judgment in respect of some but not all of the claims, the Court may pronounce judgment on the claims as to which the answers are sufficient and the remaining claims shall be retried. (MR 432a.)
>
> (4) Where the jury fails to reach a verdict in accordance with the *Jury Act*, the action shall be retried. (New.)
>
> * * *
>
> (6) If the party who required a jury trial waives his right to a retrial, the Court may pronounce such judgment on the evidence as it thinks just. (New.)

2004 BCCA 364 (CanLII)

1990 - Rule 41

> (1) No application for judgment is necessary except where an enactment or these rules otherwise provides.
>
> (2) Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.
>
> (3) Where the answers of the jury entitle either party to judgment in respect of some but not all of the claims, the court may pronounce judgment on the claims as to which of the answers are sufficient and the remaining claims shall be retried.
>
> (4) Where the jury fails to reach a verdict in accordance with the *Jury Act*, the action shall be retried.
>
> * * *
>
> (6) Where, for any reason other than the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.

[Why the word "of" was inserted in the fourth line of subrule (3), I have no idea.]

The change in Rule 41(6) has no bearing on the issue before us.

[126] In issue in ***LeBlanc v. Penticton (City)***, *supra*, was whether a trial judge was correct when he rejected the verdict of a jury on the ground that it was unreasonable. The Court

2004 BCCA 364 (CanLII)

held the judge had been wrong to reject the verdict. Subsequently this Court held that the jury's verdict was unreasonable and varied the judgment itself ((1981), 28 B.C.L.R. 205).

[127] There is a further consideration. The limitations on the power of a judge presiding at a jury trial to reject the verdict came from the practice of the common law courts. They antedated the ***Common Law Procedure Acts*** and the ***Judicature Acts***. Common law rules may be abrogated by the Legislature. The Legislature could empower a trial judge either to require a jury, which has given what, in his opinion, is an unreasonable verdict, to reconsider, or to reject such a verdict; but this Court cannot. Therefore, the answer to the first question is "no".

[128] In paragraph 11, I said I would have something more to say about the question of questions.

[129] In my opinion, it is unsatisfactory for a trial judge to leave to the jury questions in the form of the questions here. It is unsatisfactory because a jury is thereby enabled to avoid facing whatever questions of fact arise on the evidence.

2004 BCCA 364 (CanLII)

[130] Unsatisfactory questions were the root cause of the difficulty in ***Melgarejo-Gomez v. Sidhu*** (2002), 97 B.C.L.R. (3d) 154, 2002 BCCA 19, in which liability was in issue.

[131] There, the questions were [obtained from the Appeal Book]:

> 1. Was there negligence on the part of the defendant that caused or contributed to the motor vehicle accident?
>
> Answer: Yes ✓ No ___
>
> (If the answer to Question 1 is No, you do not need to deal with the other questions listed below. If the answer to Question 1 is Yes, proceed to answer the following questions.)
>
> 2. If the answer to Question 1 is Yes, was there negligence on the part of the plaintiff that caused or contributed to the motor vehicle accident?
>
> Answer: Yes ✓ No ___
>
> 3. If the answer[s] to Questions 1 and 2 are both Yes, and there was, therefore, negligence on the part of both parties, what was the percentage or degree of the negligence of each?
>
> Answer: Plaintiff 49 %
>
> Defendant 51 %
>
> Total 100%

[132] As to them, Braidwood J.A., Newbury J.A. concurring, said:

> [7] When the questions were put to the jury at the conclusion of the case, the jury members were not asked to define the particulars of the negligence of

2004 BCCA 364 (CanLII)

> either driver or pedestrian. This omission creates certain difficulties on appeal, as it makes it difficult to determine the findings of fact upon which the jury based their assessment of liability.

[133] I said:

> [59] I add words of my own only because this is a case in which had the jury been asked to give particulars of the negligence of each, as the jury was in *McLean v. McCannell* [[1937] S.C.R. 341], cited by Mr. Justice Braidwood, we ought to know who had the right of way.
>
> [60] I have never understood why trial judges do not insist on putting such questions, no matter what counsel want. The jury here plainly had a great deal of difficulty in arriving at a verdict for, in the end, it was 6-2. Questions would have concentrated their minds.

[134] At one time, detailed questions were frequently put to juries. See, for example, ***Foley v. Webster***, *supra* para. 88; ***Steves v. South Vancouver*** (1897), 6 B.C.R. 17 (F.C.); and various of the authorities cited by Taggart J.A. in ***LeBlanc v. Penticton***. See also ***Boston v. W.S. Bagshaw & Sons***, [1966] 2 All E.R. 906 at 907 and [1967] 2 All E.R. 87 (Eng. C.A.); ***Baker v. Kilpatrick*** (1900), 7 B.C.R. 150 (F.C.); and ***Keay v. Fenwick*** (1876), 1 C.P.D. 745 (C.A.).

[135] In ***R. v. Sheppard***, [2002] 1 S.C.R. 869 ¶ 55, Binnie J. elucidated the duty of a judge sitting on a criminal case to give reasons, in part, thus:

2004 BCCA 364 (CanLII)

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

* * *

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

[136] In my opinion, the concepts of "the functional need to know" and the "function in the appellate process" and the

2004 BCCA 364 (CanLII)

"[resolution of] confused and contradictory evidence" are equally important when the trier of fact is a jury in a civil case. Only questions framed to the live issues of the particular case can fulfill these requirements and prevent juries from deciding cases capriciously rather than judicially.

[137] In the case at bar, the live issues of fact were:

(1) whether the appellant had suffered a permanent back injury; and

(2) whether that injury was going to impair his future earning capacity.

[138] If the jury had answered "yes" to both questions, the quantum "0" was unreasonable on any view of the appellant's character.

[139] If the jury had answered "no" to the first question, the second question would not arise and the issue for the Court would be whether it was unreasonable for the jury to reject the medical evidence, all of which was that the appellant had suffered a permanent back injury.

2004 BCCA 364 (CanLII)

[140] If the jury had answered "yes" to the first question and "no" to the second, the question of reasonableness would also arise.

Question 2: On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court:

- **a. remedy the apparent error by substitution of an assessment of damages for the jury's verdict;**
- **b. remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or**
- **c. order a new trial on a limited issue (for example, assessment of damages).**

[141] This question only arises if this Court concludes that the jury's verdict was "unreasonable" or, in the words of Duff C.J. in ***McLean v. McCannell***, *supra*, "that no jury reviewing the evidence as a whole and acting judicially could have reached it."

[142] The learned trial judge did not put it so but that is what I infer he meant when he said at para. 4, *supra* para. 13:

> ... it would have been difficult to conclude on the evidence that the back injury did not amount to a loss of employability that would sustain an assessment of future wage loss. The evidence would also indicate that the assessment of general damages was inordinately low.

2004 BCCA 364 (CanLII)

[143] I have found it most helpful to have the learned trial judge's opinion on the reasonableness of the verdict which the Court would not have had but for the appellant's opposition to the motion for judgment. I do not know why it is that when a question of the reasonableness of the verdict arises, this Court does not make a practice of consulting the trial judge. Lindley L.J. followed that course in ***Allcock v. Hall***, *supra* para. 104, obviously without any qualm as to its propriety. That the trial judge's opinion could not bind the court does not deprive it of utility.

[144] The critical issues were whether the appellant had degenerative changes in his spine and, if so, whether those changes were caused by the accident.

[145] Counsel for the respondents says, contrary to the learned judge's assessment:

> 15. The medical evidence before the jury supported a verdict awarding minimal non-pecuniary general damages, and nil for persisting injuries or their effects. For example, x-rays taken of the appellant's spine were negative or normal, and when first examined by his physician, the appellant had no tenderness on palpation of his back, and was able to demonstrate a full range of motion.

2004 BCCA 364 (CanLII)

[146] This is the evidence of the family physician whom the appellant consulted immediately after the accident, there referred to:

> Q And you examined other parts because he had other parts that were injured as well, his thumb, for example. And you examined his back?
> A Yes.
> Q And there's a notation, "Back non-tender, full ROM." And we know that's full "range of motion"; is that correct?
> A That's right.
> Q And you've written down "non-tender." What does that mean?
> A That means palpation of the back, pressing on the back with fingers and thumbs, that there was no tenderness and that he did not feel any pain.
> Q When you pressed on it?
> A Yes.
> Q How does that relate to his report of having pain in his back?
> A Well, that -- well, it depends on the severity of the pain and the severity of the injury, and you can have a back strain -- sprain and not necessarily have tenderness.
> Q I see. Do you recall what you would have told Mr. Johnson after examining him -- after him coming in April 2nd, 1997, and having examined him, about what he might expect with respect to his back pain?
> A Well, I didn't wrote -- write a note to that regard, but normally what I tell people that come in with back complaints, injuries, accidents, is that usually the pain gets worse --
> Q Yes.
> A -- over the next while before it gets better and that it can go on for a period of time, sometimes weeks, sometimes months, and it's hard to predict at the time how long it's going to be. But I -- and I usually tell them that if things get worse and don't get better, after a while they should come back for another examination.

2004 BCCA 364 (CanLII)

* * *

Q What was the recommendation in terms of treatment after April 2nd, 1997, in relation to his back?
A Again, there's -- I didn't write a note in that regard, because he wasn't complaining of -- didn't have any tenderness at the time.
Q Yes.
A But normally I tell people that they can take some Tylenol.
Q Yes.
A If they have pain.
Q What about activity level, if the pain worsens?
A Activity level according to comfort.
Q Okay. Now, I'm sorry about that, I jumped back to that April 1997 notation and I'm going to jump back now again to December 8th, 1997. Why at this point did you ask for X-rays?
A Because the problem had been going on for a long time, and so I was looking for -- I would have expected just a muscle strain to have recovered by this time --
Q Yes.
A -- and so there must be some other cause that is perpetuating this.
MS. BEKKERING: My Lord, I'm just wondering if we're entering into the realm of opinion here.
THE COURT: No, I don't find any problem with this, counsel. Go ahead.
MS. BEKKERING: Thank you, My Lord.
MR. McMURCHY:
Q And, in fact, Mr. Johnson did have X-rays taken of his lower back about this time; is that correct?
A That's right.
Q And on December 17th, 1997, again Mr. Johnson came in and again there's notation, "back pain." And you've noted "X-ray zero." What is --
A Negative, that means that --
Q Okay.
A -- there were no separate findings.

[147] To this, counsel for the appellant replies that the uncontested evidence was that there was a series of x-rays

2004 BCCA 364 (CanLII)

which showed "ongoing progressive narrowing of the lower two discs of the lumbar spine" subsequent to the accident and, on the appellant's medical evidence, caused by it.

[148] This is the evidence on that point:

The evidence of Dr. G. McKenzie, an orthopaedic surgeon:

Q And you state: "It is my opinion that he has an injury, probably to the disc spaces of L4-5 and L5-S1 with this accident"?
A That is correct.
Q So can you explain to me what -- what the injury that you're describing here is?
A I can explain to you what led me to this opinion. Is that what you require?
Q Yes.
A It was -- this opinion was based on a number of factors, the first being that he was essentially asymptomatic prior to this injury. He has an injury, and subsequent X-rays have shown deterioration in the disk spaces between L4-5 and L5-1. And he had no pain until the date of his accident, and from the date of his accident until now, he's had ongoing pain in the lower back, all of which was consistent by history, consistent with his X-ray presentation, and consistent on physical examination.
Q You mentioned in your explanation deterioration of the disk spaces?
A That's correct.
Q And this is referred to in your report, as well as others, as a degenerative condition; is that correct?
A That is correct.
Q So as I understand your evidence, then, the disk is affected; is that correct?
A Yes, that is correct.
Q And what evidence is there as to the way in which the disk was affected over time?
A This is, by and large, a radiologic progression.

2004 BCCA 364 (CanLII)

Q Yes?
A We have a series of X-rays, starting approximately eight or nine months following his injury --
Q Yes?
A -- up until recently, all of which have shown ongoing progressive narrowing of the lower two disks of the lumbar spine, the L4-5 and the L5-1 disk spaces.
Q So what you're saying is you can look at the first set of X-rays which were taken in December 1997 --
A Yes.
Q -- and then compare them to recent X-rays and other X-rays along the way and see the actual progression of the injury that he suffered from the accident?
A That is correct.
Q And the progression is an increased -- or, sorry, a decrease in the spaces between the vertebrae?
A That is correct.

[149] As the learned judge commented in a colloquy with counsel for the defendant on the question of the charge to the jury:

THE COURT: ... Your friends are going to say, a chronic disability, debilitating and you're suggesting that he has performed work, he is capable of continuing to work.
MS. BEKKERING: Yes, My Lord.
THE COURT: Now, those are the two sides of it.
MS. BEKKERING: Okay, My Lord. In my -- in my closing arguments then I have the Court's comments and I'll refrain from arguing mitigation --
THE COURT: Well, I mean, I'm not directing you. You know, you make your own arguments, it's just not how I see it at this point. And, you know, if it were a matter of causation, there is the one element of causation is the report of Dr. --
MS. BEKKERING: Travlos.

2004 BCCA 364 (CanLII)

> THE COURT: Yeah, Travlos, and he comments that he can't attribute causation because he couldn't find the comment immediately after the accident of a complaint, back complaint. So he wouldn't take that step to find causation. Well, as he acknowledged that he didn't read that part of the -- of the treating physician, so that weakens it very considerably. It's not an absolutely definitive opinion in any event because it's -- you know, he simply wouldn't go to the positive statement that there was causation.
>
> And I think that if I did leave it in as something in the charge, I would have to express an opinion that the evidence appears to be very weak in support of it. Sometimes that door is best avoided from the defence point of view, you know, and I'll hear you if you think that it should go. But I would be putting that comment to the issue in any event.
>
> MS. BEKKERING: I'm content with it not to go, My Lord.

[150] I take that exchange, in the view of both the judge and counsel, to have eliminated from the jury's consideration any issue on the existence of degenerative changes and their being caused by the accident.

[151] That being so, for the jury to have concluded the contrary, if they did, was unreasonable.

[152] In paragraphs 137 to 140, I set out the live issues. I have concluded, concurring with the learned trial judge, that the jury's verdict on both issues was legally unreasonable. A jury, like a judge, may not do that which is unjust simply

2004 BCCA 364 (CanLII)

because it considers a plaintiff a less than responsible member of society.

[153] What then may this Court do?

[154] The appellant submits that the Court may remit the case to the court below for the learned trial judge to assess the damages or that the Court may do so itself [para. 24 *supra*].

[155] For their part, the respondents submit that the Court may do so itself, but if the Court remits the cause to the court below, it must be for a new trial by jury [para. 25 *supra*].

[156] This question turns on s. 9(1) of the Act which does differ in its wording from the provisions *in pari materia* in the 1959 Rules and the provisions in force when the authorities cited by the respondents in paragraph 25 were decided.

[157] I have concluded, although not without some hesitation, that s. 9(1)(c) does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.

2004 BCCA 364 (CanLII)

[158] Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.

[159] I would therefore allow the appeal accordingly. The appellant shall have the costs of the appeal. The costs of the first trial and of the assessment of the damages are remitted to the learned trial judge.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Mr. Justice Braidwood"

I agree:

"The Honourable Mr. Justice Oppal"

2004 BCCA 364 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Klingler v. Lau*,
2019 BCSC 1776

Date: 20191017
Docket: M150865
Registry: Vancouver

Between:

Rachel Klingler

Plaintiff

And:

Nancy Mon Lau and Thomas D. Lee

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:	K. Miles C. Caldwell
Counsel for the Defendants:	L. Kompa M. Reynolds
Place and Date of Trial:	Vancouver, B.C. July 15-19, July 30-31 and August 1, 2019
Place and Date of Judgment:	Vancouver, B.C. October 17, 2019

2019 BCSC 1776 (CanLII)

1. Introduction 2
2. Background 3
3. The accident and life after the accident 6
4. The Experts 15
(a) The Medical experts 15
(i) Dr. Finlayson 16
(ii) Dr. Rickards 19
(iii) Dr. Robinson 20
(iv) Dr. Medvedev 23
(b) The Non-medical experts 24
5. Findings and conclusions concerning Ms. Klingler's injuries 27
6. Damages 34
(a) Non-pecuniary damages 34
(b) Loss of earning capacity 37
(c) Loss of housekeeping capacity 46
(d) Cost of future care 47
(e) Special damages 50
7. Summary and disposition 52

2019 BCSC 1776 (CanLII)

1. Introduction

[1] On February 18, 2013, the plaintiff, Rachel Klingler, was involved in a motor vehicle accident, for which the defendants have admitted liability. Ms. Klingler says that, as a result of the accident, she sustained soft tissue injuries to her neck, shoulders, and upper and lower back, and that these have left her as of trial with myofascial pain syndrome and migraine-like headaches. She says further that, as a result of the injuries, her ability both to pursue her occupation as a pediatric occupational therapist and to engage in the many physical activities she enjoyed prior to the accident have been significantly impaired. In addition to non-pecuniary damages, Ms. Klingler seeks compensation for loss of earning capacity (both to the date of trial and in the future), loss of housekeeping capacity, cost of future care and special damages.

[2] The defendants do not dispute that Ms. Klingler sustained soft tissue injuries in the accident, and they do not dispute that, among other things, one of the consequences of those injuries is that Ms. Klingler now suffers from migraine-like headaches. However, the defendants say that, since the accident, Ms. Klingler continued to have a very busy and productive life, and quickly resumed many of her pre-accident recreational activities. They submit that the consequences of the injuries Ms. Klingler sustained in the accident are much less serious than she claims, and that she is essentially back to where she was before the accident. The defendants say that damages must be assessed accordingly.

2019 BCSC 1776 (CanLII)

2. Background

[3] Ms. Klingler was born in December 1983 in Montréal. She grew up in Beaconsfield, just outside Montréal. Her parents still live there.

[4] By all accounts, Ms. Klingler had a very happy and active childhood. She was involved and excelled in many activities and sports. These included T-ball, badminton, tennis, squash, cycling, kayaking and diving. When she was a high school student, she was a member of the Québec field hockey team. She played competitive softball, and was involved in competitive gymnastics. From a young age, she was an excellent skier.

[5] Ms. Klingler's evidence about her life growing up was supported by the evidence of Stephanie Swinburne and Ms. Klingler's mother, Lauren Klingler, both of whom testified at trial.

[6] Mrs. Klingler testified that Ms. Klingler started skiing at age 4, and also began gymnastics very young, at 4 or 5. She recalled Ms. Klingler being involved in racket sports, sailing and horseback riding. As Mrs. Klingler recalled, Ms. Klingler worked very hard in school and achieved very good marks. She described her daughter as competitive in sports and in her school work, although she also enjoyed team sports.

[7] Ms. Swinburne and Ms. Klingler have known one another since they were in grade school. They remain close friends, despite the fact that Ms. Swinburne and her family live in the Montréal area and Ms. Klingler is in Vancouver.

[8] Ms. Klingler attended Queen's University in Kingston, Ontario and received her Bachelor of Science degree in occupational therapy in 2006. While pursuing a Master's degree in occupational therapy, she began working part-time as a pediatric occupational therapist, her chosen career. She received her Master's in 2007.

[9] Ms. Klingler's strong interest in and commitment to pediatric occupational therapy in fact inspired Ms. Swinburne to change her course of studies at university. After completing an undergraduate degree at McGill, Ms. Swinburne then moved to Kingston and completed a degree in occupational therapy at Queens, with the goal of working as a pediatric occupational therapist.

[10] According to Ms. Klingler, a pediatric occupational therapist works mostly with children on the Autism spectrum, although it can also involve working with children who have developmental delays or conditions such as cerebral palsy. Ms. Klingler explained that the goal of the therapy is to help the child become as independent as possible with respect to all life skills. The therapy is all play-based, and is often focussed around something the child enjoys doing. The work is very physical for the therapist, who must demonstrate activities, and then work together with the child, keeping the child engaged and involved, as the therapist teaches the child how to move his or her body. In her work, Ms. Klingler often must set up equipment, such as tunnels, obstacle courses and a mini-trampoline. Sometimes, she and the child will play games at a small table to help the child develop fine motor skills.

[11] According to Ms. Klingler, and as Ms. Swinburne confirmed, the work requires imagination, focus and concentration, in addition to physical abilities. Consistency is very important to the development of both the therapeutic relationship and a rapport with the child and the child's family, which can take considerable time. The child and the child's family must be able to believe in and trust the therapist.

2019 BCSC 1776 (CanLII)

[12] While in university, Ms. Klingler continued to participate in many physical activities. She found that keeping active was essential to help her manage general feelings of anxiety. Otherwise, she would have had to take medication, which she did not want to do. Thus, her activities were very important in maintaining her emotional and mental health, as well as an important part of her social and recreational life. Ms. Klingler explained that one of the reasons she chose pediatric occupational therapy as a career was because, to feel good emotionally and mentally, she needs to be moving.

[13] After graduation, Ms. Klingler took up "Ultimate Frisbee," rock climbing and slack-lining, in addition to softball, hiking, camping, gardening and skiing. She explained that she would engage in physical activities almost every day of the week, and that she used physical activity to bring her mood "up." She also mentioned that she loved the problem solving that was involved in an activity such as rock climbing. Although Ms. Klingler had occasional injuries, she recovered quickly. Essentially (and as Ms. Swinburne confirmed in her evidence), Ms. Klingler had no limits in pursuing recreational activities or in her work. She had never suffered from migraines or migraine-like headaches before the accident.

[14] Mrs. Klingler, who saw Ms. Klingler regularly while she was living in Kingston, also described her daughter as having no limits and as being very healthy.

[15] After completing her Master's degree, Ms. Klingler continued to work in Kingston, where she had a full-time caseload. However, she found the opportunities for work and to advance in her career wanting. Ms. Klingler explained that the B.C. Lower Mainland has a much larger population than the Kingston area, and the funding was much better for parents with children on the Autism spectrum compared with Ontario. There were many more clinics in the Vancouver area, and a registry, the "Registry for Autism Service Providers" or "RASP" had been established, which allowed parents and therapists to connect with one another.

[16] Ms. Klingler explained that she had visited Vancouver in 2003, when she drove across the country with friends. She came to Vancouver again in 2010, and

2019 BCSC 1776 (CanLII)

began thinking more seriously about the possibility of moving. She explained that she was always looking on-line for job opportunities in Vancouver and B.C. Ms. Klingler explained that, in addition to the advantages available with respect to her work, she felt Vancouver better suited her lifestyle. She loved being near the ocean and the mountains, and having the ability to pursue her many physical activities year-round.

[17] In 2012, Ms. Klingler decided to make the move and arrived in Vancouver in the fall. She met with six clinics in Vancouver concerning a position as a pediatric occupational therapist and received multiple job offers.

[18] Ms. Klingler started work immediately. She accepted part-time positions at two different clinics, and began building up her caseload, with the goal of having 20 to 25 clients per week. She explained that, because Vancouver was an expensive place to live, she signed up to work six days a week. For her work at the clinics, she was paid half of the hourly rate billed to the client. Ms. Klingler explained that she was still building up her caseload when the accident happened.

[19] Ms. Klingler explained that, in addition to work, she was also busy five to seven days a week with favourite physical activities, including “Ultimate Frisbee” (where she was on a team), rock climbing and slack-lining. She explained that she was very passionate about her activities, as they regulated her mood and brought her “joy.” They were also a large part of her social life.

3. The accident and life after the accident

[20] The accident occurred about 5:20 p.m. on February 18, 2013. Ms. Klingler was driving home from work and was travelling northbound on Victoria Drive, in Vancouver. She was wearing her lap and shoulder seatbelt. Suddenly, the vehicle being driven by the defendant Mr. Lee cut in front of her and stopped. Ms. Klingler’s car collided with Mr. Lee’s vehicle, and the car that had been following Ms. Klingler hit her car. Ms. Klingler described experiencing two hard and sudden impacts. As she recalled, her body moved on a diagonal.

2019 BCSC 1776 (CanLII)

[21] The parties exchanged driver information. No emergency vehicles were called, and Ms. Klingler drove herself home. As she recalled, “my adrenalin was pumping,” and, at first, she did not feel much. However, that soon changed.

[22] At the time, Ms. Klingler did not have her own family doctor. Within a week of the accident, Ms. Klingler went to a walk-in clinic, and she was given a referral for physiotherapy and massage therapy. According to Ms. Klingler, she had back and neck pain, and experienced her first migraine-like headache. She began physiotherapy and massage therapy. As she recalled, the treatments provided her with some temporary relief, but this did not last more than a few days. She continued to have back and neck pain, and bad headaches.

[23] Mrs. Klingler visited Ms. Klingler in March or April 2013, and was in Vancouver for a week. She said that Ms. Klingler told her about the accident, and she went with Ms. Klingler to a walk-in clinic. As Mrs. Klingler recalled, on each of her visits to Vancouver after that, Ms. Klingler had an appointment for something medical. This was unusual, since, according to Mrs. Klingler, prior to the accident, Ms. Klingler would see a doctor once a year. As Mrs. Klingler recalled, Ms. Klingler’s headaches seemed particularly bad.

[24] According to Ms. Klingler, in the first six months post-accident, she had frequent back and neck pain when working, and frequent migraine-like headaches. As she recalled, she was working six days a week at two different clinics (either as an employee or an independent contractor). She explained that she tried to work through the pain. She was in new positions, and described herself as also “in denial” about her situation. However, she found that working through the pain made her headache symptoms worse.

[25] As Ms. Klingler recalled, she occasionally took time off work, and she did not take on new clients. She explained that, with her pain and headache symptoms, she did not feel that she was dependable enough to take on new clients because the children that she worked and works with need consistency in their therapy. She could not simply pass the child on to someone else if she was not available. Ms.

2019 BCSC 1776 (CanLII)

Klingler explained that she felt “awful” about this. At trial, she became quite emotional and upset when giving her evidence on this point. She explained that she wants to help as many children as possible, but at the time she felt that she was unable to help herself.

[26] Ms. Klingler’s symptoms also interfered with her ability to pursue her many physical activities outside of work. As a result, her feelings of anxiety increased, and she experienced low mood. She was no longer able to do multiple things, as she had done before the accident. Ms. Klingler explained that, when she was unable to do activities, she found herself sitting on the couch and had problems getting out of bed. The friendships she had made since moving to Vancouver were mostly based around participating in physical activities, and Ms. Klingler tried to “push through.” She went skiing and rock-climbing, for example. She went on a trip with friends to Nevada, and another trip to Oregon. However, after activities one day, she was unable to do things the following day because of pain in her neck and back, and often, a migraine-like headache. She felt that, because of her symptoms, she was no longer dependable, which was upsetting for her.

[27] To combat her mood symptoms, and for the first time, Ms. Klingler began taking medication, Amitriptyline. However, one of the side effects was that Ms. Klingler gained weight (about 20 pounds), which was distressing for her. As both Ms. Klingler and Mrs. Klingler recalled, Ms. Klingler had to buy new clothes because of her weight gain.

[28] As time went on, Ms. Klingler continued to attend physiotherapy, and eventually was going for treatments approximately weekly. According to Ms. Klingler, the therapy provided only temporary relief, and she described the therapy as “maintenance,” since, without it, she would become worse. She also tried other forms of treatment, including massage therapy, acupuncture, a course of active rehabilitation, core strengthening exercises and trigger point injections. Ms. Klingler explained that she was willing to try anything, and was hopeful for improvement.

2019 BCSC 1776 (CanLII)

However, she saw no real improvements and none of the treatments had any lasting benefit. At best, they functioned as maintenance.

[29] Ms. Klingler explained that, after the accident, she continued to engage in activities such as rock-climbing, slack-lining, high-lining and (in the winter) skiing. For example, she recalled that, on a trip with friends and immediately after a session of high-lining, she felt extremely happy. However, as Ms. Klingler recalled, after the session was over and her adrenalin level dropped, pain and a migraine-like headache kicked in and she then had to return to her tent. She was not able to participate in activities the following day. She started doing yoga, and found that the stretching helped reduce her symptoms. Although she did the Grouse Grind with two friends, Ms. Klingler described the experience as “awful.”

[30] Ms. Klingler was also prescribed medication (Zomig) for her headache symptoms, and Naproxen for pain control. As of trial, she was continuing to take Zomig and Naproxen regularly. She was also taking a lower dose of Amitriptyline, which avoided the side-effect of weight gain, and which she found helped her sleep and with her feelings of anxiety.

[31] Ms. Klingler described having three to four migraine-like headaches a month as of trial. A headache can last between one to four days, although, according to Ms. Klingler, most often it lasts between two and four days. She has yet to discern a pattern. In relation to her headaches, Ms. Klingler described having sensitivity to light and sound, and, occasionally, nausea and vomiting. According to Ms. Klingler, when she has a headache, she has very little energy and finds it very difficult to concentrate. Ms. Klingler explained that, even with medication, she is unable to function to the same level as when she has no headache. She described her headaches as being emotionally and physically draining, and very disruptive to her life. Ms. Klingler explained that she now does not make plans ahead of time because she feels that she is not dependable, and she has had to cancel or not participate in social and other events because of her symptoms. She explained that

2019 BCSC 1776 (CanLII)

she is anxious about a headache coming on, and therefore worries about participating in activities. She always carries medication with her.

[32] With respect to her work, according to Ms. Klingler, she currently has between 10 and 15 clients in a week, which is not a full caseload. A full caseload (according to both Ms. Klingler and Ms. Swinburne) would be 25 clients or client hours in a week.

[33] As of trial, Ms. Klingler had been running her own business, "Kids OT at Home," for several years and also working as an employee one day a week at a clinic. Generally, she delivers therapy through Kids OT at Home three days a week. She tries to reserve one day a week for administrative tasks, such as billing, related to her business.

[34] Ms. Klingler's work through Kids OT at Home involves (as the name implies) delivery of pediatric occupational therapy to a child or children in their homes. Among other things, it requires Ms. Klingler to travel to the client's home with all of the equipment she requires to deliver the therapy. Essentially Ms. Klingler creates a small gym, and she must set up the necessary equipment. Ms. Klingler explained that she is listed as a therapist on the RASP list, and the majority of her referrals come through that source. She does not do any separate marketing of her services, and she has had to turn down potential clients. She explained that she considers 10 to 15 clients represents her maximum capacity. Ms. Klingler explained that she refers those that she does not feel capable of taking on as clients to the RASP list, and that it is very hard for her to tell parents that she cannot help them.

[35] Ms. Klingler explained (and Ms. Swinburne confirmed) that continuity with clients is very important. Although it takes time to build the rapport between the therapist and clients (child and parent(s)), once the therapist has built that rapport, the relationship can last for years. Ms. Klingler explained that she works mostly for herself (rather than at a clinic) to have flexibility in terms of her schedule, although her work in the clinic gives her some stability and means she does not have to travel or transport equipment.

2019 BCSC 1776 (CanLII)

[36] Ms. Klingler explained that for her work at the clinic, she receives 50% of her hourly rate. When she is delivering services through Kids OT at Home, she bills clients an hourly rate. As of trial, her rate was $120 per hour, and she was intending to raise it to $130 per hour. Ms. Klingler explained that, for children on the Autism spectrum, she can bill the Province directly for her services. Sometimes, if she has had to cancel a session because of a headache or pain symptoms, she will try to reschedule the session to the day she would otherwise be doing administrative tasks, but often that is not workable for the family or families involved.

[37] Ms. Klingler explained that she has found the travel associated with delivering at-home therapy to be tiring, so that she is now limiting the distances she is prepared to service. She explained that, before the accident, she had no limits with respect to driving. When she moved to Vancouver, she drove across the country on her own and would often drive for eight hours a day (with occasional breaks). Ms. Klingler explained that now, she needs frequent breaks during the day, since she develops back and neck pain if she drives for more than about 15 minutes. She explained that there is a huge need for therapy services in Surrey, for example, but she finds it too much for her to travel that far. She would prefer to spend more time in the home delivering therapy than travelling.

[38] More generally, Ms. Klingler explained that before the accident, she could work a full day and still pursue her favourite recreational activities. Now, at the end of a workday, she feels drained. Her back and neck pain are triggered very easily, and when she pushes through, she will often get a bad headache. Now, at the end of a day, she does not have the energy to engage in favourite activities. She explained that although she takes Zomig and Naproxen when she feels her symptoms coming on, her symptoms come back the following day. According to Ms. Klingler, her lack of energy at the end of a workday has affected her ability to manage and complete administrative tasks. She explained that she uses her energy for work, and comes home at the end of the day already in pain. Moreover, when she sits at a desk working, her back hurts. As a result, she puts off doing

2019 BCSC 1776 (CanLII)

paperwork, and has found it difficult to keep up with the paperwork associated with her business.

[39] According to Ms. Klingler, she has no plans to stop working, and both of her parents worked into their 70s. She explained that she loves her work, and hopes to continue working as long as she can.

[40] Ms. Klingler explained that, since the accident, she feels that she is not as dependable, in part because she never knows when she will have one of her migraine-like headaches. This, in turn, makes her feel more anxious (a feeling that, before the accident, she relieved through activity), that she can no longer "pull her own weight" and that she is a burden to others. Ms. Klingler explained that, before the accident, she had always been very social, something else that has changed since the accident. Her relationships in Vancouver had been largely based on activities, and her feeling is that, since she is no longer dependable, she no longer receives invitations to participate and is more isolated as a result.

[41] As of trial, Ms. Klingler has been in a romantic relationship with Richard Ralph for about seven months. They met one another in December 2018.

[42] Mr. Ralph is a holistic nutritionist. He has a clinic in Vancouver, and also a clinic on Bowen Island, where he lives. He has a seven-year old daughter ("M") from a prior marriage, and shares parenting time with M's mother.

[43] Ms. Klingler and Mr. Ralph see one another most days, although they do not live together. Ms. Klingler explained that on Fridays most weeks, she and Mr. Ralph will go to Bowen Island and spend the weekend together there with M. Ms. Klingler will return to Vancouver either Mondays or Tuesdays.

[44] Ms. Klingler explained that she has always wanted to have children. However, she now has concerns that, as a result of the injuries she sustained in the accident, having children will mean that she will have more pain and increased migraine-like headache symptoms. She explained that carrying a water bottle has been enough to induce pain her neck, and she is therefore concerned about carrying

2019 BCSC 1776 (CanLII)

an infant. She explained that she feels it is a struggle for her to care for herself, and she worries about being able to care for a child. In his evidence, Mr. Ralph also expressed some reservations concerning this aspect of his relationship with Ms. Klingler.

[45] For the last several years, Ms. Klingler has lived in a two-bedroom, one-bath condominium, which is about 900 square feet. The condo is on the ground floor, and has a small garden area. Since February 2016, Ms. Klingler has had a roommate, Mark Olsthoorn.

[46] Ms. Klingler and Mr. Olsthoorn met one another through mutual friends, while they were back-country skiing on Mount Seymour. They did not know one another before the accident. According to Mr. Olsthoorn, they enjoy many of the same activities, such as skiing and rock-climbing, and have done some of these activities together (skiing in particular). However, they each have their own social circle.

[47] Ms. Klingler, Mr. Olsthoorn and Mr. Ralph all testified concerning the performance of household chores.

[48] According to Ms. Klingler, she grew up “with a hammer and a screwdriver,” and was a keen gardener. She prided herself on being self-sufficient. Now, although she is able to do household chores, she has had to modify how she performs them and needs much more help. She explained that she has to spread them out, and they take much more time to complete. According to Ms. Klingler, she is unable to wash dishes without needing a break because of back pain. She is no longer able to do projects around the house. Both Ms. Klingler and Mr. Ralph described a project that involved putting a planter box together, which Mr. Ralph had to take over from Ms. Klingler.

[49] According to Ms. Klingler, Mr. Olsthoorn typically has done most of the cleaning and cooking at the condo, while Ms. Klingler does more of the outdoor work and gardening. Mr. Ralph helps out with some of the gardening, and when he and

2019 BCSC 1776 (CanLII)

Ms. Klingler are together, he does most of the cooking. It is something he enjoys doing. At Mr. Ralph's home on Bowen Island, he does the housework.

[50] According to Mr. Olsthoorn, he and Ms. Klingler have different standards of tidiness, and his are somewhat higher. He will clean up the kitchen, do vacuuming and clean the bathroom. He explained that some days he does these chores because Ms. Klingler has a bad headache. Other days, he prefers to do them rather than tolerate messier living conditions. According to Mr. Olsthoorn, when Ms. Klingler has a bad headache, she is less talkative, and spends more time alone in her room.

[51] Ms. Swinburne has visited Ms. Klingler four times since the accident, most recently in May 2019. She has noticed changes in her friend. According to Ms. Swinburne, one of the big changes has been that Ms. Klingler had less endurance for activities, and they have had to cut activities short and return home. As a result, during visits, they spent more time at Ms. Klingler's home and did mostly sedentary activities. Ms. Swinburne explained that she has seen Ms. Klingler when Ms. Klingler has a headache, and she described Ms. Klingler as then being very low energy.

[52] Mrs. Klingler also testified concerning the changes she has noticed in her daughter since the accident. Like Ms. Swinburne, she noticed a definite difference in Ms. Klingler's energy level, and noticed that Ms. Klingler seemed to be having a hard time with her work schedule. Mrs. Klingler described the paperwork associated with Ms. Klingler's business as getting Ms. Klingler "down." According to Mrs. Klingler, Ms. Klingler seemed to be up late at night to get things done. As Mrs. Klingler recalled, when Ms. Klingler came home from work, she was noticeably tired. She described Ms. Klingler as "quite different" from the person she knew before. On a recent visit, she watched Ms. Klingler play softball. Although Mrs. Klingler described Ms. Klingler as doing most things well, she noticed that when Ms. Klingler was playing in the outfield, she was much different than what Mrs. Klingler

2019 BCSC 1776 (CanLII)

remembered. Mrs. Klingler described her as very hesitant and tentative, and missing most of the balls. Mrs. Klingler was very surprised at this.

[53] According to Mrs. Klingler, she has to ask Ms. Klingler how she is feeling, since Ms. Klingler does not like talking about such things. As Mrs. Klingler recalled, when Ms. Klingler has visited in Québec, her headaches in particular have interfered with her activities. As Mrs. Klingler recalled, before the accident, Ms. Klingler would be doing many things, for example, seeing friends, keeping up with sports and going to the rock-climbing gym. Now, she is not. She has noticed that now, Ms. Klingler is more tired, although she is sleeping better with medication. Mrs. Klingler noticed that Ms. Klingler was trying to keep up with paperwork and booking appointments while she was away from Vancouver.

[54] In contrast to the matter-of-fact and straightforward presentation of most of her evidence, Mrs. Klingler became quite emotional when she described her daughter as looking worn out and weary.

4. The Experts

(a) The Medical experts

[55] Opinion evidence from four medical doctors, each of whom carried out an independent medical assessment of Ms. Klingler, was tendered at trial. Ms. Klingler tendered opinion evidence from Dr. Heather Finlayson (a physiatrist) and Dr. Gordon Robinson (a neurologist specializing in headache disorders). The defendants tendered opinion evidence from Dr. Robin Rickards (an orthopaedic surgeon) and Dr. George Medvedev (a neurologist). All of the assessments were done in the first part of 2019.

[56] I will review Dr. Finlayson’s and Dr. Rickard’s opinion evidence first, before turning to the opinion evidence of Dr. Robinson and Dr. Medvedev.

2019 BCSC 1776 (CanLII)

(i) Dr. Finlayson

[57] Dr. Finlayson is a medical doctor with a specialty in physical medicine and rehabilitation, with expertise in the determination of causation of, diagnosis, prognosis and treatment of musculoskeletal injuries and psychological conditions arising from or aggravated by physical injury. She was qualified to give opinion evidence in that respect concerning Ms. Klingler.

[58] In addition to her qualifications as a specialist in physical medicine and rehabilitation, Dr. Finlayson has a diploma in Sports Medicine from the Canadian Academy of Sport and Exercise Medicine. Her first degree (prior to medical school) was a Bachelor of Science in Kinesiology. Dr. Finlayson estimated that about 10% of her practice involved working with individuals who are recreational (rather than professional) athletes. She herself is a rock-climber, both indoors and outdoors.

[59] Dr. Finlayson carried out her assessment of Ms. Klingler on January 24, 2019. Among her examination findings were that Ms. Klingler:

> was tender with palpation in the midline of the cervical and thoracic spines, but this was mild. She was more prominently tender when palpation of very taut bands that were felt in the splenius capitis, upper fibres of trapezius, levator scapulae, rhomboids, and thoracic paraspinal muscles. She reported that these were in her usual areas of pain.

[60] In Dr. Finlayson's opinion, Ms. Klingler's history and Dr. Finlayson's physical examination findings are consistent with a diagnosis of myofascial pain syndrome. Dr. Finlayson explained that this is a medical condition in which pain originates in muscles, tendons, ligaments and other soft tissue structures. In Ms. Klingler's case, the condition involves her neck and upper back area. In Dr. Finlayson's opinion, Ms. Klingler's myofascial pain in her neck and upper back was the direct consequence of the accident.

[61] As support for her diagnosis, Dr. Finlayson noted that the location of Ms. Klingler's reported pain corresponded with the site of soft tissues. Ms. Klingler's description of her pain as tight and aching is typical of myofascial pain. Further, Dr.

2019 BCSC 1776 (CanLII)

Finlayson explained that the improvement in Ms. Klingler's symptoms with therapies that included heat, stretches, massage, needling and the use of anti-inflammatory and muscle relaxant medications is supportive of the diagnosis. In addition, in Dr. Finlayson's opinion, the mechanism of the accident could be reasonably expected to have caused Ms. Klingler's myofascial pain syndrome, as she likely sustained whiplash and jarring injury. Furthermore, the onset of Ms. Klingler's symptoms was consistent with the expected development of symptoms following this type of injury.

[62] With respect to Ms. Klingler's headaches, in Dr. Finlayson's opinion, these were consistent with migraines, and were also the direct consequence of the accident.

[63] Finally, with respect to mood changes, Dr. Finlayson noted Ms. Klingler's report that she had a pre-existing history of a generalized anxiety disorder that was diagnosed when Ms. Klingler was in university. Dr. Finlayson noted further that it is "common for people who live with chronic pain . . . to develop anxiety and/or depression, or to experience an exacerbation of pre-existing anxiety and depression." Dr. Finlayson reported that Ms. Klingler's scores on screening questionnaires were "indicative of mild anxiety and minimal depressive symptoms." Dr. Finlayson expressed the view that "[i]t is most likely that [Ms. Klingler's] mood and anxiety symptoms have been at least partially worsened by the effects of her chronic pain" since the accident. However, Dr. Finlayson deferred to a psychiatrist for "further details regarding the specific nature and prognosis of her anxiety disorder."

[64] I note that Dr. Finlayson did not in fact make a diagnosis that Ms. Klingler either had or has an anxiety disorder. Of course, Ms. Klingler is not qualified to provide a medical diagnosis for herself. However, she can (and did) testify about how she feels, and about what she has done in the past, and does now, to address her feelings of anxiety.

[65] In her report, Dr. Finlayson set out a number of treatment recommendations. These included: active rehabilitation; physiotherapy and massage therapy, which

2019 BCSC 1776 (CanLII)

Dr. Finlayson said were both "reasonable and appropriate forms of pain management for myofascial pain," and which Dr. Finlayson recommended about once per month "indefinitely" and "for the foreseeable future"; possible Botox injections, following assessment by a headache specialist; medications, including Amitriptyline (which Dr. Finlayson considered a reasonable choice for management of both headaches and Ms. Klingler's mood disorder), Zomig and Naproxen; a psychiatric assessment for review of her mood disorder, and for medications and counselling; and an interdisciplinary pain management program.

[66] With respect to prognosis, in Dr. Finlayson's opinion, there was "potential for improvement" in Ms. Klingler's pain management "with the interventions outlined above." However:

> [Ms. Klingler] has now had chronic pain for well over two years, after which the prognosis for complete elimination of pain is extremely poor. The goals of the treatments above are to improve the overall management of her pain and to improve her ability to function despite her pain. It is not a reasonable goal for her pain to be eliminated or "cured". It is very unlikely that her pain will resolve simply with the passage of time.

[67] Dr. Finlayson was asked to, and did, express views on "Impact on Function." In this section of her report, she says (among other things, and for example):

> Ms. Klingler is probably less capable of carrying a normal caseload of clients due to her pain since the MVA. The nature of her job as an OT working with children requires her to carry equipment into and out of homes and to be active with children with special needs. This type of work is likely to aggravate her neck and upper back and to trigger or worsen migraine headaches. . . .
>
> There has likely been a marked reduction in Ms. Klingler's usual recreational pursuits. . . . All of these activities have probably reduced in frequency and intensity as a consequence of her pain since the MVA.

[68] This section of Dr. Finlayson's report is a mixture of facts (for example, that Ms. Klingler carries equipment in and out of homes, that in her job, she must be active with children, and that her recreational activities have been reduced) and inferences from those facts. However, in my view, I do not require the expertise of someone such as a specialist in physical medicine and rehabilitation to draw the

2019 BCSC 1776 (CanLII)

appropriate inferences from the facts, based on the evidence presented at trial. Ms. Klingler herself has testified about how her symptoms affect her work (and vice versa), and about the reduction in frequency and intensity of her recreational activities. Ms. Klingler has testified that her pain symptoms and headaches affect her ability to focus and concentrate. She has testified that for many years, and before the accident, she managed her anxiety through activity and testified about how important the ability to do so has been to the quality of her life. I acknowledge that Dr. Finlayson can explain why, from a medical standpoint, Ms. Klingler's evidence makes sense. However, for the most part, I give much of this section of Dr. Finlayson's report little weight.

[69] On cross-examination, Dr. Finlayson was asked about engaging in strenuous physical activity after an accident and whether the activity could cause injury. In Dr. Finlayson's view, absent something like a fall, simply engaging in physical activity would not lead to chronic pain, and often helps in recovery. Further, in her opinion, engaging in many activities would not, on its own, cause soft tissue injuries and does not contribute to a chronic pain disorder. In Dr. Finlayson's opinion, an individual engaging in activity and working as an occupational therapist will put pressure on her body, but in a good way, both for chronic pain management and anxiety management.

(ii) Dr. Rickards

[70] Dr. Rickards was tendered and qualified as a medical doctor with a specialty in orthopaedic surgery and expertise in the examination, diagnosis and treatment of diseases and injuries of the musculoskeletal system, including injuries to bones, joints, ligaments, tendons, muscles and nerves, caused by sports, physical activity and trauma. He was qualified to give opinion evidence in those areas respecting Ms. Klingler.

[71] In addition to his specialty training as a orthopaedic surgeon, Dr. Rickards has some speciality training in chronic pain management, with a specific focus on back and neck injuries and non-surgical interventions.

2019 BCSC 1776 (CanLII)

[72] Dr. Rickards had a general orthopaedic practice for 23 years and retired from clinical practice as of July 1, 2017. The current focus of his practice is on independent medical examinations.

[73] Dr. Rickards assessed Ms. Klingler on April 5, 2019.

[74] Dr. Rickards made the following clinical diagnoses: possible cervical Facet Joint Syndrome; and "subtle winging left scapula."

[75] With respect to the first diagnosis, Dr. Rickards said that Ms. Klingler "presents with symptoms and clinical findings suggestive of irritation of the facets in the neck [cervical] area." He explained that Facet Joint Syndrome of the cervical spine "can occur from repetitive activities as well as from a relatively minor event such as a sudden twist or flexion-extension," and "the evidence suggests that . . . the pain associated with this syndrome is due to an inflammatory reaction, much like a sprain of the ankle or knee." However, he accepted, based on the temporal relationship between the accident and the onset of Ms. Klingler's neck and back symptoms, that the accident caused those symptoms. I note that Dr. Rickards was incorrect in assuming that, after the accident, Ms. Klingler did not seek any treatment or have any difficulties until August 2013. His assumption resulted from a misreading of a CL-19 report.

[76] With respect to a prognosis in relation to the possible facet joint syndrome diagnosis, Dr. Rickards said that "with appropriate treatment," which (according to Dr. Rickards) included non-steroidal anti-inflammatory medication such as Naproxen and muscle strengthening, the symptoms would be "likely to resolve within a two-four-month period of time," and there would be no permanent difficulties.

[77] I note that Dr. Rickard described scapular winging as a "rare condition."

(iii) Dr. Robinson

[78] Dr. Robinson was tendered and qualified as a medical doctor with a specialty in neurology, and, specifically, with expertise in the diagnosis and in the

2019 BCSC 1776 (CanLII)

determination of causation, prognosis and treatment of headache disorders. He was qualified to give opinion evidence on those topics in relation to Ms. Klingler.

[79] Dr. Robinson's clinical practice is devoted entirely to the assessment and management of patients suffering from headache disorders, and patients are referred to him from all areas of B.C.

[80] Dr. Robinson carried out an assessment of Ms. Klingler on March 7, 2019.

[81] As part of his opinion, Dr. Robinson noted Ms. Klingler's history that, after the accident, she experienced headaches, neck and upper back pain, and in the weeks following the accident she had severe headaches that could be associated with nausea and vomiting. As of the assessment, Ms. Klingler reported having headaches on average once a week, at times lasting for a few days, and the headaches were mild to moderate in severity without incapacitating attacks. In Dr. Robinson's opinion, the improvement was likely a result in part of Ms. Klingler having access to effective treatment with Zomig. Based on the history, Dr. Robinson's opinion was that Ms. Klingler's headache condition had plateaued.

[82] The history provided to Dr. Robinson is consistent with Ms. Klingler's evidence at trial.

[83] In Dr. Robinson's opinion, Ms. Klingler's headaches meet the criteria for migraine without aura, "given the throbbing quality, moderate severity, nausea and stimulus sensitivity." In Dr. Robinson's opinion, it is unlikely that Ms. Klingler would have developed migraine headaches had the accident not occurred. He noted that:

> The temporal relationship between the accident which resulted in soft tissue injury to her neck, sleep deprivation and a worsening of a pre-existing anxiety disorder and the development of frequent and severe headaches is compelling.

[84] Dr. Robinson noted further that, in his clinical practice he has seen "many patients who have had persisting headaches with migrainous features beginning in relation to soft tissue injury to the neck that continue despite improvement or even

2019 BCSC 1776 (CanLII)

full recovery of the neck pain and stiffness." He observed that "headache is a common symptom following soft tissue injury to the neck." He explained that:

> In the majority of cases clinical examination and investigation is normal in patients suffering from recurring headache and the diagnosis rests on the temporal relationship to trauma and the historical features reported by the patient.

[85] In Dr. Robinson's opinion, Ms. Klingler's history and his examination of her was consistent with a diagnosis of persistent post-traumatic headache related to soft tissue injury to her neck sustained in the accident. In his opinion, the accident "is the causative factor in the development and persistence of [Ms. Klingler's] headache disorder." Dr. Robinson helpfully explained, from a medical perspective, how an individual (particularly a woman) who sustained a soft tissue injury to the neck can develop a chronic headache disorder.

[86] With respect to prognosis, Dr. Robinson's opinion was that Ms. Klingler would probably continue to have recurring headaches indefinitely. He explained that "[t]he prognosis for posttraumatic headache persisting beyond 2-3 years is usually guarded with improvement unlikely."

[87] With respect to treatment, Dr. Robinson said:

> 73. The treatment of chronic headache related to head and neck trauma is usually difficult. . . . As yet, there is no physical therapy that has been found to be curative. At most patients will experience temporary benefit and on occasion the headaches may be more severe following such therapy.
>
> 74. I do not believe that there is any further advice to be given other than to maintain an active lifestyle. Regular exercise directed to improving general fitness may increase the sense of well-being and ability to cope with pain.

[88] Dr. Robinson noted that medications are often unhelpful in treating chronic post-traumatic headache. However, in his view, Ms. Klingler had effective acute control with the medication Zomig, and he doubted there would be any other acute medication that would be more effective. Dr. Robinson also mentioned other possible treatments, including Botox injections. which he said "may be helpful in

2019 BCSC 1776 (CanLII)

headache related to head and neck trauma." In his opinion, Botox "would be a reasonable consideration" for Ms. Klingler.

[89] On cross-examination, Dr. Robinson was asked whether Ms. Klingler suffered from migraine headaches or tension headaches or a combination of both. Dr. Robinson explained that Ms. Klingler has neither migraine headaches nor tension headaches. Rather, she has headaches attributable to another cause, and therefore another classification applies, namely, persistent post-traumatic headache related to a soft tissue injury to Ms. Klingler's neck. Her headaches have migrainous features, but, in Dr. Robinson's opinion, they would not be classified as migraines, since they are secondary to her soft tissue injuries.

[90] Also on cross-examination, Dr. Robinson was asked to assume that, within weeks of a motor vehicle accident, a person engaged in physical activities such as indoor and outdoor rock climbing, skiing and hiking. Dr. Robinson was also asked whether the activities would be factors leading to migraine-like headaches. Dr. Robinson said potentially, but he would have to make inquiries of the individual to see what happened. He explained that Ms. Klingler told him that she engaged in activities such as skiing and rock climbing after the accident, that those activities were very important to her, and that activity was her "medicine." He explained that, in the history, Ms. Klingler did not identify these activities as associated with her headaches, and he did not diagnose her as having post-exertional headaches, as the history (including the absence of any form of headache disorder prior to the accident) did not support this diagnosis. Rather, the appropriate diagnosis was persistent post-traumatic headache related to the soft tissues injuries to Ms. Klingler's neck sustained in the accident.

(iv) Dr. Medvedev

[91] Dr. Medvedev was tendered and qualified as a medical doctor with a specialty in neurology, including headache disorders, qualified to give opinion evidence in those areas respecting Ms. Klingler. He assessed Ms. Klingler on April 3, 2019.

2019 BCSC 1776 (CanLII)

[92] In Dr. Medvedev's opinion, as a result of the accident, Ms. Klingler sustained a "sprain and strain" injury to her neck and back, and developed post-traumatic headaches. I note that this is generally consistent with the opinion evidence of Dr. Finlayson and Dr. Robinson. Further, in Dr. Medvedev's opinion, Ms. Klingler experienced an aggravation of a pre-existing anxiety disorder. With respect to causation, in Dr. Medvedev's opinion, the accident was "responsible for the development of [Ms. Klingler's] active complaints."

[93] With respect to prognosis, Dr. Medvedev said:

> Overall, the trend of her symptoms remained positive. Even though the rate of improvement slowed, based on her subjective report, it is more likely than not that her symptoms will continue to improve and likely will resolve. The precise duration of recovery is uncertain and could be measured in months and years.

[94] With respect to treatment, Dr. Medvedev said that a trial of Botox "could be considered," and other medications (such as Topamax and Flunarizine) "could be of value" for management of Ms. Klingler's headaches.

(b) The Non-medical experts

[95] Ms. Klingler also tendered opinion evidence from: Russell McNeil (an occupational therapist and functional capacity evaluator); and Darren Benning (an economist).

[96] Mr. McNeil was tendered and qualified as a occupational therapist with experience in functional capacity evaluations and cost of care assessments, and was qualified to give opinion evidence in those areas with respect to Ms. Klingler.

[97] Mr. McNeil carried out a functional capacity assessment of Ms. Klingler on April 8, 2019. His report, including his discussion of cost of future care matters, is dated April 17, 2019.

[98] Although Mr. McNeil's report very helpfully provides a table of contents and has numbered paragraphs, I found the format and structure of Mr. McNeil's report

2019 BCSC 1776 (CanLII)

challenging. The main body of the report is 18 pages, which includes Mr. McNeil's conclusions and opinions concerning Ms. Klingler's overall work capacity, as well as his "Minimum Cost of Care Recommendations." However, what follows are 14 appendices and almost 60 pages of additional material. The caution in para. 21 of the main body of the report (under the heading "Report Format (Facts, Assumptions and Opinions)") very strongly implies that, to properly understand the conclusions and opinions reached, the reader must review and consider everything through to the end of the appendices. I question whether the results of the functional capacity evaluation, Mr. McNeil's opinions and conclusions with respect to that evaluation, and his views on costs of future care need to be presented in that fashion, with the dense level of detail in some of the appendices, given the essential purpose of the expert report. Perhaps the opinions and conclusions could have been sufficiently presented in a simpler, more concise way, with a view to communicating everything that was necessary given the purpose of the opinion, but not more.

[99] I am not clear whether Mr. McNeil intends to make a rhetorical point by describing his cost of future care recommendations as "Minimum Cost of Care Recommendations" (underlining added). If he is, in my opinion, it is neither necessary nor helpful. Rhetoric and argument should be left to counsel. They do not belong in an expert report.

[100] With respect to Ms. Klingler's overall work capacity, in Mr. McNeil's opinion, based on the assessment results, Ms. Klingler is capable of working in occupations that fall within "sedentary" or "light" work categories. In Mr. McNeil's opinion, Ms. Klingler would not be suited for medium level work, as she would not be capable of sustaining the strength demands, and she is not capable of working in occupations in the "heavy work" category.

[101] Mr. McNeil classified Ms. Klingler's career as a pediatric occupational therapist as light to medium level work. In his opinion, based on his assessment, she was capable of part-time work with restrictions and accommodations, but not capable of full-time work. In Mr. McNeil's opinion, Ms. Klingler did not demonstrate

2019 BCSC 1776 (CanLII)

the capacity to perform her work on a full-time basis at a competitively employable work pace. Mr. McNeil concluded:

> 83. Specifically she has demonstrated restrictions in her capacity to perform the strength and stamina requirements of the work. She is restricted in her capacity to perform prolonged standing throughout the day. She has demonstrated restrictions in her capacity to perform prolonged static and dynamic spinal positioning. She is restricted in her capacity to perform low level crouching and/or kneeling combined with spinal positioning. She is restrict[ed] in her capacity to perform prolonged static reaching.

[102] In Mr. McNeil's opinion, with respect to the physical demands of Ms. Klingler's work, she was slightly restricted in things such as sitting and crawling. She was moderately restricted in tasks such as standing, reaching out and overhead, bending, stooping, crouching, kneeling, lifting, pushing and pulling. She lacked the capacity for carrying.

[103] With respect to Ms. Klingler's functional capacity for typical household tasks, in Mr. McNeil's opinion, she was slightly restricted for tasks such as shopping, laundry and vacuuming, and moderately restricted in respect of washing floors and cleaning bathrooms. In his opinion, Ms. Klingler was able to wash dishes, load a dishwasher, make beds and change bed linen.

[104] I will come back to Mr. McNeil's future care recommendations in the context of Ms. Klingler's claim for cost of future care.

[105] Mr. Benning was tendered and qualified as an economist, qualified to give opinion evidence concerning future income loss, multipliers and annual earnings, and also calculations of the present value of costs of future care. Mr. Benning prepared three reports: on earnings information for female occupational therapists ("Report No. 1"); on present value multipliers in relation to future income and costs of future care ("Report No. 2"); and calculating the present value of costs of future care items contained in Mr. McNeil's report ("Report No. 3").

[106] I will return to Mr. Benning's evidence in the discussion below of loss of earning capacity and costs of future care.

2019 BCSC 1776 (CanLII)

5. Findings and conclusions concerning Ms. Klingler's injuries

[107] Before setting out my findings, I will make some comments on the witnesses.

[108] Ms. Klingler's credibility and reliability are, of course, important issues in this case. The opinions of the medical doctors are based, in large part, on the history provided by Ms. Klingler and on her self-reports of pain and limitations. The weight that can be given to those opinions therefore depends on the court's assessment of Ms. Klingler's credibility and on the consistency of her evidence at trial with the information she provided to the doctors: see ***Edmondson v. Payer***, 2011 BCSC 118, at para. 21.

[109] The defendants attack both Ms. Klingler's credibility and reliability.

[110] In general, the defendants say that the type, level and frequency of activities in which Ms. Klingler engaged following the accident are entirely inconsistent with her self-reports of continued pain and significant limitations in most (if not all) aspects of her life, including in her ability to carry on her profession as a pediatric occupational therapist. As further support for their position, the defendants point to photographs in evidence, showing Ms. Klingler rock-climbing and participating in other physical activities. In many, she is smiling. The defendants say that, when the court considers the evidence as a whole, the injuries Ms. Klingler sustained in the accident have not affected her life to the extent she claims. The defendants say that the conclusion that Ms. Klingler's life is not as impaired or limited as she claims is simply a matter of common sense.

[111] The defendants argue (at least implicitly) that, since Ms. Klingler is not a reliable reporter, the expert opinions that rely on her reports cannot be given much weight.

[112] However, I do not agree with the theory that the defendants advance. I do not accept that the fact that, post-accident, Ms. Klingler has pursued many physically demanding activities means that her evidence concerning how injuries she sustained in the accident have affected her is neither credible nor reliable. In my view, in

2019 BCSC 1776 (CanLII)

advancing this theory, the defendants have very seriously underestimated the importance of physical activity to the quality of Ms. Klingler's life, a point on which Ms. Klingler was never seriously challenged on cross-examination. They have also seriously underestimated the sacrifices she has been prepared to make to try to maintain her pre-accident life-style. Moreover, the defendants ignore the medical opinion evidence from Dr. Finlayson and Dr. Robinson concerning the value of physical activity in managing pain.

[113] In her evidence, Ms. Klingler never denied that, after the accident, she continued to engage in most of her pre-accident physical activities, or at least she attempted to do so. Pursuit of these activities was entirely consistent with Ms. Klingler's lifestyle before the accident, in which (and for many years) she had used physical activity as a very important means to manage her mood and anxiety. Dr. Finlayson, in her evidence, spoke to the benefits of such an approach, including following injury.

[114] The difference for Ms. Klingler is that, after the accident, while she did her best to carry on as before, she was now injured and in pain, and had migraine-like headaches. It does not follow that, because Ms. Klingler continued to pursue many of her pre-accident activities, her injuries had completely resolved and she was no longer symptomatic. I reject that conclusion, and in my view, it is not supported by evidence that I accept. Given the importance of physical activity to the quality of Ms. Klingler's life, I find that her evidence – that she pursued activities, but, because of the injuries she sustained in the accident, was unable to do so with the same intensity or frequency or enjoyment as before – is credible.

[115] It also does not follow that when a person who has been injured in an accident is later seen smiling in a photograph or taking a trip with friends, that person no longer feels or experiences the effects of her injuries. There can still be therapeutic value in travel, for example, or in participating in activities with friends, or (as Dr. Finlayson pointed out in her evidence) in engaging in physical activity generally, even though, as a result of injuries and pain, the experience is now less

2019 BCSC 1776 (CanLII)

enjoyable. Moreover, as Murray J. observed in ***Senger v. Graham***, 2018 BCSC 257, at para. 20, plaintiffs cannot be expected to cease living once they commence a lawsuit.

[116] Ms. Klingler's evidence concerning her continuing pain symptoms and headaches, and their impact on her ability to function, is supported by the medical evidence from Dr. Finlayson and Dr. Robinson.

[117] The defendants do not dispute that Ms. Klingler sustained soft tissue injuries in the accident, and they do not dispute the diagnosis of post-traumatic migraine-like headaches resulting from those injuries. Both Dr. Finlayson and Dr. Robinson explain, from a medical perspective, how the injuries Ms. Klingler sustained in the accident can result (and, in Ms. Klingler's case, have resulted) in myofascial pain syndrome and persistent post-traumatic headaches. Thus, Ms. Klingler's reported symptoms make sense medically and they are consistent with injuries known to be caused by the type of trauma she experienced in the accident. When Dr. Finlayson assessed Ms. Klingler, she made objective findings, consistent with the pain symptoms Ms. Klingler reported and consistent with Dr. Finlayson's diagnosis of myofascial pain syndrome caused by the injuries Ms. Klingler sustained in the accident.

[118] Dr. Robinson explained how soft tissue injuries to the neck can result in post-traumatic headaches. He persuasively rejected the theory put to him on cross-examination that Ms. Klingler's headaches were related to her activities, rather than the injuries she sustained in the accident. He also made the obvious points that, by their nature, the symptoms of headache and neck pain are subjective and that the assessment of headaches (including diagnosis and impact) can only be determined by self-report. The history Ms. Klingler provided to Dr. Robinson, in particular that she had no pre-accident, activity-related, migraine-like headaches, was consistent with Ms. Klingler's evidence at trial.

[119] Ms. Klingler's evidence concerning her functioning before and after the accident, and how she has been affected by her injuries, is also supported by the

2019 BCSC 1776 (CanLII)

evidence of Ms. Swinburne and Mrs. Klingler. Both of them knew Ms. Klingler very well and were in a very good position to speak to the changes they saw in her following the accident. Although neither Mr. Olsthoorn nor Mr. Ralph knew Ms. Klingler before the accident, the evidence of both of them supported Ms. Klingler's evidence concerning how she now functions.

[120] I will address the absence of documentary evidence concerning Ms. Klingler's income, specifically her income from Kids OT at Home, below, in the discussion of Loss of earning capacity.

[121] I give little weight to Dr. Rickards' opinion evidence, except where it is consistent with the opinion evidence of Dr. Finlayson, whose evidence (apart from the areas I identified above to which I give little weight) I accept. In my opinion, Dr. Finlayson was much better positioned, given her qualifications and experience, to provide a full and reliable picture of Ms. Klingler's diagnoses and prognoses, as compared with Dr. Rickards.

[122] Moreover, Dr. Rickards' diagnoses seemed to me to ignore the obvious (and undisputed) fact that Ms. Klingler had sustained soft tissue injuries in the accident. I was not persuaded by either Dr. Rickards' report or his oral evidence at trial that I should accept his diagnosis of "scapular winging," a condition that he described as rare. One of his main treatment recommendations in respect of his (possible) diagnosis of cervical facet joint syndrome was Naproxen. However, since the accident, Ms. Klingler has been a long-term user of Naproxen, without the result Dr. Rickards at least implied should be expected. In those circumstances, I am unable to accept Dr. Rickards' possible diagnosis as a reasonable one.

[123] As between Dr. Robinson and Dr. Medvedev, I prefer and give much greater weight to Dr. Robinson's opinion evidence. I accept Dr. Medvedev's opinion evidence where it is consistent with the opinion evidence of Dr. Robinson and the opinion evidence of Dr. Finlayson.

2019 BCSC 1776 (CanLII)

[124] I found Dr. Robinson to be an impressive and very helpful witness. His evidence was balanced, thoughtful and fair. He has deep command of his area of expertise, but (unlike some experts) he was able to explain matters within his area in a straight-forward way that non-experts can understand.

[125] Ms. Klingler's headaches were the true reason for expert evidence from a neurologist in this trial. However, Dr. Medvedev does not have the depth of experience in headache disorders that Dr. Robinson possesses. Moreover, there was no explanation in Dr. Medvedev's report for his optimistic prognosis concerning Ms. Klingler's symptoms, rendering this part of his opinion of little value. Even Dr. Medvedev's optimism was guarded, as he acknowledged that the "precise duration of recovery is uncertain," and could be measured in "months or years."

[126] I find that, as a result of the accident, Ms. Klingler sustained soft tissue injuries to her neck and upper back, including the shoulder area. As a result of the injuries, particularly to her neck, Ms. Klingler also developed persistent post-traumatic migraine-like headaches. These findings are consistent with Ms. Klingler's evidence at trial, and with the medical diagnoses of Dr. Finlayson and Dr. Robinson. Dr. Medvedev's opinion evidence that Ms. Klingler sustained a sprain and strain injury to her neck and back and developed post-traumatic headaches, and that the accident was responsible for Ms. Klingler's "active complaints," is consistent with the evidence of Dr. Finlayson and Dr. Robinson.

[127] Ms. Klingler's work as a pediatric occupational therapist and her many physical, recreational activities outside of work were (and continue to be) very important to her and to the quality of her life. Initially, she was hopeful that she would recover relatively quickly and was indeed in denial about her true situation. I consider this to be an aspect of Ms. Klingler's stoicism. I find that, although Ms. Klingler attempted following the accident to carry on her pre-accident activities, including her work, her ability to do so was impaired by pain resulting from the soft tissue injuries and from the effects of her headaches. Ms. Klingler pursued a variety of treatments, including regular physiotherapy, massage therapy and active

2019 BCSC 1776 (CanLII)

rehabilitation. However, although Ms. Klingler had some relief as a result of these treatments, the relief was temporary. She required medication to address her headache symptoms.

[128] I find that, prior to the accident, Ms. Klingler used physical activity (rather than medication) to deal with feelings of anxiety and to maintain her mood. Physical activity contributed in a significant way to Ms. Klingler's overall mental health and feelings of well-being. However, because her ability to pursue recreational activities was impaired by the injuries she sustained in the accident, she was unable to manage her anxiety and mood as she had done pre-accident. Accordingly, I find that, as a result of the injuries Ms. Klingler sustained in the accident, her anxiety and mood problems have been exacerbated. Because, as a result of her injuries, Ms. Klingler was unable to manage her anxiety and mood through physical activity, she began taking medication, one of the side-effects of which was a weight gain of 20 pounds. While no medical doctor recommended that Ms. Klingler lose weight (and Dr. Rickards recorded a body-mass index of 22, which was normal), the weight gain was upsetting for Ms. Klingler and required a new wardrobe.

[129] I find that, as of trial, and as a result of the injuries she sustained in the accident, Ms. Klingler has developed myofascial pain syndrome in her neck and upper back, and also persistent post-traumatic headaches. Ms. Klingler's pain is now chronic and aggravated by activity, rendering Ms. Klingler less functional in her work and personal life. Moreover, Ms. Klingler's pain symptoms have a negative effect on her anxiety and mood. I find that, although there is some potential for improvement in her pain symptoms, in terms of management of those symptoms, the prognosis for cure or elimination is extremely poor. I accept Dr. Finlayson's opinion in that respect in preference to the opinion stated by Dr. Medvedev.

[130] Although Ms. Klingler's headaches have improved (particularly in terms of their frequency) since the accident, she continues to have mild to moderate headaches on average about once per week, sometimes lasting for a few days. Ms. Klingler has been able to obtain effective treatment by using the medication Zomig.

2019 BCSC 1776 (CanLII)

However, I find that the prognosis for further improvement is guarded, and Ms. Klingler is likely to continue to have recurring headaches indefinitely. I accept Dr. Robinson's opinion evidence in that respect. I find that Ms. Klingler's headaches are very disruptive to her life, as well as emotionally and physically taxing for her. A headache affects her concentration and focus, and this has, in turn, negatively affected Ms. Klingler's confidence in her ability to do her work as a pediatric occupational therapist. The unpredictability of her headaches is another source of anxiety for Ms. Klingler, both in her work and her personal life, and contributes to her feelings that she is no longer dependable.

[131] Before the accident, Ms. Klingler pursued her work and many recreational activities without any limits. In addition to their contribution to Ms. Klingler's sense of well-being, the recreational activities were also a significant aspect of Ms. Klingler's social life. She was very independent and took pride in being so. However, this has changed as a result of the injuries Ms. Klingler sustained in the accident. She now faces limits in both her work and personal life, and is more dependent on others. She fears being a burden in close relationships, for example in her relationship with Mr. Ralph. Although she has always wanted to have children, her desire is now tempered with her fears that doing so will increase her pain symptoms and headaches, and that she will not be able to properly care for children. Because of the unpredictability of her headaches in particular, she feels friends can no longer depend on her. As a result, Ms. Klingler is now less social, and more isolated, than before the accident. The consequences of the injuries she sustained in the accident have had a very significant negative impact on the quality of Ms. Klingler's life.

[132] I find that, since the accident, and as a result of the injuries she sustained in the accident, Ms. Klingler is no longer able to work at the same pace as before the accident, or to pursue her recreational activities with the same frequency or intensity as before. Before the accident, Ms. Klingler was able to work a full day, and then engage in activities with friends. I find that now, Ms. Klingler must use her energy for her work, and comes home at the end of a workday tired and in pain. Because of her lack of energy and her pain symptoms, she struggles to complete the paperwork

2019 BCSC 1776 (CanLII)

related to her business. Since the accident, it takes Ms. Klingler longer to manage household chores, and she must pace herself or look to others for help.

[133] I find that, instead of being able to carry on, without limits, the work Ms. Klingler was trained and felt she was meant to do as a pediatric occupational therapist, the pain symptoms resulting from her injuries and her headaches, have impaired her ability to do so. This is both very frustrating and very distressing for Ms. Klingler, given her passion for her work and her strong desire to help as many children in need as possible.

2019 BCSC 1776 (CanLII)

6. Damages

(a) Non-pecuniary damages

[134] It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff). See ***Stapley v. Hejslet***, 2006 BCCA 34, at paras. 45-46. An award of non-pecuniary damages must be fair and reasonable to both parties.

[135] It is also well established that each case must be decided on its own facts, and prior cases are useful as a guide – but only a guide – in the assessment of non-pecuniary damages.

[136] On behalf of Ms. Klingler, Mr. Miles submits that an award of $100,000 in non-pecuniary damages is justified, considering Ms. Klingler's age, how her enjoyment of her many pre-accident activities (including the significant social aspect of those activities, and their important contribution to Ms. Klingler's general feelings of well-being) has been affected, and how her injuries and their continuing symptoms (chronic pain and headaches) have affected (and will continue to affect)

her career as a pediatric occupational therapist, something that she was and is very passionate about.

[137] In support of an award of $100,000, Ms. Klingler's counsel relies on: ***Ferguson v. Watt***, 2018 BCSC 1587; ***Clark v. Kouba*** 2012 BCSC 1607; ***Moreira v. Crichton***, 2018 BCSC 1281; ***Luck v. Shack***, 2019 BCSC 1172; and ***Merko v. Plummer***, 2016 BCSC 1403.

[138] In ***Merko***, for example, the plaintiff, 52 at the time of trial, was involved in two motor vehicle accidents, which the court found left her with lasting injuries, including chronic myofascial pain or pain syndrome in her neck, upper back and shoulders. The court concluded that the evidence was overwhelming that, as of trial, the plaintiff experienced chronic pain as a result of the accidents, which had a serious and severe impact on her quality of life. The court found that, prior to the accidents she was a highly productive person who was happiest when she was busy with multiple tasks to complete, whether it was at her employment (working as a district office clerk for the Surrey School District), or in her numerous crafts and hobbies, or making elaborate meals. She took pride in all of her work and many activities. However, despite what the court described as "diligent efforts to get better," the plaintiff remained plagued by chronic pain that was exacerbated by too much activity. As of trial, she was using a narcotic medication for pain control, something that the plaintiff found distressing. The court found that the plaintiff could no longer be productive in the same way she used to be, and that, although her personality drove her to keep trying to push herself, her pain took away her enjoyment of the activities she could manage. The court found further that the plaintiff's enjoyment of life, self-image and social and marital relationships had taken a battering due to her severe and ongoing pain, and that, simply put, her life had changed significantly as a result of the injuries suffered in the accidents. The court awarded $95,000 in non-pecuniary damages.

[139] On the other hand, the defendants submit that an award of between $40,000 and $65,000 is appropriate. They say that the injuries Ms. Klingler sustained in the

2019 BCSC 1776 (CanLII)

accident have not affected her life to the extent she claims. Indeed, the defendants go so far as to submit that, when one considers the level of physical activity in which Ms. Klingler has been involved post-accident, there is no "loss of enjoyment of life" at all. The defendants point out that, within weeks of the accident, Ms. Klingler was at an indoor rock-climbing gym and downhill skiing. The defendants say that, since the accident, Ms. Klingler has resumed virtually all of her pre-accident recreational activities, and been able to continue working as a pediatric occupational therapist.

[140] In support of their position, the defendants rely on: ***Sharpe v. Tidey***, 2009 BCSC 948; ***Lin v. Yim***, 2019 BCSC 1071; and ***Juelfs v. McCue***, 2019 BCSC 1195.

[141] In ***Sharpe***, for example, the plaintiff, 32, was described as "unusually athletic," with a passion for travel. He played baseball, hockey, soccer, golf and competitive tennis, and he taught sailing He was an elite skier. He was a mountain biker and rock climber. He did not miss any work as a result of his injuries. However, the injuries affected his ability to participate in a variety of activities historically undertaken by him with (what the court described as) his unusual enthusiasm. The court found that the plaintiff was a young man in the prime of his life, and that work, sport, travel and his relationship with his partner were the cornerstones of his life. Sport and travel, in particular, were central to his social relationships, his sense of well-being, and his activities with his partner. The court found that the plaintiff lived with a constant level of pain that was exacerbated when he engaged in the very things that give him pleasure. His recovery appeared to have plateaued, and the prognosis for further recovery for at least a number of years was poor. However, the court considered that there were other aspects of the plaintiff's life, particularly as he got older, that would likely mean that he would have had less time to pursue leisure activities and less inclination to be involved in some of the more extreme activities he had done pre-accident. The court awarded $40,000 in non-pecuniary damages.

[142] In ***Juelfs***, the plaintiff, 36 as of trial, was healthy and lived a relatively active lifestyle pre-accident. As a result of the accident, she developed a TMJ dysfunction,

2019 BCSC 1776 (CanLII)

and suffered soft-tissue injuries to her neck, upper back and lower back. The soft-tissue injuries resulted in intermittent neck and back pain that had become chronic. The pain was exacerbated by prolonged sitting, sustained neck postures, and sustained vigorous physical activity such as lifting heavy weights, running, or carrying a backpack for extended periods of time. After the collision, the plaintiff made an effort to return to field work as a wildlife biologist, and continued to be as active as she could in both her fitness activities and her recreational pursuits. The court accepted her evidence, supported by the testimony of the other lay witnesses, that the soft-tissue injury and resulting pain limited the plaintiff in her ability to do field work in her chosen occupation, and imposed moderate limitations on her lifestyle. The court awarded $65,000 in non-pecuniary damages.

2019 BCSC 1776 (CanLII)

[143] In my view, the range of non-pecuniary damages proposed by the defendants fails sufficiently to take into account my findings concerning how Ms. Klingler's life has been, and will be, affected, and is too low. The cases I have found most helpful are ***Clark*** and ***Merko***. Having regard to the purpose of an award of non-pecuniary damages, I conclude that a fair and reasonable award in this case is $95,000.

(b) Loss of earning capacity

[144] Copies of Ms. Klingler's T1 General income tax returns for the years 2011, and 2013 to 2017 were entered into evidence at trial. Ms. Klingler explained that, although she filed a tax return for 2012 (the year she moved to Vancouver), she was unable to locate a copy of it. She explained further that she had not yet filed her 2018 tax return as of trial. Ms. Klingler said that she expected her income in 2018 from work as an occupational therapist would be similar to her income in 2017.

[145] No documentary evidence relating to Ms. Klingler's income working as an occupational therapist in either 2018 or 2019 was tendered at trial. I note that, in both years, Ms. Klingler was working one day a week as a clinic employee and was billing clients for therapy delivered through Kids OT at Home.

[146] Moreover, apart from Ms. Klingler's tax returns, no other documentary evidence (for example, appointment calendars or some record of hours worked, or statements of account to clients (suitably anonymized)) was tendered at trial relating to the income earned by her through Kids OT at Home. It is unclear whether, for example, Ms. Klingler bills clients for travel time, and whether that would count as part of the "client hours." The fact that Ms. Klingler can bill the Province directly for most of her services through Kids OT at Home makes the lack of documentary evidence even more questionable. What a schedule might look like delivering at-home therapy to 25 clients in four days a week is unknown. However, unless all the clients lived close to one another, fitting all of them in could be challenging. Whether, in the without-accident scenario, Ms. Klingler would have given up working one day a week at a clinic, and devoted herself full-time to her own business, was not explored at trial. There was no analysis of the expenses Ms. Klingler deducts from her gross self-employment income, and whether they are reasonable.

[147] The defendants' position is that the lack of any documentary evidence of Ms. Klingler's income in 2018 and 2019 creates a serious problem for this part of her claim.

[148] I turn then to what the evidence I do have discloses.

[149] Based on Ms. Klingler's tax returns, her income beginning in 2011 from her work as an occupational therapist is as follows (I have omitted cents):

Year	T4 earnings)	Gross self-employment income	Net self-employment income	Total
2011	$29,721	$15,192	$10,393	$40,114
2013	$10,014	$35,761	$27,317	$37,331
2014	$7,191	$35,298	$23,725	$30,916
2015	$24,720	$37,189	$24,648	$49,368
2016	$15,525	$59,289	$43,248	$58,773

2019 BCSC 1776 (CanLII)

Year	T4 earnings)	Gross self-employment income	Net self-employment income	Total
2017	$7,575	$55,510	$46,998	$54,573

[150] At trial, Ms. Klingler was never asked about the large differences in the income she earned as an employee (comparing 2014 and 2017 with 2015 and 2016, for example), although the inference I am asked to draw from her evidence is that, since the accident, she was working as an employee one day a week.

[151] Ms. Swinburne provided some helpful insight concerning the income that can be earned by a pediatric occupational therapist. Ms. Swinburne is the owner of four clinics in the Montréal area, which provide pediatric occupational therapy, physical therapy and speech therapy. The clinics employ about 130 people.

[152] Ms. Swinburne explained that she is considered a senior therapist (having practiced for 10 years), and at her level and with her experience, she can charge $125 per hour for her services. This is generally consistent with Ms. Klingler's evidence concerning her hourly rate. According to Ms. Swinburne, a full-time therapist employed at one of her clinics is expected to work 25 billable hours a week, and 35 hours total per week. A typical day is five to seven treatment sessions, with an hour allocated for each. Of that hour, 50 minutes is allocated for treatment, and then 10 minutes for charting or paperwork.

[153] Ms. Swinburne explained that building her practice was hard work, and that it takes many years for a therapist to build her reputation. At least in Québec, the special needs community is small, and if a therapist has a good reputation, then she will get referrals. On the other hand, if the therapist cannot deliver consistent, dependable therapy, it is hard to get work. Ms. Swinburne explained that during the therapy sessions, the therapist has to be 100% focussed and attentive. Ms. Swinburne said that she personally would be concerned about hiring a therapist who had to cancel appointments, as this affects the consistency in delivery of the therapy and could affect the ability of her business to get referrals. If a family has a bad experience, it is a problem, since consistency is key to establishing the therapeutic

2019 BCSC 1776 (CanLII)

relationship. According to Ms. Swinburne, there is a very high demand for pediatric occupational therapists, and on a full caseload, she can bill between $70,000 and $100,000 annually. Of course, “billings” are not equal to the therapist’s income.

[154] In Table 1 of Mr. Benning’s Report No. 1, he has set out the average full-time, full-year earnings of female occupational therapists in the lower Mainland by five year age cohort, based on the 2016 Census. The resulting earnings value is equal to $81,333 (in 2019 dollars) per year for all ages. For individuals in Ms. Klingler’s age range at the time of the accident until trial, the average full-time, full-year earnings are $76,909. The average earnings for the next cohort (ages 35 to 39) is $81,361. I note that for the age group 60 to 64, Mr. Benning shows “N/A.” In other words, the earnings shown stop at age 59.

[155] In a separate table, Mr. Benning has set out the annual base salaries of “Occupational Therapists (Grade I and Grade II)” based on the Health Science Professional Provincial Agreement. The resulting annual salaries for Grade I therapists are in the range of between $66,228 to $82,596 per year, whereas the salaries for Grade II therapists are in the range of between $68,604 and $85,596 per year.

[156] Counsel for Ms. Klingler submits that she has demonstrated both a past income loss and a loss of future earning capacity.

[157] With respect to the past income loss, Mr. Miles argues that, but for the injuries she sustained in the accident, Ms. Klingler would have earned significantly more income than she was able to, since, as a result of the accident and her injuries, her caseload and her ability to take on more clients was limited. The result has been that she has been working at a reduced capacity. She has also missed time from work because of accident-related medical appointments and on account of headaches. Mr. Miles argues that, as a result of injuries she sustained in the accident, Ms. Klingler has been limited to working with a caseload of 15 client hours per week, instead of 25 hours. In other words, Ms. Klingler has only been able to

2019 BCSC 1776 (CanLII)

work 60% of what would otherwise, and but for the accident, have been her normal caseload.

[158] Mr. Miles submits that the annual incomes described by Ms. Swinburne and Mr. Benning are the amounts that Ms. Klingler would consistently have earned, but for the injuries she sustained in the accident. In Mr. Miles' submission, Ms. Klingler has lost an average of approximately $25,000 per year, gross, in the six years since the accident, or a total of $150,000. Accordingly, in his submission, Ms. Klingler's loss up to trial should be assessed at $100,000.

[159] With respect to loss of future earning capacity, Mr. Miles submits that the evidence (in particular the opinion evidence from Dr. Finlayson and Mr. McNeil) supports the conclusions that, as a result of the injuries she sustained in the accident and her continuing symptoms, Ms. Klingler has been working at approximately 60% of the normal caseload for a pediatric occupational therapist, and that this will more than likely continue for the remainder of her working life. In his submission, the result is that, because of the injuries she sustained in the accident, Ms. Klingler will lose, on average $25,000 annually until retirement age, servicing a part-time caseload of approximately 15 client hours per week, compared with a full-time caseload of 25 client hours per week. The present value of an annual loss of $25,000 to age 65 is $430,825.

[160] Mr. Miles therefore submits that Ms. Klingler's loss of future earning capacity should be assessed at $430,000.

[161] Alternatively, in Mr. Miles' submission, Ms. Klingler's loss of future earning capacity could be assessed using the capital asset approach. Using that approach, it would be appropriate to assess her loss at two to three' years annual earnings. Using the average annual income in Mr. Benning's Report No. 1 (rounded) of $81,000, the result would be between $162,000 and $243,000.

[162] On the other hand, the defendants say that Ms. Klingler has not proven any past income loss as a result of the injuries she sustained in the accident. They say

2019 BCSC 1776 (CanLII)

further she has failed to prove any impairment of her future earning capacity, either on an earnings approach or a capital asset approach. In the defendants' submission, there is no real and substantial possibility of Ms. Klingler suffering a pecuniary loss in the future. She is both fit and active.

[163] The defendants say that, at trial, Ms. Klingler was unable to provide any useful information – in particular, any documentary information – about her current gross or net business income, or about her employment income, and the court should not be left to make an assessment essentially based on Ms. Klingler's oral evidence. In the defendants' submission, based on Ms. Klingler's own evidence, she has probably lost less than six months of income over the six years since the accident. On that basis, the maximum award for loss of earning capacity to trial would be about $33,000 (net).

[164] Although the defendants' primary position is that Ms. Klingler has failed to show any real and substantial possibility of a hypothetical future event leading to a loss of income, and therefore has failed to show any entitlement to an award for loss of future earning capacity, the defendants argue in the alternative that a maximum award of about $81,000, or one year's income, could be justified, using the capital asset approach.

[165] I turn then to the applicable legal principles.

[166] There are two stages in assessing a claim for damages for loss of earning capacity. First, a plaintiff must prove that the injuries suffered in the accident and the resulting symptoms impaired her ability to earn income and that there is a real and substantial possibility that her diminished earning capacity has resulted or will result in a pecuniary loss. A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more

2019 BCSC 1776 (CanLII)

appropriate where the pecuniary loss is not easily measured. See generally ***Perren v. Lalari***, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies.

[167] A plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: see ***Athey v. Leonati***, [1996] 3 S.C.R. 458, at paras. 34-35. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable.

[168] Using the capital asset approach does not mean that the assessment is unstructured or that the assessment is entirely at large without the necessity to explain the factual basis of the award. In every case where the capital asset approach is adopted, the four questions in ***Brown v. Golaiy*** (1985), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8, form the basis of the assessment. The questions are whether:

(1) The plaintiff has been rendered less capable overall from earning income from all types of employment;

(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 her, had she not been injured; and

(4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

2019 BCSC 1776 (CanLII)

[169] In my view, Ms. Klingler has established that, as a result of the injuries she sustained in the accident, her ability to earn income as a pediatric occupational therapist has been impaired and this has resulted in a pecuniary loss. Ms. Klingler's work is physically and mentally demanding. The injuries she sustained in the accident, and their continuing effects, have impaired her ability to perform her work consistently and to the level required by her clients. She fatigues more easily, and her headache symptoms interfere with the mental focus she requires to deliver appropriate therapy. Work has been available for her, and Ms. Klingler has had to turn down prospective clients, something that was very hard for her and that she did not want to do.

[170] I reject the defendants' argument to the effect that, because Ms. Klingler has been able to participate in recreational activities such as rock climbing, slack-lining and skiing, and is "fit and active," she has failed to establish any entitlement to compensation for loss of earning capacity, either past or future. Ms. Klingler's work and her recreational activities simply cannot be equated in this way. Ms. Klingler can stop a recreational activity any time, without any real consequences. The same cannot be said for a therapy session. Indeed, based on both Ms. Klingler's and Ms. Swinburne's evidence, consistency in the delivery of therapy is very important, as is the reputation of the therapist for her ability and reliability to deliver the therapy. A therapist who stopped in the middle of a session, or who could not be relied on to deliver therapy when scheduled, would inevitably damage her reputation and soon be struggling to find clients. Ms. Klingler now has to manage her work so that she can deliver the therapy her clients expect, within the limits imposed on Ms. Klingler as a result of the injuries she sustained in the accident. Her pain and headache symptoms take a toll, and I have no difficulty concluding that Ms. Klingler's capacity to earn income has been reduced as a result of the injuries she sustained in the accident.

[171] I find, therefore, that Ms. Klingler has established an entitlement to compensation for loss of earning capacity to trial.

2019 BCSC 1776 (CanLII)

[172] With respect to loss of future earning capacity, based on my findings above, as well as the opinion evidence from Dr. Finlayson, Dr. Robinson and Mr. McNeil, Ms. Klingler has demonstrated a real and substantial possibility of a hypothetical future event – namely, having a full-time pediatric occupational therapy caseload – that, as a result of the injuries she sustained in the accident, she can no longer realize, and that this will result in a loss of income. Accordingly, I find that Ms. Klingler has also demonstrated an entitlement to compensation for loss of future earning capacity.

[173] I turn then to the assessment of Ms. Klingler's losses.

[174] As can be seen, in submissions, Mr. Miles took a fairly straightforward, earnings-based approach, premised mainly on the assumption that Ms. Klingler's loss should be measured based on her with-accident capacity being 60% of her without-accident capacity. Since there is reasonable evidence (from Ms. Swinburne and in Mr. Benning's Report No. 1) about the full-time, full-year earnings of an occupational therapist, Mr. Miles argues that Ms. Klingler's losses can then easily be assessed. However, while this approach is attractive in its simplicity, I think that the assessment is more complicated, at least in part because the information concerning Ms. Klingler's income in the "with accident" scenario, and therefore her residual earning capacity, is incomplete.

[175] In my view, $75,000 (gross) is a reasonable assessment of Ms. Klingler's loss to the date of trial. This, somewhat arbitrarily, would represent an average loss of $12,500 per year in the six years since the accident. I say "arbitrarily," because, in my view, her loss of income was greater in 2013 and 2014, as the effects of her injuries were more acute. By 2016, Ms. Klingler's symptoms had essentially reached a plateau beyond which, based on the medical prognoses that I accept, they were and are not expected to improve in any material way. Despite that, Ms. Klingler was continuing to attend regular physiotherapy, for example, to manage her symptoms, thus taking time away from hours that, but for the accident, she would have spent working.

2019 BCSC 1776 (CanLII)

[176] I turn then to the assessment of Ms. Klingler's loss of future earning capacity. In my view, particularly given the absence of documentary evidence, this loss is best assessed on the "capital asset" approach, although I have concluded that the earnings approach will also assist in making the assessment.

[177] First, I do not accept Mr. Miles' submission that the loss should be assessed to age 65. Rather, in my view, and based on Mr. Benning's Report No. 1, it would be more reasonable to assess the loss to age 60.

[178] Second, of the ***Brown*** factors, I consider the second, third and fourth to be the most significant in Ms. Klingler's case.

[179] Third, I consider a reasonable assessment of Ms. Klingler's loss of future earning capacity to be between $17,500 and $20,000 annually. I note, for example, that the annual earnings per five-year cohort in Mr. Benning's Report No. 1 generally show increases with years of experience. On this basis, Ms. Klingler's residual earning capacity would be roughly 75% of the average annual income of $81,000 (rounded) in Mr. Benning's Report No. 1. The present value of an annual loss of $17,500 to age 60 is (rounded) $282,250. The present value of an annual loss of $20,000 to age 60 is (rounded) $320,000.

[180] In that light, I conclude that a fair and reasonable assessment of Ms. Klingler's loss of future earning capacity is $300,000.

(c) Loss of housekeeping capacity

[181] Ms. Klingler seeks an award in the range of between $10,000 and $15,000 for loss of housekeeping capacity.

[182] The defendants say that nothing should be awarded. However, I have rejected the theory on which this argument is based and it is inconsistent with my findings above.

[183] Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. Both can be awarded when supported by the evidence. An

2019 BCSC 1776 (CanLII)

award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See ***Westbroek v. Brizuela***, 2014 BCCA 48, at paras. 72-78.

[184] In my view, a modest award, consistent with the cautionary approach and my findings above, can be justified in this case. I award $7,500.

(d) Cost of future care

[185] Ms. Klingler is seeking compensation for the following items as costs of future care:

Item	Cost	Frequency	Present value
Homemaking	$3,112.00	Annual to age 80	$87,647.00
Seasonal cleaning	$479.00	Annual to age 80	$13,484.00
Sit/stand desk	$977.00	every 10 years to age 65	$2,386.00
Monitor arm	$189.00	year 1	$187.00
Keyboard tray	$185.00	year 1	$183.00
Foot rest	$39.00	year 1	$39.00
Kinesiology	$737.00	Year 1	$730.00
Follow-up kinesiology	$328.00	year 1	$324.00
Gym pass	$427.00	Annual	$13,273.00
Physiotherapy and massage	$1,080.00	Annual	$33,594.00
Botox – initial trial	$2,070.00	year 1	$2,049.00
Amitriptyline	$102.00	Annual	$3,174.00

2019 BCSC 1776 (CanLII)

Item	Cost	Frequency	Present value
Zomig	$184.00	Annual	$5,713.00
Naproxen	$38.00	Annual	$1,172.00
TOTAL			$163,955.00

2019 BCSC 1776 (CanLII)

[186] I note that the multiplier used for the "annual" amounts goes beyond age 100.

[187] In addition, counsel for Ms. Klingler submits that, in case the trial of Botox is successful, then something more should be awarded for additional Botox treatments.

[188] The defendants say that, at most, a maximum of about $10,000 (total) can be justified. This sum would include something for housekeeping, limited physiotherapy and active rehabilitation and some medications. The defendants say that Ms. Klingler has not established any entitlement to the cost of Botox treatments as an item of future care.

[189] The principles that apply are summarized in ***Rabiei v. Oster***, 2019 BCSC 733, at paras. 189-190:

> [189] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See ***Gao*** [***Gao v. Dietrich***, 2018 BCCA 372], at paras. 69-70.
>
> [190] A little common sense should inform claims for costs of future care, however much costs may be recommended by experts in the field: ***Penner v. Insurance Corporation of British Columbia***, 2011 BCCA 135, at para. 13. No award is appropriate for costs that a plaintiff would have incurred in any event: ***Shapiro v. Dailey***, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see ***Lo v. Matsumoto***, 2015 BCCA 84, at para. 20.

[190] In my view, some award for homemaking and seasonal cleaning can be justified on the evidence, including Mr. McNeil's report. However, the evidence is

very thin – verging on speculative – respecting what Ms. Klingler's living situation might be in the future, and I do not consider the amounts claimed (over $100,000) to be reasonable. I award $50,000 in total for homemaking and seasonal cleaning.

[191] The amounts claimed for the sit-stand desk, kinesiology (including follow-up), and medications (Amitriptyline, Zomig and Naproxen) have been justified and are reasonable. They are allowed as claimed.

[192] Although the amounts are quite modest, I award nothing for the monitor arm, keyboard tray and foot rest. In my view, these items do not fall into the category of what is "reasonably necessary" so as to qualify as appropriate costs of future care. If Ms. Klingler wishes to purchase these items to make herself more comfortable, they should be financed from her award for non-pecuniary damages, rather than a separate award for cost of care.

[193] The cost for physiotherapy and massage therapy is for the remainder of Ms. Klingler's life expectancy. Dr. Finlayson, who made the recommendation for physiotherapy and massage therapy described them in terms of as "indefinitely," not "for life." I conclude that if Dr. Finlayson in fact meant "for life," she would have said that. Accordingly, I do not consider that the cost presented at $33,594 has been medically justified or that it is reasonable. However, a reasonable amount can be justified as an item of cost of future care. I award $20,000.

[194] I have the same difficulty with the claim for a gym pass for life. Moreover, I am not persuaded that this is an expense Ms. Klingler would not have incurred even without the accident. I award nothing for this item.

[195] I turn next to the claim for Botox treatments. Ms. Klingler has never had a trial of Botox, although Dr. Robinson said in his report that it "would be a reasonable consideration for her." I note that in ***Merko***, the court made an award for future treatment where the plaintiff had already had a trial of Botox treatment. Even then, the court awarded the cost for only 1 further year as a cost of future care. In my

2019 BCSC 1776 (CanLII)

view, there is a medical justification for a trial of Botox. However, Ms. Klingler has not justified the cost for Botox beyond that as a cost of future care.

[196] Accordingly, I award costs of future care as follows:

Item	**Award**
Homemaking and seasonal cleaning	$50,000.00
Sit/stand desk	$2,386.00
Kinesiology	$730.00
Follow-up kinesiology	$324.00
Physiotherapy and massage	$20,000.00
Botox – initial trial	$2,049.00
Amitriptyline	$3,174.00
Zomig	$5,713.00
Naproxen	$1,172.00
TOTAL	$85,548.00

(e) Special damages

[197] For each item of expense claimed as special damages, a plaintiff must prove, on a balance of probabilities, both the amount claimed and the fact that the expenditure is causally connected to the injuries sustained in the accident. Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care, when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: see ***Redl v. Sellin***, 2013 BCSC 581, at para. 55.

[198] Ms. Klingler originally presented a claim for special damages in the sum of $18,474.39, as detailed on Ex. 4. Some items were abandoned in closing

2019 BCSC 1776 (CanLII)

submissions (for example, $400 for counselling sessions in early 2018), resulting in a new total of (rounded) $17,440. Although Ms. Klingler was asked a few questions about these expenses during her direct examination, little time was spent reviewing the circumstances in which the expenses were incurred, other than in the most general way. She acknowledged on cross-examination that after the accident, she had some physiotherapy for her left ankle, which was unrelated to the accident. She also acknowledged that, after she underwent knee surgery in January 2019 for a torn meniscus, she had three or four physiotherapy sessions.

[199] The defendants agree that the amounts itemized on Ex. 4 were incurred. However, the defendants do not agree that all of them are recoverable as special damages. They say that Ms. Klingler incurred expenses for physiotherapy treatments for conditions (her ankle and following knee surgery in early 2019) unrelated to the injuries she sustained in the accident. The defendants did not identify any particular expenses that they say are not recoverable for this reason. The defendants argue further that the "vast majority" of the amounts claimed were not medically justified and reasonably necessary, and that Ms. Klingler should therefore only recover "a portion" of her special damages. However, the defendants did not identify any particular items claimed as neither medically justified nor reasonably necessary.

[200] Given the way that counsel for both Ms. Klingler and the defendants approached the issue of special damages during the evidence and in closing submissions, I do not propose to carry out an itemized analysis. I conclude that some small deduction from the expenses claimed for physiotherapy is justified, on the basis that a small amount of physiotherapy was unrelated to the injuries Ms. Klingler sustained in the accident. I deduct $260, or the expenses for four sessions at $65 per session. Otherwise, I am satisfied on the evidence, in particular the evidence of Ms. Klingler and Dr. Finlayson, that the expenses are reasonable, related to the injuries Ms. Klingler sustained in the accident and recoverable as special damages.

2019 BCSC 1776 (CanLII)

[201] I therefore allow special damages in the sum of $17,180.

7. Summary and disposition

[202] In summary, I award damages to Ms. Klingler as follows:

(a) non-pecuniary damages in the sum of $95,000;

(b) for loss of earning capacity to trial $75,000 (less applicable taxes);

(c) for future loss of earning capacity $300,000;

(d) for loss of housekeeping capacity $7,500;

(e) for cost of future care $85,548; and

(f) for special damages $17,180.

[203] I will leave counsel to deal with applicable taxes on the gross award for income loss from the date of the accident to trial. If they are unable to reach agreement, they have liberty to apply.

[204] There will be pre-judgment interest in accordance with the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

[205] Subject to any submissions the parties may wish to make concerning costs, Ms. Klingler is entitled to her costs on Scale B. If the parties wish to make further submissions concerning costs, I direct that appropriate steps be taken within 30 days of the date of these Reasons to obtain a convenient hearing date from Scheduling.

"ADAIR J."

2019 BCSC 1776 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Knauf v. Chao,*
2009 BCCA 605

Date: 20091229
Docket: CA036688; CA036689

Docket: CA036688

Between:

Brigitte Knauf

Respondent
(Plaintiff)

And

Jian Fu Chao and Feng Zheu

Appellants
(Defendants)

– and –

Docket: CA036689

Between:

Brigitte Knauf

Respondent
(Plaintiff)

And

Hesam Chaemi-Zadeh and
Enterprise Rent-A-Car Canada Limited

Appellants
(Defendants)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, November 26, 2008
(*Knauf v. Chao*, Docket M043662; *Knauf v. Chaemi-Zadeh*, Docket M044448)

Counsel for the Appellants: T. H. Pettit and J. V. Marshall

Counsel for the Respondent: M. Tsurumi

2009 BCCA 605 (CanLII)

Place and Date of Hearing:	Vancouver, British Columbia December 1, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 29, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Frankel

2009 BCCA 605 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The plaintiff was awarded an aggregate of $500,957 by a jury as damages in respect of injuries sustained by her in two motor vehicle accidents. The defendants seek a new trial on the grounds that (i) evidence was improperly admitted, (ii) counsel for the plaintiff made improper statements during his opening statement and closing address to the jury, and (iii) there were errors in the judge's charge to the jury with respect to the plaintiff's loss of future earning capacity.

[2] In the alternative, the defendants request that the jury's awards for non-pecuniary damages, loss of past earning capacity (also commonly referred to as past income loss) and loss of future earning capacity be reduced because they are inordinately high or unsupported by the evidence.

[3] The defendants concede that their counsel at trial did not make objections in connection with any of the alleged improprieties or errors they raise on appeal.

Background

[4] The accidents occurred within two months of each other in the fall of 2002. In each accident, the plaintiff's vehicle was rear-ended by the other vehicle.

[5] At the time of the accidents, the plaintiff was 35 years of age. She was an active person, and enjoyed playing badminton, skiing, running and "dragon boating".

[6] The plaintiff began working at a company as an accounts payable clerk in 2001 at a salary of $30,000. She wanted to supplement her income and took a second job at a restaurant in August 2001. She began as a server's helper and a hostess but she worked her way into the position of server a few months before the first accident. At the time of the first accident, the plaintiff was working one or two nights a week, and was earning a wage of $8.50 an hour plus tips ranging from $80 to $200 per shift. She was still in training as a server and anticipated that the

2009 BCCA 605 (CanLII)

amount of her tips would increase when she gained experience and was given more tables to serve.

[7] The plaintiff sustained whiplash injuries in the first accident. Her head and back went forward when her vehicle was rear-ended. She suffered from headaches, severe neck pain and back pain, and her range of motion in her neck was restricted. These symptoms were aggravated by the second accident. The plaintiff testified that her condition improved over time but she continued to have intermittent pain on a daily basis at the time of the trial.

[8] The plaintiff did not miss any work at her full-time job as a result of her injuries. She tried to go back to her job at the restaurant but had to quit because her pain prevented her from doing the server's job properly.

[9] The plaintiff never took any medications for her injuries. She received physiotherapy and massage therapy treatments. Approximately two and one-half years after the accidents, x-rays showed a reversal of the plaintiff's normal cervical curvature and some degenerative changes in the cervical spine. Her physician felt that these findings accounted for her stiffness and pain in the mornings and after prolonged sitting.

[10] The physician stated in her prognosis that it was "highly unlikely [the plaintiff] will completely return to the level of functioning and pain-free status she had prior to the accidents." She felt that the plaintiff's underlying osteoarthritis, which may have pre-existed the accidents but was asymptomatic until the accidents, could continue to be a partial cause of the plaintiff's morning stiffness and neck pain.

[11] The plaintiff was curtailed in her recreational activities as a result of the injuries. She began to play badminton again approximately six months after the accidents, but she suffered a permanent knee injury in April 2003 and had two surgeries in 2004. Her knee injury prevented the plaintiff from playing badminton, skiing or running.

2009 BCCA 605 (CanLII)

[12] The plaintiff looked for other forms of physical activity, and she took up salsa dancing in 2004. She started taking dance classes twice a week. She met a man at the classes, and they married in January 2005. The plaintiff stopped going to dance classes later in 2005 as a result of a run-in with her husband. The marriage was not successful, and the couple separated in mid-2006. There was evidence from the plaintiff's physician that the marital issues caused the plaintiff a great deal of stress.

[13] The plaintiff resumed dancing after she separated from her husband, and was attending classes for salsa, tango and cha-cha dancing up to six times a week by the end of 2006. She gave up dancing in 2007 because she did not want to run into her ex-husband anymore.

The Trial

[14] The trial took place before a judge and jury over three days in November 2008. As is usual, the plaintiff's counsel made an opening statement to the jury before any evidence was introduced, and a closing address to the jury at the conclusion of the evidence. The defendants say on appeal that some of the comments made by the plaintiff's counsel were improper, and I will set out these comments when discussing the issue.

[15] One of the witnesses called by the plaintiff was Mr. Paul Pakulak, an occupational therapist, whose written report was also introduced into evidence. The defendants say on appeal that portions of his testimony should not have been admitted into evidence because his statements offended the prohibition against oath-helping. They also say that plaintiff's counsel made an improper comment about the evidence in his closing address to the jury. I will refer to the impugned statements when I address the issue.

[16] The judge gave his charge to the jury in the form contained in chapter 1A of J.P. Taylor, J.C. Bouck and R.D. Wilson, *CIVJI: Civil Jury Instructions* (Vancouver: Continuing Legal Education Society of British Columbia, 2002 update). The chapter is entitled "Abbreviated Instructions", and the user note states that they are meant

2009 BCCA 605 (CanLII)

for jury trials of from one to three days arising out of motor vehicle accidents where the issues are relatively simple. The defendants say on appeal that the judge erred by not including two paragraphs from the full CIVJI instructions dealing with the standard of proof in respect of future losses and the amount of the award.

2009 BCCA 605 (CanLII)

[17] The jury was requested to make combined awards in the two actions. Its awards were as follows:

$235,000	– non-pecuniary damages;
90,000	– past loss of income;
150,000	– loss of future earning capacity;
20,000	– cost of future care; and
5,957	– special damages
$500,957	– total

The award for past loss of income was gross of any tax and, after deduction of notional income tax as required by s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the net amount ordered to be paid to the plaintiff for past income loss was $66,632.

Discussion

[18] The plaintiff says that even if the alleged improprieties and errors exist, the jury's award should not be set aside because there was a lack of any objection at trial by the defendants' counsel. It will, therefore, be useful to first consider the effect of a lack of objection in the context of a civil trial. The law is quite different in criminal matters.

[19] The law in this regard was summarized over 50 years ago by the Ontario Court of Appeal in the decision of *Arland v. Taylor*, [1955] 3 D.L.R. 358 at 364-365, [1955] O.R. 131 (C.A.). After reviewing a number of case authorities, Mr. Justice Laidlaw set out the following four propositions he extracted from the case authorities:

> (1) A new trial is contrary to the interest of the public and should not be ordered unless the interests of justice plainly require that to be done.

> (2) An appellant cannot ask for a new trial as a matter of right on a ground of misdirection or other error in the course of the trial when no objection was made in respect of the matter at trial.
>
> (3) A new trial cannot be granted because of misdirection or other error in the course of the trial "unless some substantial wrong or miscarriage has been thereby occasioned".
>
> (4) A party should not be granted a new trial on the ground of non-direction in the Judge's charge to the jury where, having opportunity to do so, he did not ask the Judge to give the direction the omission of which he complains of.

These propositions were cited with approval by this Court in *Christie v. Westcom Radio Group Ltd.* (1990), 75 D.L.R. (4th) 546, 51 B.C.L.R. (2d) 357 (C.A.).

[20] More recently, Chief Justice Finch considered the effect of a lack of objection in *Brophy v. Hutchinson*, 2003 BCCA 21, 9 B.C.L.R. (4th) 46, an appeal dealing with improper remarks to a jury by counsel:

> [50] This court has held that the failure of counsel to object in a timely way at trial to an alleged impropriety is a significant consideration in deciding whether to order a new trial: ...
>
> * * *
>
> [52] ... the trial judge is in the best position to observe the effect of counsel's statements on the jurors, and to fashion an appropriate remedy for any transgressions. Where no objection is taken, the assumption is that the effect of any transgression could not have been seriously misleading or unfair and there would be no reason for suspecting injustice.
>
> [53] It is, however, recognized that there may be exceptional circumstances which merit a new trial, despite a failure on the part of counsel to object to an address: ...
>
> [54] In *Basra v. Gill* (1994), 99 B.C.L.R. (2d) 9 (C.A.) the court recognized that where there is a "substantial wrong or miscarriage of justice" a new trial may be required, even in the absence of an objection.
>
> [55] In my opinion, failure of counsel to make a timely objection to irregular or improper proceedings at trial is and must remain, an important consideration in determining whether there has been a miscarriage of justice. That consideration, however, is to be weighed against the nature and character of the irregularity or impropriety complained of.

In that case, the Court concluded that the nature of the impropriety did outweigh the lack of an objection because the inappropriate comments of defence counsel were

2009 BCCA 605 (CanLII)

made to the jury in an opening that preceded the calling of evidence by the plaintiff, something that was not sanctioned by the *Rules of Court*.

[21] Thus, the general rule is that a new trial will not be ordered where no objection is taken to impropriety or error in the course of a trial unless there has been a substantial wrong or miscarriage of justice.

(a) Oath-Helping

[22] The rule against oath-helping was explained by the Supreme Court of Canada in the following passage from *R. v. Burns*, [1994] 1 S.C.R. 656 at 667-668, 89 C.C.C. (3d) 193:

> The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard*, [[1993] 4 S.C.R. 223]. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators to swear to the truth of his oath: see *R. v. Béland*, [[1987] 2 S.C.R. 398], *per* Wilson J. at pp. 419-20. In modern times, it is defended on the ground that determinations of credibility are for the trier of fact, and that the judge or jurors are in as good a position to determine credibility as another witness. Therefore the fundamental requirement for expert evidence – that it assist the judge or jury on a technical or scientific matter which might otherwise not be apparent – is not met. The rule, as Iacobucci J. noted in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 729, goes to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements".

The decision of *R. v. Jmieff* (1994), 94 C.C.C. (3d) 157, 51 B.C.A.C. 213, is an example of a case where a new trial was ordered because the evidence of an expert witness, a psychologist, not only indirectly supported the credibility of a witness, but crossed the line and purported to directly confirm the credibility of the witness.

[23] In the present case, Mr. Pakulak conducted a functional capacity evaluation of the plaintiff in support of her claim of an impairment of her earning capacity. Mr. Pakulak prepared a 22-page report that was entered as an exhibit at the trial without objection from the defendants' counsel. A section of the report was entitled "Level of Effort/Pain Profile" in which Mr. Pakulak explained that he administered a series of tests to ascertain whether the plaintiff was giving maximum and consistent

2009 BCCA 605 (CanLII)

effort throughout the assessment. This testing is often referred to as validity testing. At the end of the section, Mr. Pakulak stated his belief that the "test results are a reliable measure of Ms. Knauf's maximum physical capacity at this time."

[24] During his examination in chief at trial, Mr. Pakulak explained why he conducted validity testing:

> Because we have to rely partially on what the individual is telling us during the course of the assessment it's important that we have ways to verify that the effort that they're providing is in fact a sincere effort so that we can be confident that what we're seeing and how we're interpreting the results of the testing are in fact accurate and reliable.

[25] The portions of the testimony of Mr. Pakulak to which the defendants object are the following:

> All those signs indicated to me that she was putting forth a sincere effort.... [T. 99, l. 46]
>
> In her case there was a significant decline in her speed and that's something that we would expect to see with significant increases in pain and again - - so that's consistent. [T. 100, l. 41]
>
> - - with the decline in her speed on the repetitive overhead reaching at the end of the day that again verified the legitimacy of those pain reports. [T. 101, l. 17]
>
> So again all of those things point to, yes, she can do it, but there's increases in symptoms and those reported increases were felt by me to be legitimate. [T. 102, l. 6]
>
> - - all three effort tests on the grip testing showed that she did provide a sincere and consistent effort. [T. 105, l. 20]
>
> In her case there were no significant inconsistencies in mobility or strength or capacity over the course of the day. [T. 110, l. 24]
>
> Distraction tests, those are different manoeuvres and tests that we administer in order to identify whether or not we can rely on the person's symptomatic reports. … In her case all of the distraction tests that were administered were negative, meaning or suggesting that I could rely on her symptomatic reports. [T. 111, l. 8 and l. 27]
>
> [Emphasis added.]

[26] The plaintiff's counsel commented on Mr. Pakulak's evidence in his closing address to the jury. He said the following:

2009 BCCA 605 (CanLII)

> Now, you just heard Mr. Pakulak and Mr. Pakulak put Ms. Knauf through a series of tests designed [*sic*] what she could and could not do. And you'll see from what he told you and what's in his report that a very big part of what he did throughout the day in a whole bunch of different ways was to see if she was legitimate. For a lack of another phrase, to see if she was faking, to see if what she said was consistent with what his tests showed, and these were sophisticated tests. She was consistent throughout. What she said and what the test result showed were the same. She wasn't exaggerating; she wasn't saying she was in pain when the test results showed differently. She was consistent. And that's what those tests were designed to do to show if what she told Mr. Pakulak, if what she told her doctor, what she told you was real and legitimate.
>
> [Emphasis added.]

2009 BCCA 605 (CanLII)

[27] In my opinion, there is nothing objectionable about validity testing *per se*. It goes to the reliability of the opinion expressed by the expert and the weight to be given to it by the trier of fact. That is a proper purpose. There will be occasions where there is an over-emphasis on the validity testing, and a concern may arise that the jury will use the evidence for the prohibited purpose of oath-helping. On such an occasion, the judge may intervene in the examination of the expert and limit the questioning on the topic. Alternatively, the concern may be addressed by a limiting instruction to the jury by the judge. This latter point was made by Mr. Justice Thackray in *Lawson v. McGill*, 2004 BCCA 68, 23 B.C.L.R. (4th) 254:

> [66] I am further of the opinion the trial judge erred in holding that he could not "perform surgery on her [Dr. Hayes'] evidence" by telling the jury that the credibility finding went only to the issue of the weight, if any, to be given to psychological tests. There is nothing unusual or uncommon in explaining to a jury that certain evidence can be used only in a particular way.

In the case at bar, no objection to the questioning of Mr. Pakulak was taken by the defendants' counsel, nor was a request made of the judge to include a limiting instruction in his charge to the jury.

[28] If that were the end of the matter, I would not be prepared to reach the conclusion that the jury made an improper use of Mr. Pakulak's evidence to decide that the plaintiff was telling the truth in court about her injuries and their symptoms. However, the remark made by the plaintiff's counsel in his closing address to the jury was clearly improper (this was conceded on appeal by counsel for the plaintiff, who was not counsel at trial). The plaintiff's counsel effectively told the jury that they

could use Mr. Pakulak's evidence for the improper purpose of oath-helping. This was not corrected by an instruction in the charge to the jury.

[29] The issue then becomes whether a new trial should be ordered despite the lack of objection by counsel for the defendants at the trial. In my view, a new trial should not be ordered because this impropriety did not lead to a substantial wrong or miscarriage of justice. It was conceded on appeal that the plaintiff's credibility was not challenged at trial. There was no reason for the jury to disbelieve the plaintiff. As a result, it cannot be said that the oath-helping affected the jury's decision on the credibility of the plaintiff or influenced the damage awards made by the jury.

2009 BCCA 605 (CanLII)

(b) Non-Direction by the Judge

[30] The portion of the judge's charge dealing with loss of future earning capacity was as follows:

> Loss of future earning capacity. You heard evidence suggesting that Brigitte Knauf will likely earn less income in the future from her former part-time occupation as a waitress. If you accept that evidence she is entitled to compensation for this loss from today until you expect such loss would end. Because this is a future loss she need only prove the possibility that the loss will occur. If you choose to make an award under this head of damages it should be based upon the evidence that you heard. When assessing the amount of this loss you should take into account the contingencies of life. For example, in the future Brigitte Knauf might acquire some other illness or disability unrelated to the complaints related to the motor vehicle accidents that would prevent her from working as a waitress. When considering an amount you may think about a calculation that involves an annual loss in the number of working years that she likely has. Remember that you must award a lump sum under this heading. If you do so she will have the money in hand today, so any sum must be discounted for the fact she receives it now rather than in periodic payments over a series of years. You may also think about contingencies that might reduce that amount. On the other hand, had the accident not happened she might have received unpredictable promotions or raises or other forms of good fortune.

[31] The trial judge sought input from counsel with respect to his charge before it was delivered to the jury. Most of the above-quoted passage came from CIVJI's Abbreviated Instructions. At his own instance, the judge suggested to counsel that he include an instruction about the present value of the lump sum award for loss of future earning capacity, and they agreed. The judge again asked for comments from

counsel after he had delivered the charge to the jury. There were submissions with respect to the portion of the charge dealing with cost of future care, but no submissions were made with respect to the above-quoted passage.

[32] On appeal, the defendants say that the charge should have included the following paragraphs from CIVJI's non-abbreviated instruction on loss of future earning capacity:

> 7. Since this is a future loss, neither [the plaintiff] nor [the defendant] is required to satisfy you on a balance of probabilities. You must assess the possibility that a particular event would have occurred or will occur. If you find that it is a real possibility and not merely guesswork, you must express that possibility in your award. The opportunity depends, of course, on [the plaintiff's] chances of getting a job: the less certain (he/she) was of getting a job, the lower the award.
>
> 8. Regarding future loss, if you find that the chances that [the plaintiff] will suffer a particular loss in the future are, say, 10% or 50% or 90%, you must award (him/her) 10% or 50% or 90% of the compensation (he/she) would have been entitled to if it were certain that loss would occur. In this case ... You must also assess the likelihood that [the plaintiff] might lose income due to unemployment in the future unrelated to the (injury/loss). Assess the likelihood that [the plaintiff] would have been unemployed and for what period of time. For example, if you find there was a 10% chance that [the plaintiff] would have been unemployed for three months due to [e.g., a plant closure or child care responsibilities], you must deduct from your award for lost income 10% of the income [the plaintiff] would earn in a three-month period, although you should take into account the fact that [the plaintiff] may well have received unemployment insurance benefits or sickness benefits and therefore would have lost only part of the income.
>
> [Emphasis in original.]

In support of the proposition that there must be more than a "mere possibility" of a future event giving rise to income loss, the defendants cite *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 27, and *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152 at para. 17.

[33] In my opinion, judges should be very cautious in using CIVJI's Abbreviated Instructions. The length of a trial does not necessarily correlate to the complexity of the issues raised in the trial. Even in short trials, judges should review CIVJI's non-abbreviated instructions to ensure their inapplicability before relying entirely on the Abbreviated Instructions.

2009 BCCA 605 (CanLII)

[34] In this case, it is my view that the judge should have included the above paragraphs 7 and 8 of CIVJI's non-abbreviated instruction (particularly paragraph 7) in his charge. The plaintiff's counsel was asking the jury to make a substantial award for loss of future earning capacity (he mentioned the figure of $250,000 in his closing address). At the time of the trial, the plaintiff's injuries prevented her from performing a second job she had at the time of the first accident. There was some question as to how much longer the plaintiff would have worked at the second job. There were other occupations that were potentially closed to the plaintiff as a result of her injuries. The issues relating to loss of future earning capacity were not sufficiently simple for the abbreviated instruction to be adequate.

[35] Should the non-direction by the judge result in the ordering of a new trial? The fourth of the propositions that I quoted above from *Arland v. Taylor* is that counsel's failure to request the instruction when given an opportunity to do so is an absolute bar to a new trial. I do not consider this Court to have gone that far. In *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513, 38 B.C.L.R. (2d) 1 at 10 (C.A.), Mr. Justice Esson said the following in this regard:

> ... it appears that no objection was taken by counsel for the plaintiff (who was not counsel before us) to the absence of any instruction on the law. In a civil trial, that is a powerful circumstance militating against treating the defect as grounds for setting aside the verdict.

This comment has been referred to with approval in several subsequent decisions: see *Atherton v. Maurice* (1998), 55 B.C.L.R. (3d) 182, 105 B.C.A.C. 198 at para. 18; and *Matich-Robbins v. Roden*, 1999 BCCA 141, 121 B.C.A.C. 142 at para. 7.

[36] The award made by the jury for loss of future earning capacity was in the amount of $150,000. In his closing address to the jury, counsel for the plaintiff submitted there were many jobs that were no longer available to the plaintiff as a result of her permanent partial disability, and he focused on the loss of capacity to have a second part-time job as a server in a restaurant. He submitted that the plaintiff had less capacity to earn income for the remaining 20 to 25 years of her working life and observed that a loss of $10,000 a year for 25 years amounted to

2009 BCCA 605 (CanLII)

$250,000. It was as a result of this observation that the judge modified his draft charge to include an instruction about the present value of a lump sum award in respect of a future loss.

[37] While the $150,000 award was generous, I do not regard it as a miscarriage of justice. It was open to the jury to conclude that the plaintiff would have worked at a second job as a server for many years if she had not sustained the injuries from the accidents. There was evidence upon which a properly instructed jury, acting judicially, could reasonably have made such an award.

[38] In my opinion, the non-direction did not result in a substantial wrong or miscarriage of justice. I would not order a new trial on the basis of the non-direction.

(c) Improper Comments to the Jury

[39] The opening statement made by the plaintiff's counsel to the jury included the following (with the comments the defendants say are objectionable emphasized by me):

> The statements of defence that were filed on behalf of the defendants say they are not responsible, and this confused and upset Ms. Knauf. … Responsibility was still denied, that is until last Friday, six years after these accidents, when the defendants' lawyer told us that they now admit responsibility; …
>
> Ms. Knauf comes to court to ask you to fix the harm that was done to her on those two days in 2002.
>
> * * *
>
> Ms. Knauf lost her ability to make good money as a waitress and save to buy a home back when prices were still reasonable. These accidents were six years ago and Ms. Knauf had already saved -- and by coincidence the figure is $6,000. She'd already saved that from the time a year before the accident when she started working as a waitress....
>
> Ms. Knauf has not collected any disability benefits or sick benefits or social assistance because of her injuries. She's a worker. She's struggling in an expensive city and wants to work not less but more.
>
> [Emphasis added.]

2009 BCCA 605 (CanLII)

[40] His closing address included the following (with the similar added emphasis):

> It took six years for the defendants to acknowledge their responsibility for these accidents. We are now here, not for sympathy, but to collect the debt that is owed to Ms. Knauf and the rules require that that debt be paid.
>
> * * *
>
> Ms. Knauf does not stay at home and whine. She has not collected disability benefits; she has not collected welfare; she's not collected employment insurance or any benefits because of her injuries.
>
> * * *
>
> Now, Ms. Knauf has had to deal with other problems, big, difficult problems: the death of her mother; an unrelated knee problem; her marriage. Don't be sidetracked by those issues.
>
> * * *
>
> I said that we're here to collect a debt, a debt that is owed to Ms. Knauf by the defendants. That debt is compensation for the harm and the losses that they caused her. … You're not to consider any outside reasons. The rules don't allow that. You're only to consider the losses and the harms that were suffered by Ms. Knauf, nothing else. If any of you consider any outside reasons, you're breaking the rules and everyone here has to follow the rules.
>
> * * *
>
> You're going to be asked about special damages. That's the money that Ms. Knauf spent on treatment. That's Exhibit 1. It's just under $6,000 and those amounts were not challenged. And it's a coincidence, perhaps a sad coincidence, that the money Ms. Knauf has spent on her own treatment these last six years is about equal to what she had saved up hoping to buy her own home at the time of these accidents.
>
> [Emphasis added.]

[41] I have referred to *Brophy v. Hutchinson* in connection to the test to be applied to consider whether irregular or improper proceedings at trial should result in the ordering of a new trial when no objection was taken by the appellant at trial. One of the improprieties in that case was improper comments made by counsel in the opening statement to the jury. Chief Justice Finch said the following about opening statements:

> [41] In an opening statement, counsel may not give his own personal opinion of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors' emotions,

2009 BCCA 605 (CanLII)

> rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible ...

Many of these comments also apply to closing addresses to juries. Two other subsequent decisions of this Court dealing with improper comments by counsel are *de Araujo v. Read*, 2004 BCCA 267, 29 B.C.L.R. (4th) 84, and *Giang v. Clayton*, 2005 BCCA 54, 38 B.C.L.R. (4th) 17. I will return to these decisions when discussing the outcome of the appeal.

[42] Some of the comments made by the plaintiff's counsel were irrelevant and appeared to be designed to arouse hostility against the defendants. Others appeared to be designed to appeal to the emotions of the jury or otherwise engender sympathy for the plaintiff. Counsel improperly stated that his client was owed a debt by the defendants. He improperly suggested to the jury members that they would be "sidetracked" or "breaking the rules" if they considered the death of the plaintiff's mother, the injury of her knee or her unsuccessful marriage, all of which were relevant to the state of her health or enjoyment of amenities.

[43] The plaintiff concedes that some of the comments made by her counsel at trial were unfortunate or improper, but says there were no exceptional circumstances warranting interference by this Court in view of the lack of objection by the defendants' counsel. I do not agree. The effect of the improper comments is manifested in the jury's award for non-pecuniary damages, which, as I will discuss under the next heading, was wholly disproportionate and constitutes a substantial wrong.

(d) Excessive Awards

[44] The defendants say the award for non-pecuniary damages was inordinate and the awards for past income loss and loss of future earning capacity were unsupported by the evidence.

[45] I have already stated my conclusion that the award for loss of future earning capacity, while generous, was supported by the evidence. I reach the same

2009 BCCA 605 (CanLII)

conclusion for the award in respect of loss of past earning capacity. The defendants say that the effect of the improper comments by the plaintiff's counsel is demonstrated by the fact that the jury awarded $90,000 for past income loss when counsel only asked for $50,000 in his closing address. It is inaccurate, in my view, to characterize the submission of the plaintiff's counsel in his closing address as a request for only $50,000. Counsel did mention the figure of $50,000, but he was using "figures in the middle" (one and a half shifts a week at $175 per shift for 48 weeks a year, giving an annual loss of $12,600) which he said produced a loss of "at least" $50,000 in a five-year period. Counsel's multiplication was in error ($12,600 x 5 = $63,000), there was a time period of more than five years between the dates of the accidents and the date of the trial, and the plaintiff's evidence was that she had anticipated earning more tips when she became more experienced.

[46] In support of their contention that the $235,000 award for non-pecuniary damages should be reduced, the defendants cite several decisions where judges awarded between $20,000 and $70,000 in cases of permanent soft tissue injuries. Those decisions are *Perren v. Lalari*, 2008 BCSC 1117 ($50,000); *Aulakh v. Poirier*, 2006 BCSC 2027 ($22,500); *Romanchych v. Vallianatos*, 2009 BCSC 669 ($45,000); and *Kasic v. Leyh*, 2009 BCSC 649 ($70,000). The defendants say that awards in the range of $235,000 are for devastating or catastrophic injuries, which normally include brain injuries.

[47] The defendants say that the $235,000 award should be reduced because it is inordinately high. The "inordinate" standard has long been applied to awards for non-pecuniary damages made by judges sitting without a jury. The recent decision of this Court in *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58, has clarified that a different standard applies to awards made by juries. After reviewing the authorities (including *Nance v. British Columbia Electric Railway*, [1951] A.C. 601, [1951] 3 D.L.R. 705 (P.C.) and *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108), Madam Justice Rowles summarized her conclusions, in part, as follows:

> [126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived

2009 BCCA 605 (CanLII)

> and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para. 64 and [*Dilello v. Montgomery*, 2005 BCCA 56, 250 D.L.R. (4th) 83] at para. 39, both citing *Nance* at 614).
>
> [127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" ([*Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184] at para. 32 citing *Nance* at 614, and referred to with approval in [*Boyd v. Harris*, 2004 BCCA 146, 237 D.L.R. (4th) 193] at paras. 13-14, *White v. Gait* [2004 BCCA 517, 244 D.L.R. (4th) 347] at paras. 10-11, and [*Courdin v. Meyers*, 2005 BCCA 91, 250 D.L.R. (4th) 213] at para. 22; [*Wade v. C.N.R.*, [1978] 1 S.C.R. 1064, 80 D.L.R. (3d) 214] at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or, in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young* at para. 64).
>
> * * *
>
> [129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: [*Cody v. Leonard* (1995), 15 B.C.L.R. (3d) 117, [1996] 4 W.W.R. 96 (C.A.)] at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

Hence, greater deference is to be given to juries than to judges sitting alone and appellate courts will only interfere with a jury's damage award in rare cases where the award is wholly disproportionate or shockingly unreasonable.

[48] In my opinion, the $235,000 award for non-pecuniary damages is wholly disproportionate. While the upper end of the range for judge-made awards for permanent soft tissue injuries may be somewhat higher than the $70,000 figure suggested by the defendants, the degree of the plaintiff's pain and discomfort cannot be considered to be the most severe in nature. The award is more than three times what I consider would have been an appropriate award for non-pecuniary damages. In my view, the jury's award for non-pecuniary damages was wholly disproportionate, and this is one of those rare cases where interference with the award by an appellate court is warranted.

2009 BCCA 605 (CanLII)

[49] I am mindful that the jury's award this Court declined to set aside in *Moskaleva v. Laurie* was in the amount of $245,000. While the award in that case was similar to the award in the present case, it is my view that the injuries to the plaintiff in *Moskaleva v. Laurie* were significantly more serious than the plaintiff's injuries here. In addition to chronic pain, the plaintiff in that case suffered a mild traumatic brain injury, post-concussion syndrome, headaches, fatigue, depression and inability to concentrate. Madam Justice Rowles was of the view that it was open to the jury to conclude that the accident had a devastating, if not catastrophic, effect on the plaintiff. While the plaintiff's injuries here are unfortunate, they could not reasonably be classified as devastating or catastrophic.

(e) Appropriate Remedy

[50] The defendants request the setting aside of the jury's awards and the remittal of the actions to the Supreme Court for a new trial. In the alternative, the defendants seek a reduction in the awards for non-pecuniary damages, past income loss and loss of future earning capacity. If the appeal is to be allowed, the position of the plaintiff is that this Court should make an award in substitution of the jury's award. The defendants have not proposed amounts for the reduced awards, while the plaintiff says the substituted award for non-pecuniary damages should be in the amount of $160,000.

[51] The first of the propositions quoted above from *Arland v. Taylor* is that a new trial "should not be ordered unless the interests of justice plainly require that to be done". In *Atherton v. Maurice* at para. 21, Mr. Justice Hinds stated that "[n]ew civil jury trials are to be avoided wherever reasonably possible". It is settled that this Court has the jurisdiction to vary an award made by a jury instead of ordering a new trial: see *Vaillancourt v. Molnar Estate*, 2002 BCCA 685, 8 B.C.L.R. (4th) 260.

[52] As noted above, the decisions of *de Araujo v. Read* and *Giang v. Clayton* also involved improper comments made by counsel to a jury. In *de Araujo*, where the awards were high but "within a range not otherwise subject to variation" (para. 70), a new trial was ordered. In *Giang*, Chief Justice Finch would have dismissed the

2009 BCCA 605 (CanLII)

appeal and Madam Justice Southin would have reduced the jury's award because it was excessive. While preferring to order a new trial as a result of counsel's improper comments, Thackray J.A. agreed to the reduction of the award proposed by Southin J.A.

[53] In my opinion, the interests of justice do not require a new trial in this case. While the lack of objection by the defendants' counsel does not act as a bar to the allowance of the appeal because the improper comments by the plaintiff's counsel did result in a substantial wrong, it is my view that the lack of objection remains a factor to be taken into account when deciding whether to order a new trial or to make a substituted award. A more forceful argument for a new trial would exist if the defendants had requested a mistrial because, if a mistrial had then been declared by the trial judge, a new trial would have been required.

[54] A new trial should be ordered because credibility is a live issue: see *Banks v. Shrigley*, 2001 BCCA 232, 154 B.C.A.C. 214; and *Toor v. Toor*, 2007 BCCA 354, 245 B.C.A.C. 12. In this case, however, the plaintiff's credibility is not in issue.

[55] Here, counsel for the defendants was apparently content with the way in which the case was left with the jury, and the defendants now seek relief from this Court in view of the magnitude of the jury's award. It is apparent the jury was favourably impressed by the plaintiff, and the defendants should not be given another opportunity to attempt to cast the plaintiff in a less favourable light. I believe relief can be adequately given to the defendants by substituting an award in place of the jury's award.

[56] The jury's awards for past income loss and loss of future earning capacity were supported by the evidence, and I am not persuaded that the improper comments by the plaintiff's counsel influenced these awards. It is the award for non-pecuniary damages that I believe was improperly affected by the comments.

[57] It would not be appropriate, in my view, to substitute an amount at the high end of the range of judge-made awards in respect of injuries of the kind sustained by

2009 BCCA 605 (CanLII)

the plaintiff. That would have the effect of undermining the greater deference to be afforded to jury awards. Nor do I believe it would be appropriate to make the highest award possible without the award being considered to be wholly disproportionate because that would fail to take counsel's improper comments into account.

[58] Having regard to the greater deference to be given to juries and considering the effect of counsel's improper comments, it is my conclusion that the amount of the substituted award for non-pecuniary damages should be $135,000, representing a reduction of $100,000.

Conclusion

[59] I would allow the appeal on two bases. First, the plaintiff's counsel made improper comments during his opening statement and closing address to the jury and, despite the lack of any objection from the defendants' counsel, this Court should intervene because a substantial wrong was occasioned by the comments. Secondly, the jury's award for non-pecuniary damages was wholly disproportionate.

[60] In the circumstances of this case, I would not order a new trial. I would substitute an award of $135,000 for non-pecuniary damages in place of the jury's award of $235,000.

"The Honourable Mr. Justice Tysoe'

I agree:

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Frankel"

2009 BCCA 605 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Laidlaw v. Couturier,*
2010 BCCA 59

Date: 20100210
Docket: CA036576

Between:

James Wilson Laidlaw

Appellant
(Plaintiff)

And

George Teleasfore Couturier

Respondent
(Defendant)

2010 BCCA 59 (CanLII)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall
The Honourable Madam Justice Kirkpatrick

On appeal from the Supreme Court of British Columbia, October 15, 2008,
(*Laidlaw v. Couturier*, Kelowna Registry No. S67870)

Counsel for the Appellant:	S.W. Turner, P. Hergott
Counsel for the Respondent:	A.M. Gunn
Place and Date of Hearing:	Vancouver, British Columbia December 18, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 10, 2010

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] The appellant, James Wilson Laidlaw, was involved in a motor vehicle accident on 23 May 2004. By a statement of claim filed in the Supreme Court on 11 April 2005, Mr. Laidlaw alleged that he sustained an array of injuries in the accident. These included, as set out in the statement of claim:

> 6. As a result of the accident aforesaid, and the negligence of the Defendant, the Plaintiff has sustained injuries, particulars of which are as follows:
>
> a) whiplash injury;
> b) back injury;
> c) neck injury;
> d) shoulder injury;
> e) hip injury;
> f) head injury;
> g) arm and/or hand injury;
> h) leg and/or foot injury;
> i) jaw injury;
> j) twitching;
> k) headaches;
> l) depression, fatigue and anxiety;
> m) sleep disruption;
> n) pain and discomfort;
> o) irritability and mood swings;
> p) amnesia;
> q) long and/or short term memory loss;
> r) sexual dysfunction;
> s) shock and distress; …

[2] He claimed general damages, loss of income, loss of earning capacity, and special damages.

[3] It should be noted that Mr. Laidlaw was involved in another motor vehicle accident on 12 April 2005. The jury found that the April 2005 accident did not contribute to Mr. Laidlaw's injuries. No appeal is taken from that finding. These reasons therefore focus on the May 2004 accident and the injuries and loss Mr. Laidlaw claimed to have sustained in that accident.

2010 BCCA 59 (CanLII)

[4] The defendant contended at trial that Mr. Laidlaw was susceptible to recurring depression and would have suffered from depression even if the motor vehicle accident had not occurred. The defendant suggested that the accident caused only minor injuries that resolved within a few months of the accident and that Mr. Laidlaw's continuing complaints were attributable to his personality and emotional disorders which the defendant argued pre-dated the accident.

[5] Following a 12-day trial before a judge and jury, judgment in accordance with the verdict of the jury was entered which awarded Mr. Laidlaw $19,307.59.

[6] The verdict as made by the jury was attached as a schedule to the order entered in 14 January 2009. It reads:

SCHEDULE "A"

1) Total amount of damages awarded to the Plaintiff for all of his physical and psychological complaints, after deducting for any failure to mitigate, as of the date of the Trial:

a)	Non-pecuniary loss		$ 120,000.00
b)	Past income loss		$ 7,500.00
c)	Reduction of earning capacity		$ 0.00
d)	Past Special Damages awarded as follows:		$ 1,217.28
	i) Medications	$423.28	
	ii) Physical Therapy	$405.00	
	iii) Massage Therapy	$155.00	
	iv) Chiropractic Care	$180.00	
	v) Counselling and psychological	$ 0.00	
	vi) Diagnostic procedures	$ 0.00	
	vii) Special Equipment	$ 54.00	
e)	Cost of Future Care Awarded as follows:		$ 0.00
	i) Medications	$ 0.00	
	ii) Physical Therapy	$ 0.00	
	iii) Massage Therapy	$ 0.00	
	iv) Chiropractic Care	$ 0.00	

2010 BCCA 59 (CanLII)

	v) Counselling and psychological	$ 0.00	
	vi) Diagnostic procedures	$ 0.00	
	vii) Special Equipment	$ 0.00	
f)	Total Damages		$ 128,717.59
g)	Reduction for the measurable risk that the Plaintiff would have suffered from the physical and psychological complaints even if the May, 2004 collision had not happened		
	Reduction by 85%		$(109,409.69)
h)	The April 2005 collision did not materially contribute to the Plaintiffs complaints after April 2005.		
i)	Total Award		$ 19,307.59

[7] On appeal, Mr. Laidlaw contends that the jury verdict was perverse and internally inconsistent. He further contends that the trial judge failed to properly instruct the jury on the issues of causation and resultant damages.

BACKGROUND

[8] Mr. Laidlaw was 29 years old at the date of the accident and 33 years old at the date of trial. He graduated from high school and had one year of post-secondary education. His work history includes working as a restaurant manager, an assistant snubber in the oil field, and as a manual labourer and machine operator.

[9] Prior to the accident, Mr. Laidlaw had a history of low back pain. More significantly, Mr. Laidlaw had a history of serious depression both personally and familially. He had a psychiatric referral in his teens. In the year preceding the accident, he was diagnosed with recurrent depression. On 30 September 2003, he reported in a hospital intake interview that he had “mentally and emotionally crashed”; “[f]elt his mood slipping about 8 [months] ago”; his marriage was strained and he and his wife attended counselling; he had problems with concentration, sleep disturbances, anxiety, chest pain, nausea and passive thoughts of suicide.

2010 BCCA 59 (CanLII)

[10] Mr. Laidlaw was unemployed at the time of the accident, and has not returned to work since. He had potentially lucrative employment working in Alberta in the oil patch during the period 1996 to 1998. He was laid off from that work and returned to work in the restaurant in Kelowna where he had been previously employed. He left that job in 2001 to work at Crown Packaging. He was laid off in early 2003. When called back to work, he instead took a three-week leave of absence. He was again off work for five weeks in June and July 2003 due to depression. In August 2003, he was warned that excessive absenteeism was jeopardizing his employment at Crown Packaging. In September 2003, he took a nine-week medical leave on account of stress. He was fired in November 2003. He considered applying for work in the oil field in the months prior to the accident in May 2004.

[11] It was against this history that Mr. Laidlaw advanced his claims. Extensive medical evidence was tendered at trial by both the plaintiff and the defendant.

[12] Mr. Laidlaw's family physician, Dr. Goldberg, noted in December 2005 that Mr. Laidlaw had attended at his office on the day of the accident and complained of having hit his head during the collision (but did not lose consciousness), impacted his knee on the dashboard, and complained of right shoulder pain, mild numbness in his right arm and a mild headache. In the following months, he complained of severe neck pain, nausea, headaches, sleep disturbances, back pain, memory problems, erectile dysfunction.

[13] In the summary provided in his medical legal report, Dr. Goldberg concluded that Mr. Laidlaw suffered soft tissue injuries and a mild traumatic brain injury (based on a report from Dr. Miller, a clinical neuropsychologist). Dr. Goldberg's ultimate opinion was that "it is likely that Mr. Laidlaw will not experience a complete recovery of his symptoms unless he undergoes counselling with aims to developing appropriate coping strategies for managing the emotional impacts of the injuries sustained in the motor vehicle accident."

[14] Dr. Anton, a physiatrist, examined Mr. Laidlaw in January 2007 at the request of Mr. Laidlaw's lawyer. Based on his review of Mr. Laidlaw's clinical records and

2010 BCCA 59 (CanLII)

Mr. Laidlaw's reports of pain, Dr. Anton concluded that Mr. Laidlaw suffered soft tissue injuries to the cervical spine and left shoulder, injuries to the soft tissues of the chest wall, superficial contusion or soft tissue injury to the left knee, "probable" soft tissue injury to the thoracolumbar spine, and "probable" mild traumatic brain injury (i.e., a cerebral concussion).

[15] Dr. Anton believed that Mr. Laidlaw would probably never be pain-free, which in turn would require modification in participation in physically demanding tasks to prevent flare-ups of pain. He did not consider that Mr. Laidlaw would develop late complications from his injuries.

[16] Dr. Hirsch, a physiatrist, conducted an independent medical examination in September 2007. He noted that the depression suffered by Mr. Laidlaw prior to the accident appeared to significantly compromise his ability to function at work, but deferred the possible negative ramifications of the accident on Mr. Laidlaw's depressive symptoms to a psychiatrist. As to his physical injuries, Dr. Hirsch stated that he would not have expected Mr. Laidlaw to be off work for more than three or four months. He considered his perceived physical limitations were "significantly dictated by his outstanding mental health issues".

[17] At Mr. Laidlaw's lawyer's request, Dr. Semrau, a psychiatrist, assessed Mr. Laidlaw in November 2007. In his opinion, Mr. Laidlaw's mental health prognosis was guarded, with significant improvement possible with treatment. He considered that Mr. Laidlaw's psychological symptoms would interfere substantially with his return to work, including social anxiety, lack of self-confidence and a conspicuous tic disorder. He believed that Mr. Laidlaw needed substantial psychological therapy to deal with depression, anxiety, cognitive management and pain management. Dr. Semrau stated that if the May 2004 accident and the April 2005 accident had not occurred, Mr. Laidlaw would have continued to do well in terms of mental health based on his understanding that the two episodes of depression he experienced prior to the May 2004 accident had fully resolved.

2010 BCCA 59 (CanLII)

[18] Dr. Solomons, a psychiatrist, conducted an examination of Mr. Laidlaw in April 2008 at the request of the defendant's lawyer. He noted that, although Mr. Laidlaw had been diagnosed with "a variety of psychiatric conditions following the accident … none of the diagnoses had been made by a psychiatrist." In his opinion, the description of the symptoms in the clinical records did not "pass muster" for making the diagnoses. He did not consider that Mr. Laidlaw suffered from a psychiatric or psychological disorder.

[19] Dr. Solomons considered that the lack of objective findings to substantiate his subjective symptoms, together with the discrepancy in the severity of reported symptoms relative to their functional impact was indicative of secondary gain.

[20] At trial, having read Dr. Semrau's report, Dr. Solomons retracted his opinion that Mr. Laidlaw was not depressed.

[21] Mr. Laidlaw alleged that he sustained a mild traumatic brain injury in the accident. However, the medical evidence did not tend to support the finding of brain injury and was inconsistent with Mr. Laidlaw's actions immediately after the accident.

[22] Most of the health professionals who dealt with or assessed Mr. Laidlaw considered that he would benefit from counselling. He did see a counsellor after the accident, but stopped in November 2005. He resumed counselling in 2008 and he agreed that it helped. At trial, the defendant argued that his failure to attend counselling and to return to restaurant work amounted to a failure to mitigate.

[23] In closing submissions to the jury, Mr. Laidlaw's lawyer urged the jury to accept that Mr. Laidlaw's pre-accident low back pain and episodes of depression had completely resolved by the time of the accident but that he was irrevocably injured in the accident and would feel its impacts for the rest of his life.

[24] In the defence closing submissions, counsel built on Dr. Solomons' observation that Mr. Laidlaw blames others and makes excuses rather than taking responsibility when things go wrong. Counsel emphasized Mr. Laidlaw's pre-accident depression and his failure to obtain work and take counselling.

2010 BCCA 59 (CanLII)

[25] The trial judge summarized the positions of the parties as follows:

> As I understand it, counsel for Mr. Laidlaw contends that Mr. Laidlaw had fully recovered from his mood disorders before the May 2004 accident. Immediately after the accident Mr. Laidlaw experienced a period of altered consciousness, together with pain in his head and back. During the months after the accident he experienced headaches, pain in his neck and back, disturbed sleep, impaired memory, concentration and attention span. Had the May 2004 accident not happened nothing would have prevented Mr. Laidlaw from going to work for Mr. Moynagh in Alberta and earning on the order of $80,000 per year. The April 2005 accident did not produce any new symptoms in Mr. Laidlaw, and any emotional upset he felt as a result of that accident was very short-lived. Mr. Laidlaw now suffers from chronic pain as a result of the May 2004 accident. He now suffers from impaired memory, concentration, attention span and reading ability. He is always uncomfortable, his sleep is disturbed, his sexual performance and bladder functions are now compromised, and as a consequence of all of these symptoms and limitations, Mr. Laidlaw's value in the labour market has been diminished and he will require care and treatment in the future.
>
> As I understand it, the defence argues that Mr. Laidlaw was susceptible to recurring general anxiety disorder and depression, and would have suffered from these disorders even if the May 2004 accident had not happened. The May 2004 accident caused Mr. Laidlaw minor injuries from which he recovered in no more than a few months. Any problems that Mr. Laidlaw suffered after that are attributable to his personality, mood and emotional disorders, and not to the May 2004 accident. The April 2005 collision had a more profound effect on Mr. Laidlaw than he was willing to admit to when he was assessed after that accident. If Mr. Laidlaw needs counselling now it is to treat the personality issues that Dr. Solomons identified. Those issues pre-dated the May 2004 collision, and Mr. Couturier cannot be held to account for them. Mr. Laidlaw is capable of working full-time in a competitive work environment, and Mr. Laidlaw has failed to mitigate his loss by undertaking counselling when Dr. Goldberg advised him to do so in late 2005, and by not looking for work in restaurants other than Milestones.

Neither party objected to the trial judge's summary of their respective positions.

JURY CHARGE

Causation

[26] The trial judge described causation as "the nut" of the case. His instruction on liability is not in issue. The controversial aspect of the charge dealt with the degree to which the defendant caused or contributed to Mr. Laidlaw's alleged losses. It reads:

2010 BCCA 59 (CanLII)

> The second causation issue is this: to what degree might Mr. Couturier be liable for Mr. Laidlaw's complaints. Here the question is whether the evidence satisfies you on the balance of probabilities that there is a measurable risk that even if the May 2004 accident had not happened, Mr. Laidlaw's pre-accident history, the general anxiety disorder and depression, would have interfered with his life anyway consistent with the complaints that he has made since the accident. And here I am going to add something that is not in the written instructions, but you should pay attention to it anyway, and that is that in closing arguments the defendant submitted that Mr. Laidlaw's pre-existing back problems would also have, even in the absence of the 2004 accident, interfered with his life. So you should add that consideration into the mix as well.
>
> If you find that had the May 2004 accident not happened, there is no measurable risk that Mr. Laidlaw would have experienced general anxiety or depression, then, subject to what I am going to tell you in a moment about the April 2005 accident, you should find Mr. Couturier liable for all of the injuries and loss you find were materially caused by the May 2004 accident. On the other hand, if you find that if the May 2004 accident had not happened there was a material risk that Mr. Laidlaw would nevertheless have suffered from general anxiety or depression or back problems, then you should reduce Mr. Courturier's liability by the amount of that material risk, whatever you find it to be.
>
> [Emphasis added.]

[27] The trial judge then explained, by example, how the jury might use the measurable risk in its assessment of damages:

> … Suppose you find that the May 2004 accident materially contributed to his condition, but you also find that there was a measurable risk of say X percentage that Mr. Laidlaw would have suffered from general anxiety and depression like what he says he has now, even if the May 2004 accident had not happened. In that case you would still be obliged to find Mr. Couturier liable to pay damages, but you would reduce the award to account for that measurable risk. But you would probably not reduce the award by the full X percent. That is because in this example the risk applies only to the psychological injuries.
>
> You might find that Mr. Laidlaw had physical injuries in the accident too. So to account for the fact that the physical injuries are not reducible but the psychological ones are, you might decide that the measureable risk should reduce Mr. Laidlaw's overall claim by, say, Y percent, or some other number that you find is appropriate.

[28] The trial judge later instructed the jury as to how to approach the defendant's responsibility as reflected in the question sheet provided to the jury. The instruction reads:

2010 BCCA 59 (CanLII)

> (1) Assess as best you can which of any of Mr. Laidlaw's complaints were materially caused or contributed to by the May 2004 collision. If you find that he suffered no injury or loss from the first accident, then you must award him no damages. His claim will then stand dismissed.
>
> (2) Assess Mr. Laidlaw's overall or global damages as of today; that is to say, assess his damages for all of the complaints that he has brought forward, even though those complaints may have been caused or exacerbated by the second accident, and deduct from those damages any amount by which you find that Mr. Laidlaw has failed to mitigate his loss.
>
> (3) Decide whether there was a measurable risk that Mr. Laidlaw would have suffered from some or all of his complaints, even if the first accident had not happened. If you decide that there was a measurable risk of that, then assign a percentage to that task.
>
> (4) Decide whether the second accident exacerbated Mr. Laidlaw's complaints or perhaps caused new complaints. If you decide that it did, then assess the percentage that Mr. Laidlaw's complaints after the April collision are attributable to that collision, and for convenience I set out that process in the questions you should answer as a guide to reach a verdict.

This instruction does not include all of the analytical steps referred to earlier in the charge and is inconsistent with question 3 of the Question Sheet.

[29] The question sheet as completed by the jury is as follows:

> Laidlaw v. Couturier
> Question Sheet
>
> 1. Did the May 2004 collision materially contribute to the physical and psychological complaints the plaintiff has made since then?
>
> [ ] No: Award no damages and do not answer the rest of the questions.
>
> [√] Yes: Continue to answer the questions.
>
> 2. What is the total amount of damages you would award to the plaintiff for all of his physical and psychological complaints, after deducting for any failure to mitigate, as of the date of trial:

Non-pecuniary loss	$	120,000
Past income loss	$	7,500
Reduction of earning capacity	$	0
Past special damages		
medications	$	423.28
physical therapy	$	405

2010 BCCA 59 (CanLII)

massage therapy	$	155
chiropractic care	$	180
counselling and psychological	$	0
diagnostic procedures	$	0
special equipment	$	54
Cost of future care		
medications	$	0
physical therapy	$	0
massage therapy	$	0
chiropractic care	$	0
counselling and psychological	$	0
diagnostic procedures	$	0
special equipment	$	0
Question #2 Total	$128,717.28 (~~128,800~~)	

3. Was there a measurable risk that the plaintiff would have suffered from the physical or psychological complaints even if the May 2004 collision had **not** happened?

[ ] No: Go to question 4

[√] Yes: State the percentage of risk that the plaintiff would have suffered the complaints even if the May 2004 accident had not happened: 85%
(The plaintiff's total damage award at question #2 will be reduced by this percentage.)

4. Did the April 2005 collision materially contribute to the plaintiff's complaints after April 2005?

[√] No

[ ] Yes: State percentage of complaints after April 2005 that are attributable to the second accident: _____%
(The plaintiff's damage award at question #2 will be reduced by this percentage.)

DISCUSSION

[30] The trial judge prepared written instructions for the jury and discussed the draft instructions with counsel on several occasions prior to delivery of the charge, at which times counsel expressed their various concerns and points of clarification.

2010 BCCA 59 (CanLII)

[31] It must be noted at the outset that a party's failure to object at trial to a jury charge or to the questions put to the jury is, as the respondent submits, a powerful circumstance militating against appellate interference with the ensuing verdict. See *Basra v. Gill* (1995), 99 B.C.L.R. (2d) 9 (C.A.) at para. 15; leave to appeal ref'd, [1995] 2 S.C.R. v.

[32] However, as the appellant demonstrated on appeal, there was considerable debate between plaintiff's counsel and the trial judge as to the wording of the charge. This was not a case in which counsel stood mute. Rather, plaintiff's counsel attempted to impress on the trial judge the concern he had with, among other things, the instruction related to the third jury question.

> MR. HERGOTT: I'm just imagining, My Lord, the jury trying to wrestle with -- in percentage terms. If they're relying on that charge and were to answer this question to come up with first one percentage according to the charge and then another percentage based on that first percentage, and wrestling with psychological, physical income loss that may have been related to the psychological or the physical or both in part as being a very difficult percentage kind of analysis.
>
> THE COURT: I guess you are wishing that the jury had a different case to decide. There is no way around it, Mr. Hergott, frankly. *Athey* is the law of the land, and it says measurable risk expressed as a percentage. The Supreme Court of Canada tells us that's what we do.
>
> MR. HERGOTT: My Lord, with respect, the measurable risk, though, relates to not one of these complex type cases. It relates to a case where you've got an underlying set of conditions, one condition, one outside event that comes in and whether that one injury would have happened, whether it's a measurable risk of that one injury happening, not this very, very complex set of factors, My Lord.
>
> My submission would be that the jury ought to be faced with a question that would be one question that would say, disregarding whatever aggravation they have -- you may assess from the second crash, and taking into account any potential of whatever the wording would be for measurable risk of something happening anyway, what is your assessment of the damages under this -- for this crash? Without asking for -- without asking for a percentage. A global assessment asking the jury to come up with one number rather than a -- I just find that I'm confused by the percentage approach and I expect the jury will be, as well. That's my submission.

2010 BCCA 59 (CanLII)

The appellant submits, and I agree, that there was little utility in pressing his arguments further with the trial judge. He made his submission and the trial judge disagreed. In the circumstances, he properly accepted the judge's ruling without necessarily agreeing with it.

[33] On appeal, Mr. Laidlaw contends that the trial judge's instruction on the law pertaining to measurable risk was not in accordance with *Athey v. Leonati*, [1996] 3 S.C.R. 458, the decision on which the trial judge obviously placed considerable weight.

[34] The respondent properly emphasizes that jury charges are to be considered in their entirety, in light of the evidence as a whole, and in light of counsels' closing submissions to the jury. The respondent submits that Mr. Laidlaw's argument that the instruction failed to instruct the jury to consider the onset of his complaints, their relative effect on him, and to make separate findings of fact in respect of each injury is without merit. I agree. The assessment of damages requires the trier of fact to consider all relevant negative and positive contingencies and risks and to provide a global assessment that reflects those contingencies.

[35] As *Athey* makes clear, the jury's first task, as anticipated in question 1, was to determine whether the plaintiff had shown that the injuries would not have occurred but for the negligence of the defendant.

[36] For reasons that are unclear (and to which no objection is made on appeal), the trial judge instructed the jury that causation was established if the defendant's negligence "materially contributed" to the occurrence of the injury. As stated in *Athey*:

> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education,* [1981] 2 S.C.R. 21; *Bonnington Castings,*

2010 BCCA 59 (CanLII)

> *Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

[37] In my opinion, the general "but for" test for causation was applicable in this case and the jury should have been instructed on that basis.

[38] In any event, the jury found that the defendant was liable and the legal result of that finding is that, to a certainty, the defendant caused Mr. Laidlaw's injuries (*Athey* at para. 28). The jury was then required to consider Mr. Laidlaw's original position and the effect it might have on the assessment of damages payable by the defendant. As *Athey* explains:

> 32. … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.
>
> [Emphasis in original.]

[39] The defendant advanced the theory that Mr. Laidlaw's "original position" included a marked propensity for depression that significantly impaired his past and future ability to work. As can be seen from the completed question sheet, the jury evidently accepted the defence theory.

[40] It must be said that explaining to a jury the manner in which the law approaches these difficult issues is no easy task. The task was made more difficult in this case due to the myriad of complaints of pain and injury (both psychological and physical) alleged by Mr. Laidlaw, and his pre- and post-accident medical and psychiatric history.

[41] The trial judge eschewed reference to the phrases "thin skull" or "crumbling skull" suggesting, as did *Athey*, that the phrases are unhelpful. Nevertheless, I consider that the concepts underlying the phrases are helpful in understanding how

2010 BCCA 59 (CanLII)

they affect the ultimate consideration – how much the defendant is obliged to pay to the plaintiff to compensate him for his injuries. In my opinion, a paraphrasing of the comments in *Athey* would have better informed the jury of the law to be applied.

[42] Ultimately, this appeal turns on a significant error exposed in the jury charge, in the third jury question, and the ultimate verdict.

[43] As can be seen from the emphasized portion of the jury charge recited in paragraph 26 of these reasons, the trial judge instructed the jury that if they found that "if the May 2004 accident had not happened there was a material risk that Mr. Laidlaw would nevertheless have suffered from general anxiety or depression or back problems, then you should reduce Mr. Couturier's liability by the amount of that material risk, whatever you find it to be."

[44] The trial judge then instructed the jury by reference to an example, that the jury might find the measurable risk that the accident materially contributed to Mr. Laidlaw's injuries to be X percent, but that they would "probably not reduce" the damage award by the "full X percent" but by "Y percent or some other" appropriate number.

[45] In their answer to Question 3, the jury was directed to state the percentage risk that Mr. Laidlaw would have suffered "the complaints" even if the May 2004 accident had not happened and told that the total damages awarded under question 2 would be reduced by that percentage.

[46] I first note that the word "complaints" is inapt. A person may complain a great deal and yet not be injured. The law compensates for injuries, not complaints. More importantly, the direction in the first part of the impugned charge and in question 3 is inconsistent with the second part of the judge's instruction and with *Athey*. *Athey* says:

> 34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though

2010 BCCA 59 (CanLII)

> the plaintiff's losses are more dramatic than they would be for the average person.
>
> 35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Emphasis added.]

[47] The wording of question 3, together with the judge's charge on causation was overly simplistic. The various conditions from which the plaintiff had suffered previously, and the symptoms to which they gave rise, were not capable of reduction to a single "measurable risk".

[48] One, some or none of those previous conditions might have "detrimentally affected the plaintiff in the future". One or more of those conditions might have affected him at different points in time. The degree to which each such condition might have affected him need not have been identical.

[49] To lump these variables together into one question and to invite a single mathematical adjustment was unfair and inappropriate.

[50] *Athey* was a case with a single identifiable injury, a disc herniation, occurring some months after the accidents giving rise to the plaintiff's claim. There was a single pre-existing condition, "a history of minor back problems", which was alleged to have contributed to his injury. I do not read the language in *Athey,* while appropriate to the kind of case with a single measurable risk, to be transferable to

2010 BCCA 59 (CanLII)

the facts of a more complex case such as this one, which involves the assessment of multiple and distinct measurable risks.

[51] The contributing effects of a pre-existing condition to a subsequent injury can be taken into account if the trier of fact considers that to be appropriate. In many cases, it may well be a relevant factor for the jury to consider. However, the jury should be told that the effect to be given to such a "measurable risk" should be carefully related to the specific facts of the case. In a case such as this, where there were various pre-existing conditions, and where it was uncertain if, when, or to what degree those conditions might adversely affect the plaintiff in future, it was an error to invite a general reduction across the board, as is required by question 3.

[52] In my opinion, the first portion of the charge on causation and in question 3 directed the jury to undertake a formulaic approach to the assessment of damages attributable to the defendant rather than directing them to consider, in a nuanced fashion, all of the contingencies and risks inherent in Mr. Laidlaw's individual circumstances and to arrive at a global assessment of damages. Question sheets such as this one that ask the jury to answer questions that tend to reveal their deliberations are not helpful, invite appeals, and are to be avoided.

[53] It must be said that the second portion of the trial judge's written instructions did not mirror the wording in question 3. However, it stands to reason that by the time the jury was completing its deliberations, their focus must have been on the question sheet. Question 3 is clear in its terms but, unfortunately, incorrect in its legal effect. In my view, it amounts to misdirection.

[54] This misdirection is exemplified by the award for special damages which, it seems to me, is entirely at odds with the quantum of the other heads of damage.

[55] Mr. Laidlaw advanced a claim for special damages of $18,859.84. Counsel for the defendant reviewed Mr. Laidlaw's special damage claim in his closing submissions and accepted that Mr. Laidlaw was entitled to his out-of-pocket expenses to the end of 2004 "with the exception of the Cialis". Viewing the evidence

2010 BCCA 59 (CanLII)

of special damages, it is evident that the jury fully accepted the defence position, because they awarded, under question 2, almost exactly the amounts claimed up to the end of 2004.

[56] What is particularly anomalous is the reduction by 85% of the award of special damages of $1,217.83 for an award of $182.13. That amount is at odds with defence counsel's submissions and arguably inconsistent with the reduced non-pecuniary damage award ($18,000) which, although much reduced, nevertheless indicates a significant degree of pain and suffering which would in most circumstances cause more than $182 in out-of-pocket expenses.

[57] Further, in his submissions, counsel for the defendant submitted that Mr. Laidlaw needed counselling and, indeed, failed to mitigate his loss by refusing to return to counselling. Yet the jury awarded nothing for the counselling expense of $2,575 that Mr. Laidlaw had taken.

[58] In the end, it is impossible to say with confidence that the jury properly understood its task in assessing the damages due to Mr. Laidlaw. In my view, the only recourse available is to order a new trial.

[59] Counsel for the respondent requested that, if the appeal were allowed, he be permitted to make supplementary submissions on the issues of remedy and costs. In my view, the time to make those submissions is in the factum or at the time of the hearing of the appeal. To accede to the respondent's request would needlessly bifurcate the appeal and result in unnecessary time and expense.

[60] I would allow the appeal, order a new trial, grant the appellant his costs of the

2010 BCCA 59 (CanLII)

appeal, with the costs of the first trial and any subsequent trial to be determined by the next trial judge.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hall"

2010 BCCA 59 (CanLII)

Citation: Laycock v. Longo et al 2002 BCCA 186 Date: 20020308 Docket: CA026384

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low
The Honourable Mr. Justice Thackray

March 8, 2002

Vancouver, B.C.

BETWEEN:
IRENE EVELYN LAYCOCK
APPELLANT
(PLAINTIFF)
AND:
LEONEL DASILVA LONGO, DENISE RENE BALLARD,
MICHAEL GREEN and JUDY JOAN GREEN
RESPONDENTS
(DEFENDANTS)

J.D. Spencer appearing for the Appellant
J.L. Lindsay appearing for the Respondents

[1] **LOW, J.A.**: The appellant is dissatisfied with a damage award by a jury and wants this court to increase the award under two heads of damage. In my opinion, the appellant has demonstrated no basis on which this court can interfere.

[2] The appellant suffered soft-tissue injuries in motor vehicle accidents some seven months apart, on 17 June 1995 and 6 January 1996. The defendants responsible for the first accident admitted liability. The jury found the defendants involved in the January 1996 accident to be responsible for it without any contributory negligence on the part of the appellant. There was an intervening motor-vehicle accident on 10 August 1995 in which the jury found the appellant was not injured. The jury apportioned responsibility for the June 1995 and the January 1996 accidents at 30 percent and 70 percent respectively. No appeal was brought from any of these findings.

[3] The jury awarded the appellant $10,000 for non-pecuniary damages; $14,000 for impairment of future earning capacity; and $8,622.37 for special damages, the latter award being the amount claimed. The appellant says that the first two awards were inordinately low.

[4] At the time of the trial, the appellant was 46 years old and married with three children. Since 1993 she has operated a licenced daycare facility in her home in Surrey. She sustained neck strain in the first accident and also suffered back pain. The month following that accident she was able to go to Disneyland on a family holiday. She returned to work in her daycare business less than three months after the accident and had recommenced ordinary housework the month previous to that. Her injuries from the first

2002 BCCA 186 (CanLII)

accident apparently were well on the way to resolution when the third accident occurred.

[5] Despite the third accident, the neck and back problems continued to improve. The appellant testified that by sometime in 1997 those problems were not significant.

[6] The third accident caused right hip and leg problems. Those were the only difficulties persisting as of the trial in September 1999. There was conflicting medical opinion as to the significance and prognosis of the hip and leg problems. A diagnosis of trochanteric bursitis was common ground. The appellant's medical expert agreed that this condition could be remedied by surgery should that be required. The respondents' medical expert described the condition as a nuisance and not a disability.

[7] The respondents at trial challenged the credibility of the appellant and, of course, it was up to the jury to assess the reliability of the appellant's evidence as to her condition from time to time. There were issues about her attendance for regular chiropractic treatment for 20 years prior to the first accident, and her post-accident rejection of less passive therapy such as physiotherapy and exercise leading to needed weight loss. In the fall of 1995, the appellant attended a program at the Canadian Back Institute but refused to see it through as she eschewed exercise. She preferred to follow her family doctor's recommendation of chiropractic treatment. This situation continued until a specialist recommended an exercise programme. The appellant did stretching and strengthening exercises thereafter and admitted that these were of benefit to her.

[8] I am sure the judgment of the jury was influenced by the fact that for many years prior to the first accident the appellant suffered aches and pains similar to those she complained of at trial. The jury was entitled to view the appellant's claim, in part at least, as an exacerbation of an existing condition. I have no doubt that the award of non-pecuniary damages reflected this history and I am not persuaded that the award was unreasonable.

[9] The appellant argues that the award of $14,000 for impairment of future earning capacity does not properly take into account the financial effect of her disability on her business or the impairment of the capital asset her earning power represents, as set out in ***Brown v. Golaiy***, (1985) 26 B.C.L.R. (3d) 353 (B.C.S.C.). The appellant submits that the award for impairment of future earning capacity is inordinately low and should have been at least $30,000.

[10] The appellant presented no actuarial evidence and no work-capacity evaluation. She claimed that she had a disability that caused her to lose $150 per month because she was no longer able to physically handle very small children in her daycare facility. Apparently this was a gross figure that did not take into account additional operating costs associated with the care of infants and toddlers. Assuming the appellant operated her business to age 65 for 11 months each year (as was her practice) she presented the gross loss at $31,350. She argues that the award made by the jury does not adequately reflect these figures. I disagree. The jury had to take into account the conflicts in the medical opinions, the issues raised as to the credibility of the appellant, her medical history and the mitigation

2002 BCCA 186 (CanLII)

issue. The gross figure was subject to discount for additional expenses and other negative contingencies. The assessment had to reflect the present value of the future loss.

[11] The appellant also asked the jury to do an analysis of her employability other than in daycare work at an hourly wage of approximately $10 and conclude that her present earning capacity is $7,000 to $8,000 per year less than it was before the first accident.

[12] Before us the appellant asserts that the gross amount of the business loss of $31,350 would accurately reflect both the business loss and the impairment of the capital asset arising out of the possibility that she might not be able to continue her daycare business. The jury no doubt noted that the evidence disclosed that the appellant's income from her business increased each year since its inception despite the intervening motor vehicle accidents and the appellant's injuries therefrom, and that the appellant continued in her business to the time of trial close to four years after the third accident. In these circumstances I am unable to conclude that the award under this head of damage was inordinately low.

[13] I see no merit in the appellant's argument that the award of the full amount claimed for special damages means that the other two awards of damage or either of them were inordinately low.

[14] For these reasons I would dismiss the appeal.

[15] **HUDDART, J.A.**: From my appreciation of the evidence in this case, I agree with the appellant, that the jury's award for non-pecuniary loss and loss of earning capacity are low. However, despite the able submissions of her counsel I am not persuaded the awards are so inordinately low as to justify this Court's interference with them.

[16] **THACKRAY, J.A.:** I agree with the disposition of this appeal and the articulation thereof by Madam Justice Huddart and Mr. Justice Low.

[17] I will add some comments with respect to the appellant's assertion that the jury award for non-pecuniary damages was not within "the reasonable range of awards for cases involving injuries similar to those sustained by the appellant." Counsel for the appellant suggested the range to this Court and supplied case precedents of judge-made awards that came within his suggested range.

[18] As a recent departee from the trial bench I can say that "precedent" cases are of limited value to trial judges in assessing damage awards. That being the case I doubt that such cases are of any greater value to this Court. Counsel for the appellant, citing ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, said that "comparables should be no more than a rough guide." My comment on this is that comparables might be, at the most, a rough guide.

[19] I would also bring to counsels' attention that in ***Lindal***, supra, the trial judge made an award in excess of the upper limit, commonly called the "cap". The comparison, therefore, was between the award and the cap. The Court ruled that "the amount of an

2002 BCCA 186 (CanLII)

award for non-pecuniary damages should not depend alone upon the seriousness of the injury." It did not say that injuries could never be compared, although this may be taken to be a reasonable inference.

[20] In ***Cody v. Leonard*** (1995), 15 B.C.L.R. (3d) 117 (C.A.) Mr. Justice Legg at 124, on behalf of the Court, said as follows:

This Court must recognize that a jury award is not necessarily wrong if it does not conform with damage awards made by judges when considering whether a jury award is out of all proportion to the circumstances of the case.

[21] This statement brings into question the relevance of considering "comparable" cases if they do not set the standard to be met.

[22] There is a lack of logic in citing what are suggested to be comparable cases of judge-made awards with the award under review. A jury is generally not supplied with guidelines as to a range of damages. The jury in the case at bar did not have before it the allegedly comparable cases cited to us by counsel for the appellant. Yet this Court is asked to find that the jury made an award "outside of the range." That is to say, the Court is asked to find that the jury was in error. This is illogical, unfair to the jury and unfair to the civil jury system.

[23] I am not levelling any criticism at counsel on this appeal. There are innumerable judicial statements that support the practice of comparing a jury award to awards made in allegedly similar cases. In ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248, Chief Justice McEachern noted that the analysis should encompass a consideration of where the jury award stands relative to both the circumstances of the case itself and to other cases. In ***Cody v. Leonard***, supra, Mr. Justice Legg said he saw no inconsistency between the lack of binding authority imposed by judge-made awards and "examining whether the award fell substantially beyond the upper range for damage awards in the same class of case."

[24] In **Nance v. British Columbia Electric Railway Company,** [1951] A.C. 601, [1951] 3 D.L.R. 705 (P.C.) Viscount Simon, for their Lordships at 713, said that before an appellate court can intervene in a jury award "it must be satisfied ... that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." That, to me, does not suggest that jury awards are to be compared to judge-made awards.

[25] In an appropriate case a fresh analysis of the principles to be applied in appellate review of jury damage awards for non-pecuniary damages might be appropriate. This might include a consideration of the suggestion of K. Smith J. that jury awards should set the standard, not judge made decisions. In ***Way v. Frigon*** (2001), New Westminster Registry No. S050867, (B.C.S.C.) Mr. Justice Smith said that he would take into account "the instructive value of jury verdicts" in setting his award of damages.

[26] Nothing I have said in these reasons should be taken as an insight into my views on

2002 BCCA 186 (CanLII)

the two matters to which I made reference. That is, instructing juries as to a range of damages and treating jury awards as precedents for judge-made awards.

[27] In the case at bar I would dismiss the appeal of the non-pecuniary damages for the reasons stated by my colleagues and in doing so would reject as irrelevant the cases that were submitted as representing "the proper range of non-pecuniary damages."

[28] **THACKRAY, J.A.**:

[29] **HUDDART, J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Huddart"

"The Honourable Mr. Justice Low"

"The Honourable Mr. Justice Thackray"

2002 BCCA 186 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lennox v. New Westminster (City),* 2011 BCCA 182

Date: 20110413
Docket: CA038142

Between:

Eileen Lennox

Appellant
(Plaintiff)

And

The City of New Westminster

Respondent
(Defendant)

Before: The Honourable Mr. Justice Low
The Honourable Madam Justice Smith
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, May 3, 2010,
(*Lennox v. New Westminster (City)*, Vancouver Docket No. S065390)

Counsel for the Appellant:	J.S. Stanley
Counsel for the Respondent:	D.A. Gooderham
Place and Date of Hearing:	Vancouver, British Columbia March 14, 2011
Place and Date of Judgment:	Vancouver, British Columbia April 13, 2011

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Mr. Justice Low

Dissenting Reasons in part by:
The Honourable Madam Justice D. Smith (p. 12, para. 41)

2011 BCCA 182 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] On May 30, 2006 the appellant fell and injured herself while walking on a municipal sidewalk in the 400-block of Fader Street in the City of New Westminster. She brought an action in negligence against the respondent City. Her action was dismissed by the trial judge based upon the answer given by the jury to the sole question framed by the trial judge.

[2] The appellant contends that the question asked of the jury was a misdirection amounting to an error of law and she seeks a new trial. In the alternative the appellant seeks a new trial based upon her assertion that the jury's verdict was against the weight of the evidence before it.

Background

[3] The evidence before the jury was that the respondent had both written and unwritten sidewalk inspection and maintenance policies. All sidewalks within the City of New Westminster are designated as either Zone A or Zone B, based on the volume and type of pedestrian traffic. The sidewalk upon which the appellant fell is a Zone B sidewalk. As such, the respondent's written policy requires that it be inspected once every three years.

[4] If a sidewalk is found to have cracks or separations on an inspection, the inspector is to measure the height or the depth of the fault created by the crack or separation. A fault that is 10 to 20 millimetres in height or depth is categorized by the respondent as a Level 1 fault and a fault that is greater than 25 millimetres in height or depth is categorized by the respondent as a Level 2 fault. It was conceded by the respondent's engineering technologist that a fault that is greater than 25 millimetres in height or depth can constitute a safety hazard for people walking at night, blind people and the elderly.

[5] The sidewalk upon which the appellant fell was inspected on February 3, 2005, some sixteen months prior to her fall, and noted to then have three Level 1

2011 BCCA 182 (CanLII)

faults on the side of the street where the appellant fell, one of which was directly in front of the address where she fell.

[6] The respondent's written policy provides that all Level 1 faults "shall be placed on a list for repair as resources allow" and that all Level 2 faults are to be scheduled for repair "as quickly as possible and marked for public notice immediately". The respondent's unwritten policy is that any fault, regardless of level, will be repaired if the City receives a complaint about it.

[7] On the day of her fall, the appellant had attended the Royal Columbian Hospital in New Westminster for some testing. She left the hospital around mid-day, and was returning to her car when she fell. She was wearing flat leather shoes, and said that she tripped on the sidewalk in front of 451 Fader Street, due to a discrepancy in the elevation between two panels of the sidewalk that had apparently shifted due to the roots of a large tree.

[8] The appellant sustained significant injuries. The City denied any negligence on its part, but did not allege that the appellant was negligent.

[9] After the jury was empanelled, counsel for the respondent handed a proposed jury question to the trial judge which she advised she had taken from *Civil Jury Instructions*, 2nd ed. (Vancouver, B.C.: Continuing Legal Education Society of British Columbia, 2010 Update, loose-leaf). The question was:

> Was there negligence on the part of the defendant that caused or contributed to the damage suffered by the plaintiff?

[10] In his opening comments to the jury, the trial judge advised the jury that it would later be asked to answer a single question, and then read the question proposed by counsel for the respondent to the jury.

[11] The evidence before the jury was that on May 31, 2006, the appellant's son measured the crevice between the two panels where the appellant fell and determined that one of the two panels was one and one quarter inch higher than the adjoining panel. He did not remove the pine needles that were in the crevice

2011 BCCA 182 (CanLII)

between the two panels in order to conduct his measurement, and simply measured from the top of the needles. One and one quarter inches is roughly equivalent to 32 millimetres.

[12] Approximately one week after the appellant's fall, an adjuster measured the difference in height between the same two panels, after removing the pine needles, and estimated the difference to be one and one quarter to one and one half inches (32 to 38 millimetres). Three days later, the City's Street Branch supervisor measured the difference in height between the same two panels and found it to be "about 23 millimetres".

[13] The jury also heard evidence that Mr. Bolderson, the resident who lived directly across the street from 451 Fader Street, had contacted the City on five different occasions in 2005 about "sidewalks being heaved up from the roots". The jury also heard evidence from Mr. Bolderson's neighbour, Mr. Neste that in 2003 he had complained to the City of the root system of the tree in front of his house "heaving up the sidewalk". Mr Neste said that a series of meetings with City employees followed his complaint, during which he talked to the employees about the condition of the sidewalks generally on the block. The sidewalk in front of his home was fixed, but no other areas of the sidewalk on the block were fixed.

[14] Mr. Bolderson's other neighbour, Mr. Stephenson, also gave evidence and said that in 2005 he advised a City employee that the condition of the sidewalks on the block were "dangerous because they were raising", and was told that the City "would send somebody out to inspect the other imperfections in the sidewalk".

[15] Although the question framed by counsel for the respondent had been agreed to by counsel for the appellant, the judge proposed two questions after the closing arguments of counsel had been made to the jury. He said:

> I do have some concern about, and maybe I'm jumping ahead a bit here, we've told the jury that there's only one question. In terms of certainly appellate review, would it be appropriate to break that question down?

2011 BCCA 182 (CanLII)

[16] Counsel for both parties agreed that two questions might be asked, one to address the issue of whether the respondent's employees had carried out their operational responsibilities in accordance with the policy (the judge had used the singular when speaking with counsel) in a negligent manner, and a second question to address whether, if the employees did act negligently, that negligence contributed to the appellant's injuries and damages. Counsel agreed to try to formulate such questions but were unable to agree on them. Counsel for the respondent proposed two questions:

> Was there negligence on the part of the city's employees in carrying out their operational responsibilities in accordance with their written and unwritten policies?
>
> If so, did the negligence contribute to the plaintiff's damages?

[17] Counsel discussed the matter further and decided that the second question was unnecessary in light of the respondent's admission that "the plaintiff's injuries were caused by a trip on a change in elevation between sidewalk panels".

[18] Counsel for the appellant proposed that the sole question for the jury be:

> Did the defendant breach the duty of care by failing to exercise the standard of care required by the City based on their inspection and maintenance policy, whether written or unwritten?

[19] Counsel for the appellant said:

> We both created questions for the jury, that [sic] they are slightly different. I know you would like us to agree, but there is a difference in terminology that we wish to use ...

[20] The judge considered the first question proposed by counsel for the respondent, and the only question proposed by counsel for the appellant, and selected the first question proposed by counsel for the respondent. He advised the jury not that counsel had agreed upon the wording of the question for the jury, but only that:

> ... in the course of considering my charge, and having heard further submissions from counsel, we are all agreed that the question to be put to you should be modified.

2011 BCCA 182 (CanLII)

Discussion

[21] The verdict of a jury will not be set aside unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. In *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 19, leave to appeal ref'd, [2002] S.C.C.A. No. 126, Braidwood J.A. (for the majority) stated:

> [8] The classic statement regarding the standard of review of a jury verdict is set out in *McCannell v. McLean*, [1937] S.C.R. 341, a case in which the jury was asked of what the negligence consisted. At p. 343, Duff, C.J. wrote as follows:
>
> > The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported. …
>
> [9] *McCannell v. McLean*, supra, and the authorities cited therein make clear that interference with a jury verdict is not justified unless the jury has miscarried in its duty so badly that a reasonable person could not have arrived at the same conclusion.

[22] This general standard was affirmed by Iacobucci and Major JJ. (for the majority) in *Housen v. Nikolaisen*, 2002 SCC 33, at para. 30:

> The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings … Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

[23] I do not consider that the dismissal of the plaintiff's claim was against the weight of the evidence before the jury. It was open to the jury to find that there was no breach of either the written or the unwritten City inspection or maintenance policies or that if there was such a breach, it played no part in the appellant's fall. I would not, therefore accede to the second ground of appeal.

2011 BCCA 182 (CanLII)

[24] The first ground of appeal is, as I have indicated above, that the question asked of the jury amounted to misdirection and thus was an error of law.

[25] When reviewing jury instructions, the appellate court should consider the entire charge to the jury, the whole of the evidence, and the positions of counsel as taken from their addresses to the jury. The court should not consider isolated parts of the charge alone. In *Alden v. Spooner*, 2002 BCCA 592, leave to appeal ref'd, [2002] S.C.C.A. No. 535, Rowles J.A. held:

> [20] When reviewing jury instructions, an appellate court must consider the entire charge to the jury, not isolated parts: *Dudek v. Li* (2000), 74 B.C.L.R. (3d) 341 at 345, 2000 BCCA 321. Furthermore, the charge in its entirety is to be considered in light of the whole of the evidence and in light of the positions of counsel as taken from their addresses to the jury: *Brunsdon v. Shaw* (1992), 73 B.C.L.R. (2d) 313 (B.C.C.A.) at para. 28. One statement in a judge's charge might constitute a misdirection, but it is the charge as a whole that must be considered to determine whether the misdirection may have misled the jury or whether the issues were placed before it fairly.

[26] The *Civil Jury Instructions* manual is a helpful guide to counsel and judges conducting civil jury trials, but is only a guide and the choice of whether to adopt any portion of the manual or not is for the trial judge to determine in each case.

[27] The question chosen by the trial judge in this case referred to the respondent's written and unwritten policies in a conjunctive manner, leaving the potential for members of the jury to believe that the plaintiff's case would have to fail, unless she proved a breach of both as opposed to either policy. It was unnecessary for the appellant to establish a breach of both the written and the unwritten policies in order to succeed in her claim in negligence, and a misdirection amounting to an error in law results, if that is what the jury question required.

[28] The respondent argues that a belief that a breach of both the written and the unwritten policies had to be proven by the appellant in order to establish her claim in negligence could not have been held by members of the jury, given the judge's charge to the jury, which he both read, and provided in written form to the jury. The trial judge's charge to the jury was not entirely consistent. In his charge the judge instructed the jury that:

2011 BCCA 182 (CanLII)

> The plaintiff must prove that the city's employees negligently carried out their responsibilities under the city's written and unwritten inspection and maintenance policies.
>
> [Emphasis added.]

[29] The judge also told the jury that the respondent had a written policy which he instructed the jury was a reasonable one, and then went on to say:

> It is the position of the plaintiff that the city had an unwritten policy of repairing any defects reported on its inspection - - let me try that again ladies and gentlemen of the jury.
>
> The alternative position and complementary position of the plaintiff, is that the city had an unwritten policy of repairing any defects so reported, if on inspection a defect is found to be more than 10 centimetres [sic?]. It is for you to decide if in fact the city did have such a policy, and how that policy was applied.
>
> In this case the parties have agreed that the city had an unwritten policy of responding to complaints by members of the public but have been unable to agree on the contents of that policy.
>
> Given that agreement you must accept that there was such a policy and decide what the elements of that policy were. It seems to me that the dispute between the parties about the policy is over the question of how specific a complaint had to be in order for the city to respond. While it is for you to decide, there is evidence that the city has agreed that it had a policy of repairing level 1 defects, which were brought specifically to its attention.

[30] Shortly thereafter, the judge instructed the jury:

> If you conclude that the city did not comply with its repair policies, written or unwritten, it is open to you to find that the city was negligent and that that negligence caused or contributed to Ms. Lennox's fall on May 31 [sic] 2006.
>
> [Emphasis added.]

[31] Still later the judge instructed the jury:

> The theory of the defence is that the city's employees acted reasonably in all respects in carrying out their duties under the policies of the city, both unwritten and written.
>
> [Emphasis added.]

[32] The judge repeated this theory, referring to the respondent's written and unwritten policies, and then instructed them:

2011 BCCA 182 (CanLII)

> The sole question you are asked to answer is, was their negligence on the part of the city's employees in carrying out their operational responsibilities in accordance with their written and unwritten sidewalk inspection and maintenance policies. I know I have repeated that, but I have given you the written question.
>
> [Emphasis added.]

[33] It is not apparent from the record whether the jury was permitted to take the written charge with them into the jury room. In his instructions to the jury, the trial judge directed the jury that "The official charge, and the one you must follow, is the one I give you orally, and not the one that is written, should there be any differences between them."

[34] While it is true that the trial judge instructed the jury on more than one occasion that the appellant's case was argued in the alternative; that she asserted a breach of both the written and the unwritten policies, I do not consider that his summary of the appellant's alternate theories of her case overcomes the potential that the single question asked of the jury may have caused them to conclude that the appellant had to establish breaches of both the written and the unwritten City policies in order to succeed.

[35] The trial judge was careful to instruct the jury that:

> You must disregard anything either counsel said to you about the law if it conflicts with what I tell you.

[36] The jury was obliged to accept the instruction of the jury on matters of law, and the question put to them was a question as to whether or not the respondent had met its legal obligations to the jury. Any conflict between what counsel for the appellant said, and the question that they were to answer, would have to be resolved by answering the question.

[37] In *Laidlaw v. Couturier*, 2010 BCCA 59, this Court considered the correctness of a question put to a jury in the context of the judge's overall charge. The jury there found that the defendant was liable and caused the plaintiff's injuries. It was then required to consider the plaintiff's original position and the effect that position had in

2011 BCCA 182 (CanLII)

percentage terms on the assessment of damages payable by the defendant. The jury's award reflected acceptance of the defendant's theory that the plaintiff's original position included a marked propensity for depression that significantly impaired his ability to work. However, the conditions from which the plaintiff suffered, and their concomitant symptoms, were not capable of reduction to a single measurable risk. The degree to which each condition might have affected him was not necessarily identical.

[38] Madam Justice Kirkpatrick, for the Court, observed that the charge itself was initially incorrect on the issue, but later corrected. She concluded that to conflate the variables into a single jury question and invite a single mathematical adjustment was unfair and amounted to misdirection as it was impossible to determine with confidence that the jury had understood its task in assessing the plaintiff's damages.

[39] At para. 53 Kirkpatrick J.A. said:

> It must be said that the second portion of the trial judge's written instructions did not mirror the wording in question 3. However, it stands to reason that by the time the jury was completing its deliberations, their focus must have been on the question sheet. Question 3 is clear in its terms but, unfortunately, incorrect in its legal effect. In my view, it amounts to misdirection.

I am driven to a similar conclusion in this case. As was the case in *Laidlaw,* the trial judge's charge did not mirror the wording in the single question asked of the jury, and again, as in *Laidlaw*, the charge was inconsistent, here, as to whether the plaintiff needed to prove a breach of one or both of the respondent’s policies. By the time the jury was completing its deliberations, their focus must have been on the question, which is clear in its terms but, unfortunately, had the potential to mislead them as to what the plaintiff needed to prove in order to succeed. It is impossible to determine with confidence that the jury had understood its task in deciding if the respondent’s employees were negligent in carrying out their operational responsibilities in accordance with either, as opposed to both of the respondent’s written and unwritten policies.

2011 BCCA 182 (CanLII)

[40] I would therefore accede to the first ground of appeal, and order a new trial.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Low"

2011 BCCA 182 (CanLII)

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[41] I have had the advantage of reading the draft reasons of my colleague Mr. Justice Hinkson in which he would allow the appeal because of an ambiguity between the wording of the question for the jury and the trial judge's instructions to the jury. With respect, I find that I am unable to agree with his proposed disposition of the appeal. In my view, when the question for the jury is viewed in the context of the issues raised at trial, the addresses of counsel, and the trial judge's written and oral instructions, I am unable to find any substantial risk that the jury could have misunderstood their task in arriving at the verdict they delivered.

[42] As was noted by Hinkson J.A., the trial judge advised the jury during his opening remarks that the question they would have to answer was:

> Was there negligence on the part of the defendant that caused or contributed to the damage suffered by the plaintiff?

[43] In their respective opening addresses to the jury, counsel for each of the parties clearly stated that there was a written and unwritten policy that they would have to consider separately. The appellant referred to the two policies independently, while the respondent advised the jury that there were two issues for them to consider – one related to the city's written policy and the other to its unwritten policy. Each counsel reviewed the distinct features of both policies with the jury and advised the jury that the events of each alleged breach were separate in time and nature: They both noted that the issue regarding the written policy related to an inspection and measurement of the sidewalk panel by Mr. Cole on February 3, 2005, while the issue concerning the unwritten policy related to complaints about the sidewalk faults that had been made by neighbours at various times between 2003 and 2006.

[44] Before counsel made their closing addresses to the jury, the trial judge discussed with them his concern over the wording of the proposed question. Although the trial judge suggested the single question be broken into two questions,

2011 BCCA 182 (CanLII)

he advised counsel that it was their job to prepare the question(s). During this discussion, counsel for the appellant confirmed that he was advancing alternative theories of liability and each counsel went away to draft his and her question(s). Unfortunately, neither version of the proposed question(s) was marked as an exhibit for identification.

[45] Counsel for the appellant disagreed with the counsel for the respondent's proposed two questions for the jury. In particular, appellant's counsel took issue with the wording of the questions in regard to the standard of care issue and wanted to incorporate aspects of occupier's liability into the questions. After some discussion, the parties agreed that the admissions by the parties removed the necessity of the proposed second question. The question ultimately put to the jury was:

> Was there negligence on the part of the city's employees in carrying out their operational responsibilities in accordance with their written and unwritten sidewalk and inspection maintenance policies?

[46] A review of the transcript of the proceedings indicates that the use of the conjunctive in the question was not the source of any disagreement between counsel and/or the trial judge at any time.

[47] During closing addresses to the jury, each counsel addressed the written and unwritten policy issue separately. The burden was on the appellant to establish, on a balance of probabilities, that the city had breached one of its policies. After reviewing each of the respective policies, counsel for the appellant focused primarily on the alleged breach of the city's unwritten policy, believing that the evidence was stronger on that claim. In this regard, he made the following comments to the jury in his final address:

> ... [W]e spent quite a lot of time debating the height of this trip and, quite frankly, ladies and gentlemen, I think a lot of that was a complete waste of time because clearly, because of their policy, their unwritten policy, and the complaints of these people across the street, it doesn't matter how big it was, okay, you know, like, whether it's just under an inch, just over an inch. We know that it was significant enough to repair and that it was a hazard and that it was dangerous, but we're getting into this debate and I'm getting sidetracked into, you know, baited into this about trying to prove that it was

2011 BCCA 182 (CanLII)

> this one inch, but that's not necessarily what this case is about. There's so much more to it than that.

[48] Counsel then went through the evidence regarding the written policy and, after claiming that the city had not complied with that policy during the inspection, again acknowledged before the jury that his attempts to prove the fault was over an inch (and thus qualifying for immediate attention without a complaint) may have been unnecessary:

> Now, quite frankly, as I said before, this is all a red herring, you know, we're trying to get to -- I'm trying to say, oh, well, he didn't get it right, this was a level 2 fault and they should have come out immediately. You know what, even if I'm wrong, so what. The fact is that we have these complaints across the street and they didn't respond to them, so, you know, I know I've been pushing hard to say, hey, this is over an inch and, you know, I got an engineer and I got all these photographs and, you know, we have Mr. Lennox measuring and Mr. Slater measuring and all of it is a bit of a side show, quite frankly. The heart of it is they had the opportunity to repair this.

[49] In my view these passages demonstrate that counsel for the appellant made clear to the jury that regardless of the conflicting evidence over the alleged breach of the city's written policy, he was relying largely (in the alternative) on his claim that the city had breached its unwritten policy, and that was sufficient for a finding of liability.

[50] The city was defending itself against an alleged breach of both of its policies. Before the jury, counsel for the city separately reviewed each of the policies and appellant's allegations of negligence in regard to each of them. Counsel for the city concluded her address by stating that "neither of these policies were breached in this case".

[51] The trial judge held a pre-charge conference with counsel during which he reviewed his proposed written instructions for the jury. During the conference, counsel for the appellant expressed concern that the jury might be left with the impression that both routes to liability had to be proven in order to find liability, and he suggested some changes to the draft charge. The trial judge agreed with those proposed changes and incorporated them into his final draft which went to the jury.

2011 BCCA 182 (CanLII)

In the final charge, the trial judge made it clear in several parts of the charge that the appellant was advancing alternate theories of liability and that the jury could find the city liable on either a breach of the city's written policy or a breach of the city's unwritten policy.

[52] Thus, both the final question for the jury and the final written and oral charge that went forward to the jury were agreed upon by both counsel.

[53] Unfortunately, the written charge that was given to the jury was not marked as an exhibit. However, it is clear from the transcript of the proceedings that the jury had the written charge with them during their deliberations. The trial judge stated:

> To assist you in your deliberations I have prepared a written copy of my charge. I have already asked the registrar to hand it to you. As I indicated, I will proceed to read the charge to you and you can follow along.

[54] The trial judge also advised the jury at the start of his charge: "When you retire to deliberate, you must consider my instructions as a whole. Do not single out some part and ignore others". He went on to repeat the revised question for the jury and instructed them that the burden was on the appellant to "prove that the city's employees had negligently carried out their responsibilities under the city's written and unwritten inspection and maintenance policies". It is this conjunctive instruction with which the appellant takes issue.

[55] Immediately following that instruction, however, the trial judge clarified the alternative nature of the appellant's theories of liability:

> In this case the plaintiff asserts that the defendant's employees were negligent in carrying out their duties and responsibilities in <u>two alternative respects</u>: Firstly, with respect to the city's written policy, the plaintiff alleges that Mr. Cole, who carried out the city's sidewalk inspection on February 3, 2005, negligently failed to recognize that the defect that he uncovered was a level 2 defect, which should have been marked for public notice and repaired as quickly as possible. The plaintiff has the burden of establishing this on a balance of probabilities.
>
> <u>Alternatively</u>, the plaintiff asserts that the city has an unwritten, and had, an unwritten policy of repairing at least all level 1 defects which were disclosed by a complaint from the public. In this case the parties agree that the city had an unwritten policy in responding to complaints by members of the public. The plaintiff asserts that the complaints made by Mr. Stephenson and by Mr.

2011 BCCA 182 (CanLII)

> Bolderson were of such a nature that the city was required to respond to them and take reasonable steps to determine whether they were level 1 defects that required repair.
>
> The burden of proof of establishing that these were the terms of the written policy, and that complaints made by Mr. Stephenson and Mr. Bolderson, and to a lesser extent by Mr. Neste, require such a response from the city is on the plaintiff.
>
> In addition, the plaintiff bears the burden of proving on a balance of probabilities that the city did not take reasonable steps to investigate these complaints and repair any defects disclosed by them.
>
> [Emphasis added.]

[56] He then reviewed the evidence regarding the alleged breach of the written policy, reiterated the alternative nature of the appellant's theory of liability, and reviewed the evidence regarding the alleged breach by the city of its unwritten policy of repairing defects in its sidewalks:

> The alternative position and complementary position of the plaintiff, is that the city had an unwritten policy of repairing any defects so reported, if on inspection a defect is found to be more than 10 centimetres. It is for you to decide if in fact the city did have such a policy, and how that policy was applied.

[57] The trial judge again returned to the appellant's alternative theories of liability:

> If you conclude that the city did not comply with its repair policies, written or unwritten, it is open to you to find that the city was negligent and that that negligence caused or contributed to Ms. Lennox's fall on May 31, 2006.
>
> ...
>
> ... I understand that the theory of the plaintiff's case is that the city was negligent in carrying out its operational responsibilities in two ways: Firstly, as I have already explained, it is the theory of the plaintiff, Ms. Lennox, that Mr. Cole simply misjudged the size of the gap between the two concrete slabs on the sidewalk when he carried out his February 3, 2005 inspection.
>
> ...
>
> The plaintiff's alternative theory is that the city's policy and practices required them to respond to the complaints made by various residents of the 400-block Fader Street with respect to the state of repairs of the sidewalks and that the city either failed completely to respond to those requests and complaints, or did not adequately address those complaints when they were received.

2011 BCCA 182 (CanLII)

[58] The trial judge then turned to the city's defence to each of the appellant's theories of liability. It was in that context that he referred in his instructions to the city's written and unwritten policies in the conjunctive:

> The defendant's theory is that the city has shown that it acted reasonably in carrying out its operational responsibility under the city's written and unwritten policies and was therefore not negligent.
>
> ...
>
> The sole question you are asked to answer is, was their negligence on the part of the city's employees in carrying out their operational responsibilities in accordance with their written and unwritten sidewalk inspection and maintenance policies. I know that I have repeated that, but I have given you the written question.

[59] Near the end of his charge, the trial judge informed the jury that should they encounter any difficulty with respect to the law, they could ask a question in order to obtain clarification.

[60] The jury was then excused and counsel were invited to make submissions to the trial judge on any corrections or clarification to the charge that might be required. Neither counsel made any reference to the errors now alleged.

[61] The jury demonstrated no confusion over their task. At no time did they ask to review any aspect of the evidence or to have the trial judge clarify any aspect of his instructions on the law. About three hours after the start of their deliberations, they returned with their verdict.

[62] Counsel for the appellant relies on *Laidlaw v. Couturier,* 2010 BCCA 59, 282 B.C.A.C. 255 in support of his position that a new trial is required because the question for the jury was misleading. Specifically, counsel asserts that it not possible to know if the jury rejected the appellant's claim because they understood they had to find liability based on both the written and unwritten policies. I cannot agree. In my view the circumstances in *Laidlaw* were substantially different from those of this trial. Both the question for the jury and the trial judge's charge to the jury in this case were straightforward.

2011 BCCA 182 (CanLII)

[63] *Laidlaw* involved an assessment of damages that required the jury to consider whether the plaintiff's several pre-existing psychological and physical problems would have caused the presenting medical complaints, absent the motor vehicle accident. This Court found an error of law embedded in one of the several questions put to the jury. That error of law was repeated in a parallel form in the first part of the trial judge's charge to the jury. In the impugned question and portion of the charge, the trial judge instructed the jury that if they found there was a material risk that the plaintiff would nevertheless have suffered from his prior problems, they should reduce the plaintiff's liability by the amount of that material risk. The question directed the same approach: it invited the jury to fix a single percentage number to the material risk of the prior conditions developing despite the collision, and to apply that percentage number to reduce the overall damage award.

[64] Further along in his charge to the jury, the trial judge in *Laidlaw* correctly instructed the jury on the more nuanced approach that was required on the issue. That instruction directed the jury to consider all of the contingencies or risks inherent in the plaintiff's individual circumstances and arrive at a global assessment. On appeal, the Court noted:

> [47] The wording of question 3, together with the judge's charge on causation was overly simplistic. The various conditions from which the plaintiff had suffered previously, and the symptoms to which they gave rise, were not capable of reduction to a single "measurable risk".

[65] The appellant and Mr. Justice Hinkson rely on the following paragraph from *Laidlaw* for the proposition that a question to the jury that is inconsistent with the charge to the jury amounts to misdirection:

> [53] It must be said that the second portion of the trial judge's written instructions did not mirror the wording in question 3. However, it stands to reason that by the time the jury was completing its deliberations, their focus must have been on the question sheet. Question 3 is clear in its terms but, unfortunately, incorrect in its legal effect. In my view, it amounts to misdirection.

[66] However, the error in *Laidlaw* was in failing to correct the embedded error of law that was contained within the question for the jury. In allowing the appeal, the

2011 BCCA 182 (CanLII)

Court considered the erroneous question in the context of the parallel error in the trial judge's charge to the jury.

[67] In this case, the passages in the charge that the appellant takes issue with were made primarily in the context of explaining the respondent's position that the written and unwritten policies had not been breached.

[68] Further, unlike *Laidlaw,* the question for the jury in this case was straightforward. It did not require a nuanced approach. The jury had only one question to answer and that question did not contain an error of law. At best, it could be said that it contained a latent ambiguity. However, the structure of the appellant's submissions and the trial judge's instructions to the jury repeatedly framed the issue that the jury had to decide in the context of alternate theories of liability that required them to find either the written or unwritten policies had been breached in order to answer the question of liability in the affirmative.

[69] In this case, it must also be noted that counsel for the appellant made no objection to the wording of the question for the jury, or to the trial judge's final charge to the jury after it had been delivered, when he was given the opportunity to do so. As was stated in *Laidlaw,* this is "a powerful circumstance militating against appellate interference with the ensuring verdict" (para. 31). Also see *Basra v. Gill* (1995), 99 B.C.L.R. (2d) 9 (C.A.) at para. 15; leave to appeal to S.C.C. refused, [1995] 2 S.C.R. v.

[70] It is often said that that the law does not require a perfect charge. While this charge to the jury may not have been perfect, I am not persuaded the jury could have misunderstood their task when the charge and the revised question included within the charge is considered in its entirety in light of the whole of the evidence and the positions of counsel in their addresses.

[71] The comments of Madam Justice Rowles in *Alden v. Spooner,* 2002 BCCA 592, 6 B.C.L.R. (4th) 308, leave to appeal to S.C.C. refused, [2003] 1 S.C.R. xviii are

2011 BCCA 182 (CanLII)

apposite when considering the scope of appellate intervention on an alleged misdirection in a jury charge:

> [20] When reviewing jury instructions, an appellate court must consider the entire charge to the jury, not isolated parts: *Dudek v. Li* (2000), 74 B.C.L.R. (3d) 341 at 345, 2000 BCCA 321. Furthermore, the charge in its entirety is to be considered in light of the whole of the evidence and in light of the positions of counsel as taken from their addresses to the jury: *Brunsdon v. Shaw* (1992), 73 B.C.L.R. (2d) 313 (B.C.C.A.) at para. 28. One statement in a judge's charge might constitute a misdirection, but it is the charge as a whole that must be considered to determine whether the misdirection may have misled the jury or whether the issues were placed before it fairly.

[72] In the circumstances of this trial, I am unable to find any reasonable possibility that the jury might have rendered an erroneous verdict based on a misunderstanding of the question they had to decide.

[73] Like my colleague Hinkson J.A., I also find no basis for the appellant's second ground of appeal, that being that the verdict was unreasonable. In my view, it was open to the jury to find in favour of the appellant or the city on the evidence presented. A significant part of the jury's finding on the issue of liability would have been their assessment of the credibility of each of the witnesses, including the appellant. From the verdict, it is clear that the jury accepted the evidence of the city's witnesses over that of the appellant's. I would not accede to this ground of appeal.

[74] In the result, I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

2011 BCCA 182 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Little v. Schlyecher,*
2020 BCCA 381

Date: 20201218
Dockets: CA45307; CA45308

Docket: CA45307

Between:

Kellyanne Little also known as Kellyanne Scott Little

Respondent/
Appellant on Cross Appeal
(Plaintiff)

And

Robert Schlyecher

Appellant/
Respondent on Cross Appeal
(Defendant)

- and -

Docket: CA45308

Between:

Kellyanne Little

Respondent
(Plaintiff)

And

Ashley Jonal Robert Gunn and Richard Douglas Williams

Appellants
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Madam Justice Griffin
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated April 27, 2018 (*Little v. Schlyecher*, Vancouver Dockets M121907 and M125700).

2020 BCCA 381 (CanLII)

Oral Reasons for Judgment

Counsel for Robert Schlyecher, Ashley Jonal Robert Gunn, and Richard Douglas Williams, appearing via videoconference:	G. Ritchey
Counsel for Kellyanne Little, appearing via videoconference:	G.J. Kehler
Place and Date of Hearing:	Vancouver, British Columbia December 15, 2020
Place and Date of Judgment:	Vancouver, British Columbia December 18, 2020

2020 BCCA 381 (CanLII)

Summary:

The respondent was injured in two motor vehicle accidents in 2010. A jury awarded non-pecuniary damages of $447,000, in excess of the upper limit for such damages which, adjusted for inflation, was $375,000 when the trial took place.

Held: Appeal allowed in part. The trial judge erred in not reducing the non-pecuniary damages to the upper limit of $375,000 before entering the verdict. Even that sum was wholly disproportionate and should be further reduced on appeal to $250,000, a sum which reflects the deference owed to jury awards and the greater margin of deviation allowed in such cases.

2020 BCCA 381 (CanLII)

[1] **FENLON J.A.**: The respondent, Kellyanne Little, was injured in two car accidents in 2010. In 2018, a jury awarded Ms. Little non-pecuniary damages of $447,000 for pain, suffering, and loss of amenities, an amount which exceeded the upper limit on such damages set by the Supreme Court of Canada in *Andrews v. Grand & Toy,* [1978] 2 S.C.R. 229. The parties agree that, adjusted for inflation, the upper limit is approximately $375,000 in 2018 dollars.

[2] The appellants, defendants at trial, raise two grounds of appeal:

1. Did the judge err in failing to reduce the jury's award for non-pecuniary damages to the upper limit for such damages?

2. Should the award of the upper limit for non-pecuniary damages be reduced?

1. Did the judge err in failing to reduce the jury's award for non-pecuniary damages to the upper limit for such damages?

[3] The first ground of appeal is not opposed by the plaintiff. In *Ter Neuzen v. Korn,* [1995] 3 S.C.R. 674, Sopinka J. said:

> [114] Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive. …

[4] In *Andrews*, the Court left open the possibility that "in exceptional circumstances" this upper limit might not apply (at 265), but there is no suggestion

that this is such a case. Accordingly, the judge erred in not reducing the non-pecuniary award to the upper limit or "cap" before entering the verdict. In fairness to the judge, I note that neither counsel requested that she do so.

2. Should the award of the upper limit for non-pecuniary damages be reduced?

[5] Given that non-pecuniary damages in this case could not exceed $375,000 and that a verdict in that amount should have been entered, the question before us is whether the award must be reduced further.

[6] A jury's award of damages is a finding of fact entitled to substantial deference on appeal. Appellate intervention is warranted only where the award is "wholly disproportionate" or "shockingly unreasonable": *Moskaleva v. Laurie,* 2009 BCCA 260 at para. 127; *Taraviras v. Lovig,* 2011 BCCA 200 at para. 32. This standard of review is more deferential than the standard of review applied to damage awards made by judges alone, which require an assessment of whether the award is "inordinately" high or low: *Taraviras* at para. 33.

[7] Ms. Little's injuries include chronic myofascial neck pain, mechanical back pain, left shoulder pain, and chronic post-traumatic cervicogenic headaches. In addition, she experienced an increase in the frequency of migraine headaches as well as a somatic symptom disorder (a pattern of chronic pain), and an adjustment disorder with depressed mood. The defendants acknowledge that Ms. Little experiences limitations due to her injuries that will continue throughout her life and negatively impact both her vocational and avocational activities.

[8] It is evident from the record before us that prior to the accidents, Ms. Little was an extraordinarily creative and effective homemaker and mother of four young children. She was involved in home upkeep, decorating, and renovations; active in her church, her children's school; engaged in rollerblading, hiking, running, swing dancing; and attended a gym. Although Ms. Little continued to participate in many of these activities after the accidents, she did so with greater difficulty and to a lesser degree.

2020 BCCA 381 (CanLII)

[9] Ms. Little does not suggest that she suffered catastrophic injuries of the kind that would justify an award at the upper limit. She acknowledges that the award for non-pecuniary damages must be reduced to some extent and submits that an award of $250,000 is appropriate. She points to judge-alone awards for non-pecuniary damages in comparable cases of between $147,000 and $171,000: *Bellaisac v. Mara,* 2015 BCSC 1247; *Cumpf v. Barbuta,* 2014 BCSC 1898; *Chow v. Goodman,* 2016 BCSC 1486.

[10] The defendants contend that judge-alone awards support non-pecuniary damages of $115,000, relying on *Evans v. Keill,* 2018 BCSC 1651; *Elpel v. Glover,* 2018 BCSC 1404; *Crozier v. Insurance Corporation of British Columbia,* 2019 BCSC 160; and *Scelsa v. Taylor,* 2016 BCSC 1122.

[11] Although it is appropriate and logical to use judge-alone awards as a rough guide to assist the Court on appellate review, a jury award ought not to be set aside only because it fails to conform to those awards. To do so would be to ignore the more deferential standard of review applicable to jury awards, which can only be set aside if they are “wholly disproportionate” and “shockingly unreasonable”: *Taraviras* at para. 40.

[12] In *Taraviras*, Garson J.A. described the process to be followed on an appeal of this kind, saying:

> [43] Thus, I view the task on appellate review of an award alleged to be inordinately high is to assume that the jury found the facts most favourable to the plaintiff, and then to first compare the award to judge alone assessments in a generous way, and then to assess the appropriate “margin of deviation” applying the *Moskaleva* test – that is, whether the award would “shock the court’s conscience and sense of justice”. As to what deviation would shock the court’s conscience, I do find other appellate cases to be a useful guide. It is clear from the authorities discussed that considerable deference must be accorded a jury verdict and even where on appellate review the award must be reduced, such reduction should continue to reflect the views of the jury implicit in the verdict.
>
> [Emphasis added.]

[13] The defendants submit that the direction in *Taraviras*—to assume the jury found the facts most favourable to the plaintiff—should not be followed in the present case. They say to do so would be to ignore the view of the jury reflected in the

2020 BCCA 381 (CanLII)

awards they made for the other heads of damages claimed—awards the appellants say suggest the jury did not accept the plaintiff's evidence about the extent of her injuries and their impact on her life. The defendants point to the disparity between what the plaintiff sought under each head of damages and the sums awarded by the jury:

- The plaintiff claimed past loss of income of $103,000; the jury awarded $30,800.
- The plaintiff sought a loss of future earning capacity award of $795,000; the jury awarded $125,000.
- The plaintiff sought damages for cost of future care in the range of $273,000 to $505,000; the jury awarded $207,000.

[14] Without deciding that such comparisons could never be relevant, I am not persuaded that they are helpful in this case. That is so because there are reasons other than findings unfavourable to the plaintiff that could explain the jury's decision to award the sums it did. For example, the plaintiff had not worked outside the home, focusing on homemaking and homestay students, but her claim for loss of future earning capacity assumed that, but for the accidents, she would have obtained an education degree and worked as a teacher. By the time of trial eight years' post-accident, Ms. Little had taken only a few courses towards obtaining a degree in education. In these circumstances, the jury could reasonably have concluded that it was unlikely that the plaintiff would have chosen to enter the workforce as a teacher, and decided on an award that reflected that view of the evidence.

[15] I return now to the question before us. In my view, an award of non-pecuniary damages at the upper limit of $375,000 is wholly disproportionate. The real question is whether the reduction of $125,000 proposed by the plaintiff—leaving an award of $250,000—is appropriate.

[16] This Court faced a similar question in *Dilello* v. *Montgomery,* 2005 BCCA 56, a case in which a 19-year-old plaintiff suffered multiple fractures of the vertebrae in her neck, injury to her cervical spinal cord, a soft tissue neck injury extending into

2020 BCCA 381 (CanLII)

her back, a vestibular inner ear injury, and a mild traumatic brain injury. The jury awarded $362,000 for non-pecuniary damages that the judge reduced to $281,000, which, at that time, was the inflation-adjusted value of the upper limit.

[17] On appeal, this Court reduced the award to $200,000: the amount the plaintiff submitted was appropriate. Finch C.J.B.C., writing for the Court, said:

> [48] … I am not persuaded that the Court should make any further reduction in that award. The jury heard all of the evidence in this case, including that of the plaintiff. Unfettered by the artificial upper limit, the jury was asked to apply its best judgement to the amount of proper compensation for the plaintiff's injuries and their consequences. The jury obviously thought the case deserving of a substantial award. Considering the evidence of injury and loss summarized above at paras. 6-11 and 15-18, I am not prepared to say the jury award is inordinately high.
>
> [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases. As Mr. Justice Smith noted in *Boyd v. Harris* [2004 BCCA 146], *supra*:
>
> > [42] … [I]n determining whether the award falls so far outside the acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury. Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.
>
> [Emphasis added.]

[18] The jury in the present case heard the lay and medical evidence describing Ms. Little's life both before and after the accident. They heard evidence about the value she placed on her role as mother and homemaker, the exceptional skill and energy she brought to that role, and the impact of her injuries on that important aspect of her life.

[19] Applying the two guidelines—deference to the jury's view of an appropriate award and judge-alone awards in comparable cases—I cannot say that an award of $250,000 would shock the Court's conscience and sense of justice. It would, in my view, meet the lower standard of review applicable to judge-alone awards of being

2020 BCCA 381 (CanLII)

inordinately high, but that is not the standard to be applied here. I conclude that an award of $250,000 falls within “the greater margin of deviation in the case of a jury award,” which “respects the parties’ original choice to have the damages assessed by a jury rather than a trial judge”: *Boyd v. Harris*, 2004 BCCA 146 at para. 42.

[20] I would accordingly reduce the award for non-pecuniary damages to $250,000.

[21] A cross-appeal brought by Ms. Little was abandoned at the hearing, but it remains to address the plaintiff’s argument that the award of $447,000 could be left intact on the basis that the jury’s non-pecuniary award must have included a pecuniary award for loss of homemaking capacity. Counsel for Ms. Little did not press this argument on appeal, and I will deal with it only briefly here.

[22] In my view, there is no merit to this submission for three reasons. First, juries are presumed to follow the instructions given to them. The judge charged the jury to determine an award of non-pecuniary damages for pain, suffering, and loss of amenities of life. There is no reason to assume that the jury, on their own initiative, decided to include a pecuniary award for loss of homemaking capacity in that award. Second, counsel did not, in his closing submissions, suggest to the jury that the plaintiff was seeking compensation for loss of homemaking capacity. Third, the plaintiff sought a pecuniary award to cover the cost of paying for housekeeping assistance, home maintenance, and gardening as part of her claim for future care.

[23] In summary, I would allow the appeal, set aside the award of $447,000 for non-pecuniary damages, and replace it with an award of $250,000.

[24] **GRIFFIN J.A.**: I agree.

[25] **VOITH J.A.**: I agree.

[26] **FENLON J.A.**: The appeal is allowed to the extent stated in my reasons.

“The Honourable Madam Justice Fenlon”

2020 BCCA 381 (CanLII)

M.B. v. 2014052 Ontario Ltd., carrying on business as Deluxe Windows of Canada, et al.

[Indexed as: B. (M.) v. 2014052 Ontario Ltd.]

109 O.R. (3d) 351

2012 ONCA 135

2012 ONCA 135 (CanLII)

Court of Appeal for Ontario,
Juriansz, Rouleau and Watt JJ.A.
March 2, 2012

Damages -- Causation -- Plaintiff suing for damages for sexual assault -- Defendant admitting liability for sexual assaults but arguing that four unrelated incidents materially contributed to plaintiff's psychological disorders and mitigated his responsibility for damages -- Trial judge erring in applying "material contribution" test for causation in declining to instruct jury to assess whether portion of plaintiff's damages were attributable to other causes -- Error not requiring new trial as evidence that other incidents contributed to plaintiff's damages was very weak.

Damages -- Personal injury -- Sexual assault -- Plaintiff suing for damages for sexual assaults committed by defendant as her employer and supervisor -- Jury's award of $300,000 for general damages not plainly unreasonable -- Award affirmed on appeal -- Plaintiff granted leave to amend her statement of claim to increase claim for general damages from $250,000 to $300,000. [page352]

The plaintiff sued for damages for assault and battery based on four sexual assaults committed by the defendant, her

employer and supervisor while the plaintiff was employed as a commissioned salesperson. The defendant conceded liability and accepted that the psychological conditions from which the plaintiff suffered were due, in part, to the sexual assaults, but claimed that four unrelated incidents materially contributed to the plaintiff's psychological disorders and, therefore, mitigated his responsibility for damages. The trial judge declined to instruct the jury to assess whether a portion of the plaintiff's damages was attributable to other causes. She was of the view that if the sexual assaults caused or materially contributed to the plaintiff's damages, the defendant would be liable for all of the damages. The jury found the defendant liable to the plaintiff and awarded a total of $468,969.18, including general damages of $300,000. The plaintiff was awarded her costs on a substantial indemnity basis. The defendant appealed. The plaintiff cross-appealed from the trial judge's refusal to put her claim for loss of income to the jury.

Held, the appeal and cross-appeal should be dismissed.

The trial judge erred in relying on the material contribution test to establish causation and in failing to turn her mind to the applicability of the principles of damages relied on by the defendant, the crumbling skull principle and the principle of successive tortious events. Her failure to consider those issues resulted in her refusal to leave the crumbling skull and successive tortious events questions with the jury. However, the errors were not of such significance as to warrant ordering a new trial on the issue of damages, as the evidence suggesting that the other incidents contributed to the plaintiff's damages was weak and there was no reasonable basis to justify leaving the questions of contribution with the jury.

The award of general damages was high and outside of the generally expected range, but was not so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have reached it. The plaintiff should be allowed to amend her statement of claim to increase the claim for general damages from $250,000 to $300,000.

2012 ONCA 135 (CanLII)

The costs award was not inordinately high.

The trial judge did not err in refusing to put the plaintiff's claim for loss of income to the jury. No claim for loss of income was included in the prayer for relief nor was it particularlized in the body of the claim or in the reply to the demand for particulars. The claim lacked detail and substance and consisted of no more than bald allegations that the plaintiff would have made more sales but for the results of the harm sustained.

Cases referred to

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, [1978] S.C.J. No. 6, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225; Arnold v. Teno, [1978] 2 S.C.R. 287, [1978] S.C.J. No. 8, 83 D.L.R. (3d) 609, 19 N.R. 1, 3 C.C.L.T. 272, [1978] 1 A.C.W.S. 231; Athey v. Leonati, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102, 140 D.L.R. (4th) 235, 203 N.R. 36, [1997] 1 W.W.R. 97, 81 B.C.A.C. 243, 31 C.C.L.T. (2d) 113; Beals v. Saldanha (2001), 54 O.R. (3d) 641, [2001] O.J. No. 2586, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191, 106 A.C.W.S. (3d) 431 (C.A.); Bella v. Young, [2006] 1 S.C.R. 108, [2006] S.C.J. No. 2, 2006 SCC 3, 261 D.L.R. (4th) 516, 343 N.R. 360, J.E. 2006-290, 254 Nfld. & P.E.I.R. 26, [2006] R.R.A. 1, 37 C.C.L.T. (3d) 161, 21 C.P.C. (6th) 1, 145 A.C.W.S. (3d) 343, EYB 2006-100404; [page323] Blackwater v. Plint, [2005] 3 S.C.R. 3, [2005] S.C.J. No. 59, 2005 SCC 58, 258 D.L.R. (4th) 275, 339 N.R. 355, [2006] 3 W.W.R. 401, J.E. 2005-1925, 216 B.C.A.C. 24, 48 B.C.L.R. (4th) 1, [2005] R.R.A. 1021, 46 C.C.E.L. (3d) 165, 35 C.C.L.T. (3d) 161, 142 A.C.W.S. (3d) 1080, EYB 2005-96641; Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 132 A.C.W.S. (3d) 15 (C.A.); Evans v. Sproule, [2008] O.J. No. 4518, 176 A.C.W.S. (3d) 895 (S.C.J.); Fiddler v. Chiavetti, [2010] O.J. No. 1159, 2010 ONCA 210, 317 D.L.R. (4th) 385, 260 O.A.C. 363, 186 A.C.W.S. (3d) 673; Hanke v. Resurfice Corp., [2007] 1 S.C.R. 333, [2007] S.C.J. No. 7, 2007 SCC 7, 278 D.L.R. (4th) 643, 357 N.R. 175, [2007] 4 W.W.R. 1, J.E. 2007-333, 69 Alta. L.R. (4th) 1, 404 A.R. 333, [2007] R.R.A. 1, 45 C.C.L.T. (3d)

2012 ONCA 135 (CanLII)

1, 153 A.C.W.S. (3d) 1012, EYB 2007-113553; Hicks v. Cooper (1973), 1 O.R. (2d) 221 (C.A.); Hill v. Church of Scientology of Toronto (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, 126 D.L.R. (4th) 129, 184 N.R. 1, J.E. 95-1495, 84 O.A.C. 1, 25 C.C.L.T. (2d) 89, 30 C.R.R. (2d) 189; McCannell v. McLean, [1937] S.C.R. 341, [1937] S.C.J. No. 23, [1937] 2 D.L.R. 639 at 649; Milligan v. Toronto Railway (1908), 17 O.L.R. 530, [1908] O.J. No. 78 (C.A.); Snell v. Farrell, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73, 72 D.L.R. (4th) 289, 110 N.R. 200, J.E. 90-1175, 107 N.B.R. (2d) 94, [1990] R.R.A. 660, 4 C.C.L.T. (2d) 229, 22 A.C.W.S. (3d) 493; Thornton v. Prince George School District No. 57, [1978] 2 S.C.R. 267, [1978] S.C.J. No. 7, 83 D.L.R. (3d) 480, 19 N.R. 552, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, [1978] 1 A.C.W.S. 219

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(6) [as am.]

Negligence Act, R.S.O. 1990, c. N.1, s. 1

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 25.06(9), 26.01

Authorities referred to

Knutsen, Erik S., "Clarifying Causation in Tort" (2010), 33 Dal. L.J. 153

APPEAL AND CROSS-APPEAL from the judgment of D.A. Wilson J., sitting with a jury, [2010] O.J. No. 4676, 2010 ONSC 5835 in a personal injury action.

Judy Hamilton, for appellant/respondent by way of cross-appeal Mickey Weig.

Paul D. Koven and Allan Fogul, for respondent/appellant by way of cross-appeal M.B.

The judgment of the court was delivered by

[1] ROULEAU J.A.: -- The defendant (appellant) Mickey Weig appeals from the judgment entered by Wilson J. in accordance with the jury's verdict holding him liable to the plaintiff

2012 ONCA 135 (CanLII)

(respondent), M.B., for assault and battery. A total of $468,969.18 was awarded for general and aggravated damages, future health care costs and prejudgment interest. The general damages award was $300,000. The appellant also seeks leave to appeal from the order granting the respondent her costs on a substantial indemnity basis. [page354]

[2] The central issues on appeal are the trial judge's ruling as to the appropriate questions for the jury on the issues of causation and damages and whether the jury award for general damages was so inordinately high as to warrant appellate intervention.

[3] The respondent, M.B., has cross-appealed, arguing that the trial judge erred in refusing to put her claim for loss of income to the jury.

[4] For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

Facts

[5] The respondent moved to Canada in June 2002. From December 2003 until May 2005, she was employed as a commissioned salesperson at the defendant companies, Deluxe Windows of Canada and Deluxe Windows Industries (collectively referred to as "Deluxe"). At the time, the appellant was the respondent's direct supervisor as well as a principal and part owner of Deluxe.

[6] Between January and October 2004, the appellant committed four sexual assaults on the respondent. In relation to these assaults, he was convicted of criminal charges and sentenced to a term of imprisonment.

[7] The respondent testified that as a result of the sexual assaults, she feels shame and fears that she will be targeted again. She is afraid to leave home and afraid to go shopping without her cellphone; she sleeps with double locks on her bedroom door and purchased an alarm system for her home. She experiences nightmares where the appellant is chasing her and attacking her children. She suffers from insomnia and has

2012 ONCA 135 (CanLII)

difficulty getting out of bed in the morning. She suffers a loss of sexual desire and experiences intermittent suicidal ideations.

[8] According to Dr. Jackson, an expert who testified at trial for the respondent, the respondent experiences dissociative episodes, rumination, somatization, as well as intrusive memories of the trauma, including flashbacks. Dr. Jackson also testified that the respondent experiences "depression, anxiety, and symptoms such as headaches, stomach upset, pain, dizziness, weakness, fatigue and blank spells".

Issues at Trial

[9] The respondent's action for damages for assault and battery was brought against both the appellant and Deluxe.

[10] In addition to her claim for general and aggravated damages, the respondent sought compensation for loss of income. [page355] She claimed that as a result of the assaults, her income was substantially reduced. In support of this claim, she alleged that following the assaults she avoided her workplace and was given less lucrative sales leads as punishment for failing to accede to the appellant's continuing sexual demands.

[11] The experts for both parties agreed that the respondent suffers from post-traumatic stress disorder and major depressive disorder. The appellant conceded liability and accepted that the psychological conditions from which the respondent now suffers were due, at least in part, to the sexual assaults. In his view, however, four unrelated incidents materially contributed to the respondent's psychological disorders and, therefore, mitigated his responsibility for damages. The four incidents are as follows:

(1) as a child, the respondent was approached by a stranger who took her behind a building and made her remove her underpants before she ran away;
(2) the respondent had been through a 14-year abusive marriage to her first husband, in which he would occasionally push, grab and yell at her when he had been drinking;
(3) the respondent had at least one therapeutic abortion or

2012 ONCA 135 (CanLII)

miscarriage; and

(4) the respondent was involved in a car accident after the first sexual assault, but before the three other sexual assaults. As a result of the car accident, she claimed statutory accident benefits and damages for personal injury.

[12] The appellant's expert, Dr. Teplin, testified that these four incidents may have contributed to her depression and post-traumatic stress disorder, although it was impossible for him to determine the extent, if any, of that contribution. His clinical opinion was

> that it remains unclear to what extent Ms. [B.'s] chronic major depressive disorder and chronic post-traumatic stress disorder are directly related to the sexual assault itself and/ or are also directly related to a combination of the severe traumatic events in her life.

[13] The respondent's expert, Dr. Jackson, testified that she had no difficulty concluding that the sexual assaults caused the respondent's depression and post-traumatic stress. In cross-examination, counsel for the appellant suggested to Dr. Jackson that her opinion would have been different had the details of the four incidents been fully disclosed to her. Although Dr. Jackson conceded that she had not been made aware of the extent of [page356] these incidents, she did not resile from her opinion that the sexual assaults caused the depression and post-traumatic stress.

[14] The respondent argued that the magnitude of the "other causal incidents" was overblown. And that the impact, if any, of these other incidents was to make her more susceptible to depression; however, they did not cause or aggravate her psychological disorders.

[15] Following an eight-day trial, the jury awarded damages for assault and battery against the appellant and Deluxe on a joint and several basis as follows:

(a) $300,000 in general damages;

(b) $25,000 in aggravated damages;

2012 ONCA 135 (CanLII)

(c) $45,000 for future health care costs; and
(d) $98,969.18 in prejudgment interest.

[16] The respondent's claim for loss of income was not left with the jury because the trial judge ruled that it was improperly pleaded and not sufficiently supported by the evidence.

[17] The trial judge also awarded the respondent her costs on a substantial indemnity basis -- fixed at $150,000, plus GST and $24,382.82 in disbursements.

Issues

[18] The issues raised on appeal are as follows:

(1) Should the jury have been instructed to assess whether a portion of the respondent's damages were attributable to other causes?
(2) Is the general damages award inordinately high and so excessively disproportionate to other awards for similar injuries as to warrant appellate intervention?
(3) Should the respondent be allowed to amend her claim to increase the claim for general damages from $250,000 to $300,000?
(4) Should the jury have been instructed on the cap on non-pecuniary damages?
(5) Was the jury inflamed by a picture filed by the respondent and by comments made by her lawyer in his closing address?
(6) Is the costs award inordinately high? [page357]

[19] By way of cross-appeal, the respondent raises the following question:

Did the trial judge err by precluding the respondent's claim for loss of income from being put to the jury?

Discussion

(1) Should the jury have been instructed to assess whether a portion of the respondent's damages were attributable to other causes?

[20] Before final submissions, the parties met with the trial judge to formulate the questions to be put to the jury. The

2012 ONCA 135 (CanLII)

appellant sought to include a question or questions asking the jury to assess the role, if any, that the four incidents raised by the appellant played in the respondent's damages.

[21] After hearing submissions from counsel on the jury questions, the trial judge summarized the position of counsel as follows:

> Counsel agree that one of the questions to be put to the jury is the assessment of the plaintiff's non-pecuniary damages for her pain and suffering and loss of enjoyment of life. The focus of the defence of Weig was that while it was conceded that the plaintiff had suffered damages as a result of the sexual assaults, there were other traumatic events in her life that had contributed to her damages, and counsel for Mr. Weig wished the jury to make a finding on that issue.
>
> Counsel for the plaintiff did not object to a question being put to the jury on the role of the sexual assaults in the plaintiff's overall diagnosis, but he disagreed with the manner in which counsel for the defendant Weig drafted the question.

[22] However, the trial judge appears to have disagreed with the positions of both parties. She was of the view that if the sexual assaults caused or materially contributed to the respondent's damages, the defendant would be liable for all of the damages. In support of that conclusion, she relied on the following quote from the Supreme Court's decision in Athey v. Leonati, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102, at para. 17:

> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. . . . As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants

2012 ONCA 135 (CanLII)

remain liable for all injuries caused or contributed to by their negligence.

On that basis, in her view, a question regarding the role, if any, the four incidents played in the overall diagnosis was unnecessary. [page358]

[23] Accordingly, the trial judge ruled that the following questions would go to the jury:

1) At what amount do you assess the damages sustained by the plaintiff arising from the actions of defendant Matvei Weig for her pain and suffering and loss of enjoyment of life from the date of the assault forward?
2) Did the actions of the defendant Matvei Weig cause or materially contribute to the injuries sustained by [M.B.]? Answer: Yes or no.
3) At what amount, if any, do you assess the damages for future treatment of [M.B.]?
4) At what amount, if any, do you assess aggravated damages?
5) Has the plaintiff satisfied you on a balance of probabilities that the defendant Deluxe Windows of Canada should be found vicariously liable for the actions of the defendant Matvei Weig?

[24] The appellant argues that the trial judge erred in her interpretation of Athey and its application to the facts of this case, and conflated the principles that apply to causation with the assessment of damages. As a result, she erred in failing to ask the jury to consider the role, if any, of the other incidents on the respondent's damages.

[25] I agree that the trial judge's analysis was flawed. However, she did not conflate causation and damages principles. The flaw in her analysis was her reliance on the material contribution test and the consequent failure to turn her mind to the applicability of the principles of damages relied on by the appellant.

(a) Treatment of causation and damage principles

(i) Principles of causation

[26] In Snell v. Farrell, [1990] 2 S.C.R. 311, [1990] S.C.J.

2012 ONCA 135 (CanLII)

No. 73, at p. 326 S.C.R., Sopinka J. described causation as "an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former". The prevailing test for causation is the "but for" test: see Hanke v. Resurfice Corp., [2007] 1 S.C.R. 333, [2007] S.C.J. No. 7, 2007 SCC 7. It requires the trier of fact to conclude that "but for" the defendant's misconduct, the plaintiff would not have suffered the injuries in question.

[27] In rare cases, causation may also be proven on the basis of the material contribution test. However, the test is only available where two stringent preconditions are met: (1) it must be "impossible" to prove causation using the "but for" test due to factors beyond the plaintiff's control; and (2) the plaintiff's [page359] injury must be within the ambit of risk created by the defendant's breach: Hanke, at para. 25. If, and only if, these two conditions are met, causation may be established by demonstrating that the defendant's conduct was a material contributing cause of the plaintiff's injury, that is, causation may be established on the basis of the material contribution test.

[28] In this case, the defendant conceded that the sexual assaults caused or materially contributed to plaintiff's injuries. Liability was not a live issue at trial. Nor was it an issue on appeal. However, this was not an appropriate case in which to use the material contribution test to establish causation.

[29] The appellant's argument that other factors contributed to the respondent's injuries did not make it "impossible" to prove causation in this case using the "but for" test. As Erik S. Knutsen [See Note 1 below] points out in his paper "Clarifying Causation in Tort" (2010), 33 Dal. L.J. 153, at p. 169: "Successive and cumulative injury cases, including those involving pre-existing conditions, can also satisfactorily meet the 'but for' test." This is because a "defendant's negligence need only be 'a' cause, not 'the' cause [of the injury]". It was therefore an error for the trial

2012 ONCA 135 (CanLII)

judge to instruct the jury in accordance with the material contribution test.

[30] As far as liability goes, however, the error was harmless because (1) liability was not seriously challenged; and (2) the trial judge charged the jury that she, as well as both counsel, urged them to answer the question of liability in the affirmative. The difficulty arising from this error is that it coloured the trial judge's treatment of the appellant's arguments regarding the possibility that other causes contributed to the respondent's damages.

(ii) Principles of damages

[31] Once causation, and therefore liability, has been established, a separate inquiry must be conducted to assess the extent of the harm. Different principles govern the two analyses. Causation is concerned with connecting the defendant's fault to the plaintiff's harm. Damages are concerned with repairing that harm by putting the plaintiff in the same position he or she would have been in but for the defendant's fault.

[32] While a finding of causation equates to responsibility for the entire injury, a defendant is not required to put the plaintiff [page360] in a better position than his or her original one. Major J. explained this principle in Athey, at para. 32:

> The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.

[33] Certain principles may limit the extent of a plaintiff's damages notwithstanding a finding that the defendant caused the

2012 ONCA 135 (CanLII)

injuries. Two such principles formed the thrust of the appellant's case at trial -- the crumbling skull principle and the principle of successive tortious events. The appellant's position was that

(1) even absent the sexual assaults, there was a measurable risk that because of the other incidents, the respondent would have suffered from depression or post-traumatic stress and, therefore, part of the damages she suffered would have occurred in any event (the crumbling skull principle); and

(2) the tortfeasors responsible for the other tortious incidents caused or contributed to the depression and post-traumatic stress now suffered by the respondent (the successive tortious events).

[34] I will address each of these principles in turn.

Argument 1 -- The crumbling skull

[35] The first argument put forward by the appellant is based on the "crumbling skull principle". The crumbling skull principle is derived from the familiar thin skull principle. Both principles speak to the extent of damages -- not causation. The thin skull rule holds that a tortfeasor takes his victim as he finds him. In other words, if as a result of a pre-existing vulnerability -- a thin skull -- a plaintiff suffers greater injury than an average person would, the defendant is nonetheless responsible for the full extent of the plaintiff's loss: Athey, at para. 34.

[36] The crumbling skull rule, on the other hand, applies to situations where the defendant's act causes the premature or accelerated degeneration of the plaintiff's pre-existing condition. If there is a "measurable risk" that the condition suffered by the plaintiff would have affected the plaintiff in the future [page361] regardless of the defendant's tortious act, the defendant will be liable for the effect of his act on the degenerative process. However, the defendant need not compensate the plaintiff for any debilitating effects of the pre-existing condition that would have occurred in any event: see Athey, at para. 35.

2012 ONCA 135 (CanLII)

[37] The trial judge was alive to this principle. After giving an example of a crumbling skull situation in her discussion of the jury questions with counsel, she stated:

> [B]ut I don't see that in the case here because there is no evidence of a pre-existing condition here. You don't have evidence of the plaintiff getting psychiatric or psychological treatment prior to the accident, based on the medical information that I have reviewed. So it is not the same factual basis, in my view. This isn't a case, Mr. Novak, in my view, of a pre-existing condition. Rather it is the defence position that the diagnosis is multi-factorial and is not just related to the sexual assault. That is a different situation than where an assessment is made based on the pre-existing condition.

(Emphasis added)

[38] However, she was of the view that the crumbling skull doctrine was inapplicable to the facts of this case. She came to this conclusion not because she wrongly conflated causation and damages principles, but rather because of her understanding that using the material contribution test the appellant was liable for all of the damages. The trial judge, therefore, did not turn her mind to the question of whether there was a "material risk" that because of the other incidents the respondent would have suffered from some degree of depression and post-traumatic stress in the future, even without the sexual assaults. Assuming, for the moment, that there was an evidentiary basis to support that position, this is a question that should have been left with the jury.

[39] In such circumstances, the jury would be asked to determine if there was anything inherent in the respondent's original condition, that is, her pre-assault condition, that posed a "measurable risk" that she would develop her current problems notwithstanding the sexual assaults. In assessing her original condition, the jury could consider the four incidents relied on by the appellant. If the jury concluded that there was indeed a measurable risk that her current problems would have developed in any event, the measure of damages

2012 ONCA 135 (CanLII)

attributable to the appellant would reflect only the increased aggravation of her condition brought about by the sexual assaults.

Argument 2 -- Successive tortious events

[40] The appellant's second argument relates to the principle that where multiple tortious events contribute to a divisible [page362] injury, each tortfeasor will only be responsible for damages relating to the portion of the injury he caused. The classic example is where the plaintiff has suffered injuries in two separate car accidents -- but for the first accident the plaintiff would not have suffered some injury, and but for the second accident the plaintiff would not have suffered some additional injury. Each defendant is only responsible for the damages attributable to his or her accident: see Hicks v. Cooper (1973), 1 O.R. (2d) 221 (C.A.).

[41] This concept was not necessarily lost on the trial judge; but, because of her approach to liability she failed to turn her mind to it. The material contribution test assumes the existence of other potentially contributing causes, but due to the impossibility of isolating each cause, the tortfeasor is held liable for the whole of the injury. The use of the material contribution test in this case accounted for the potential causal effects of the other tortious causes and acknowledged the impossibility of parsing out the damages attributable to each. Its application therefore foreclosed the appellant's argument that the jury ought to have been instructed to assess the contribution of the other tortious causes.

[42] However, as I have already discussed, this was not an appropriate case in which to use the material contribution test to establish causation and it was an error to do so. On a proper "but for" analysis, the contribution of the other tortious causes to the respondent's injuries may have been a live issue for the jury to consider in assessing damages.

[43] Thus, once again assuming a sufficient evidentiary basis to support the appellant's position, the jury should have been

2012 ONCA 135 (CanLII)

asked to assess the extent, if any, to which the other tortious incidents, i.e., the motor vehicle accident and the assaults by the respondent's former husband, contributed to the respondent's current condition. This would require the jury to first determine whether the respondent's injuries were divisible, i.e., whether the contributions of the other tortious causes could be identified. From there, the jury would be asked to assess the respondent's original position to determine whether she was suffering from depression or post-traumatic stress caused by one or both of the tortious incidents prior to the sexual assaults. That position would then be compared to her position after the sexual assaults, with the difference in severity between the two being the portion of damages attributable to the defendant: see Hicks.

[44] Importantly, for the purpose of answering this question, the jury would be instructed not to consider the childhood incident or the abortions and miscarriages. In my view, the [page363] childhood incident is non-justiciable as it involved a relatively vague incident of inappropriate conduct alleged to have occurred 30 years ago by an unknown individual in the former Soviet Union. The abortions and miscarriages are simply not tortious.

[45] Therefore, while the trial judge did not conflate causation and damages principles, her analysis of what questions should go to the jury was not without error. She failed to consider whether there was a material risk that the respondent would suffer some degree of depression or post-traumatic stress in the absence of the sexual assaults. And, her reliance on the material contribution test led to her failure to consider whether other tortious causes might have contributed to the respondent's damages. Her failure to consider these issues resulted in her refusal to leave the crumbling skull and successive tortious events questions with the jury.

[46] However, that is not the end of the inquiry. The question remains as to whether the error is serious enough to merit a new trial.

(b) Are the errors of such significance as to warrant

2012 ONCA 135 (CanLII)

ordering a new trial on the issue of damages?

[47] In a civil case, a new trial will only be ordered where the interests of justice plainly require it: see Fiddler v. Chiavetti, [2010] O.J. No. 1159, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 9. A reviewing court will not direct a new trial unless there has been a "substantial wrong or miscarriage of justice": see Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(6). Although I have concluded that the trial judge erred in her analysis of the applicability of principles limiting damages, an issue remains as to the gravity of the error.

[48] In this respect, the respondent argues that
(i) the questions as phrased were nonetheless adequate;
(ii) the evidence in support of the suggestion that the other incidents contributed to the damages is weak; and
(iii) the appellant never pleaded that the other incidents contributed to the damages suffered by the respondent.

[49] I would not give effect to the third submission -- that contribution was not pleaded. Though the statement of defence simply contained a bald denial, it was clear from the conduct of the trial and the submissions of counsel that the potential impact of the other incidents on the measure of damages was a live issue. [page364]

[50] However, as I will explain, even taken at its highest, the evidence suggesting that the other incidents somehow contributed to the damages suffered by the respondent was weak. In my view, there was no reasonable basis to justify leaving the questions of contribution with the jury. In my view, therefore, the trial judge's error did not cause a substantial wrong. In the light of this conclusion, it is unnecessary to address the submission that the question as phrased was adequate.

(i) Was there sufficient evidence of contribution to warrant the questions being put to the jury?

[51] Whether a jury in a civil case should be asked to decide on a particular issue is a question of evidence. There must be

2012 ONCA 135 (CanLII)

"reasonable evidence" to allow a question to go to the jury. As Meredith J.A. stated in Milligan v. Toronto Railway (1908), 17 O.L.R. 530, [1908] O.J. No. 78 (C.A.) [at para. 50]:

> Although the jury are the sole judges of fact they are such judges only in cases in which there is a reasonable question of fact to be determined. It is the duty of the Court to determine whether there is any reasonable evidence to go to the jury, upon any question of fact; and no such question can be rightly submitted to them until that question has been answered in the affirmative[.]

[52] Had the trial judge applied the proper analysis in the present case, she would have gone on to consider whether there was "reasonable evidence" to leave the following questions with the jury:

(a) was there a material risk that the respondent would have suffered some degree of depression or post-traumatic stress notwithstanding the sexual assaults; and

(b) did other tortious incidents cause part of the respondent's damages?

[53] In the appellant's submission, there was expert evidence that, if accepted by the jury, provided a basis for both of these positions and therefore the questions should have been left with the jury. The respondent, however, contends there was no evidentiary basis for either question. For the reasons that follow, I agree with the respondent that there was no reasonable evidence to support either question being put to the jury.

The crumbling skull question

[54] With respect to the first question -- the "crumbling skull" issue -- the appellant argues that Dr. Teplin's evidence [page365] suggested that there was a substantial likelihood that because of the other incidents, the respondent's pre-assault condition was such that her psychological problems would have developed in the future, albeit to a lesser degree, even in the absence of the sexual assaults.

2012 ONCA 135 (CanLII)

[55] The respondent asserts that Dr. Teplin's evidence does not go that far. At best, his testimony suggests that other events created a pre-existing vulnerability to the harm caused by the sexual assaults. As the respondent explains, the presence of contributing causes is to be distinguished from the situation where the plaintiff is "thin skulled" in the sense that the damages flowing from the sexual assaults are more significant as a result of the victim's vulnerability. In accordance with the principles set out in Athey, a vulnerable plaintiff is entitled to be compensated for the entire harm caused by the sexual assaults.

[56] I agree that Dr. Teplin's evidence does not go as far as the appellant contends. Most of his evidence, and that of the other experts, suggested that the other incidents made the plaintiff more vulnerable to depression and post-traumatic stress. Indeed, Dr. Teplin's clinical opinion was "that it remains unclear to what extent Ms. [B.'s] chronic major depressive disorder and chronic post-traumatic stress disorder are directly related to the sexual assault itself and/or are also directly related to a combination of other severe traumatic events in her life".

[57] Dr. Teplin did not opine that the occurrence of any of the four other incidents caused or contributed to the respondent's condition -- he could only say that they may have. Indeed, none of the experts could offer anything tangible with respect to the risk that the other incidents would have eventually caused the respondent to develop her current psychological conditions.

[58] At various points, the experts independently opined that while certain things may be traumatic to certain people, there are no absolutes. For example, when Dr. Jackson, the respondent's expert, was asked in cross-examination if she agreed that abortions were "stressful incidents", she replied that in many cases women who had abortions felt relief and not stress. The evidence of Dr. Brown, the respondent's psychologist, was similar. She said women are not necessarily traumatized by abortions if they've made a decision that suits them. Significantly, the respondent's own evidence was that she

2012 ONCA 135 (CanLII)

was not traumatized by any of the incidents relied on by the appellant.

[59] In my view, the evidence on the record establishes no more than a vague possibility that the respondent's depression and post-traumatic stress would have developed to some degree in the absence of the sexual assaults. However, evidence [page366] of a vague possibility is not reasonable evidence of a material risk. In the absence of reasonable evidence that there was a material risk that the respondent's conditions would have developed absent the sexual assaults, there was no need to leave the "crumbling skull" question with the jury. I therefore conclude that there was no substantial wrong or miscarriage of justice occasioned by the failure of the trial judge to consider whether to do so.

The successive tortious events question

[60] The respondent argues that the evidence at trial demonstrated that her injuries -- post-traumatic stress disorder and major depressive disorder -- were indivisible, making it neither possible nor appropriate to attribute portions of the damages to other tortious causes. Relying on Athey, at paras. 22-25, she contends that because the sexual assaults caused these indivisible injuries, the appellant should be responsible for the full extent of the damages suffered (although he could bring third party claims against the alleged contributing tortfeasors who would be jointly and severally liable for the full extent of the injury pursuant to s. 1 of the Negligence Act, R.S.O. 1990, c. N.1).

[61] The respondent points to the evidence of the appellant's own expert, Dr. Teplin, who testified that it was "impossible" to discern the impact of any one possible cause. Although that evidence appears to support the view of the injuries as "indivisible", in my view it speaks more to the lack of evidence of other contributing causes than to the divisibility of the injuries. The simple fact that it may be difficult to attribute damages to their particular source is not a sufficient excuse to refrain from doing so. As the Supreme Court explained in Blackwater v. Plint, [2005] 3 S.C.R. 3,

2012 ONCA 135 (CanLII)

[2005] S.C.J. No. 59, 2005 SCC 58, at para. 74:

> The calculation of damages for sexual assault to Mr. Barney [the plaintiff] is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS [the residential school]; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed.

(Emphasis in original; citations omitted)

[62] More problematic for the appellant is the dearth of reasonable evidence that might suggest the two tortious incidents, [page367] i.e., the motor vehicle accident and the "abuse" by the respondent's ex-husband, caused any portion of the depression or post-traumatic stress suffered by the respondent. The evidence surrounding the motor vehicle accident was that, "but for" that accident, the respondent would not have suffered a number of physical injuries and ailments. By contrast, the evidence on the record that the accident caused any psychological problems was more in the nature of speculation.

[63] The appellant argued that because the pain caused by the physical injuries from the motor vehicle accident was strong enough to necessitate pain medication, that pain could have lead to increased anxiety. However, there was no evidence that the respondent's pain had in fact caused her any anxiety. There was also evidence that in December of 2004, the respondent was on a drug that can be used to treat depression, amitriptyline. This, however, was after all of the sexual assaults and it is unclear from the record when she began taking that drug or why it was prescribed.

2012 ONCA 135 (CanLII)

[64] As for the "abuse" by the respondent's ex-husband, the respondent's testimony was that this "abuse" was occasional and consisted of yelling, pushing and grabbing when her ex-husband was drinking. The respondent denied any adverse effects of the relationship. When it was suggested in cross-examination that she downplayed its significance to Dr. Brown, the respondent questioned why she would discuss it in any more detail than she did given that, in her words, "I didn't have any problems with my ex-husband. I divorced him and I'm happy and I move on; right." There was no specific evidence that this relationship caused the respondent any psychological harm. The most any of the experts could say was that it could have.

[65] To attribute fault to other tortious causes, those causes must be shown on a balance of probabilities to have caused some harm -- speculation that they might have is not sufficient. In my view, the evidence did no more than suggest a vague possibility that the tortious incidents might have done so. Speculative evidence is not reasonable evidence. In the absence of reasonable evidence that the other tortious incidents contributed to the respondent's condition, there was no need for the trial judge to leave the question of contribution from the other tortious incidents with the jury. I must therefore once again conclude that no substantial wrong or miscarriage of justice was brought about by the failure of the trial judge to consider whether to do so. [page368]

(2) Is the general damages award inordinately high and so excessively disproportionate to other awards for similar injuries as to warrant appellate intervention?

[66] The appellant argues that the jury's award of $300,000 in general damages is grossly disproportionate to the damages the respondent suffered. He contends that it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. In his submission, awards for general damages should be in line with those reached in other cases involving similar wrongs. He suggests that a review of the case law reveals that the appropriate range for damages as a result of the sexual assault of an adult victim is between $75,000 and $125,000. These amounts are well below the amount awarded in

2012 ONCA 135 (CanLII)

this case.

[67] The respondent submits that an appellate court may not substitute its own assessment of damages merely because it would have arrived at a different figure or because the award is larger than those in similar cases. To justify intervention by an appellate court, there must be a palpable and overriding error. The difference between what was awarded and what could properly have been awarded must "be even wider than when the figure has been assessed by a judge sitting alone": Bella v. Young, [2006] 1 S.C.R. 108, [2006] S.C.J. No. 2, 2006 SCC 3, at para. 64.

[68] The respondent maintains that although the award is high and does in fact exceed the range suggested by her counsel at trial ($125,000 to $225,000), it is not so high as to shock the conscience of the court: see Hill v. Church of Scientology of Toronto (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64.

[69] The respondent takes the position that the appropriate range, adjusted for inflation, is in the order of $96,000 to $277,000: see Evans v. Sproule, [2008] O.J. No. 4518, 176 A.C.W.S. (3d) 895 (S.C.J.). The respondent further asserts that an award outside of this range is justified in the present case because

(a) two of the assaults involved significant violence;
(b) she was particularly vulnerable, being a recent immigrant with limited language skills;
(c) she was required to work to support her family; [page369]
(d) the appellant was her immediate supervisor and misused his position of authority and awareness of her plight for his own sexual purpose; and
(e) the appellant threatened her with violence and death.

[70] There is no doubt that the jury's award for general damages was high and outside of the generally expected range. Nonetheless, I would not interfere. Although it is certainly generous and may not have been one this court would make, it is not so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole, and acting

2012 ONCA 135 (CanLII)

judicially, could have reached it: see McCannell v. McLean, [1937] S.C.R. 341, [1937] S.C.J. No. 23, at p. 343 S.C.R. Jury awards attract significant deference. This award, though outside the general range, is not, in my view, so exceptional as to warrant appellant intervention.

(3) Should the respondent be allowed to amend her claim to increase the claim for general damages from $250,000 to $300,000?

[71] The appellant argues that the general damages award of $300,000 should be reduced as it exceeds the $250,000 claimed in the statement of claim. No amendment to the claim was sought or obtained at trial. The respondent concedes this point. However, she asks this court to allow the amendment to the statement of claim to increase the claim for general damages from $250,000 to $300,000.

[72] I see no reason not to grant the respondent's request to amend her statement of claim. As this court stated in Beals v. Saldanha (2001), 54 O.R. (3d) 641, [2001] O.J. No. 2586 (C.A.), at para. 99, rule 26.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 "requires the court to make those amendments unless the defendant can show prejudice that cannot be cured by costs or an adjournment". Further, the power is available at any stage of the proceeding, including on appeal: Beals, at para. 98.

[73] In this case, the appellant will suffer no prejudice if the amendment is allowed. The respondent specifically asked for general damages in her pleadings. There were sufficient pleadings to alert the appellant of the case he had to meet. While the award of $300,000 may have come as a surprise given that the amount at issue in the pleadings was $250,000, the amount awarded is not so significantly higher than the amount pleaded as to be obviously unfair. [page370]

[74] The amendment to the amount claimed does not depend on additional facts or legal arguments and the appellant has not presented any arguments addressing the issue of prejudice. In my view, an increase in the amount claimed would not have affected the way the appellant responded to the claim. I would,

2012 ONCA 135 (CanLII)

therefore, grant leave to the respondent to amend her pleadings to conform with the jury's general damages award.

(4) Should the jury have been instructed as to the cap on non-pecuniary damages?

[75] The appellant submits that, because the jury's award of $300,000 is very close to the limit on non-pecuniary loss -- the cap -- set by the Supreme Court of Canada in a trilogy of cases, the jury should have been instructed on the cap and the policy behind it. In the Supreme Court trilogy, the court held that a plaintiff should not recover more than $100,000 for non-pecuniary damages for personal injury: see Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, [1978] S.C.J. No. 6; Arnold v. Teno, [1978] 2 S.C.R. 287, [1978] S.C.J. No. 8; and Thornton v. Prince George School District No. 57, [1978] 2 S.C.R. 267, [1978] S.C.J. No. 7. The appellant submits that, adjusted for inflation, the cap was $328,000 in 2010.

[76] The respondent argues that the cap does not apply in cases of personal injury resulting from sexual assaults. In any event, the damage award did not exceed the cap and no one asked the trial judge to instruct the jury about it.

[77] I would not give effect to this ground of appeal. Even assuming that the cap applies to general damages for sexual assault, the trial judge cannot be faulted for her failure to instruct on the cap in the circumstances of this case. The ranges being proposed to the jury were well below the amount of the cap, counsel did not request such an instruction and the amount awarded did not exceed it.

(5) Was the jury inflamed by a picture filed by the respondent and by comments made by her counsel in his closing address?

[78] The appellant submits that jury was inflamed by the admission of a photograph of him under which the following caption appeared: "If you see this person, do not let him in. He is wanted." In addition, the appellant submits that counsel for the respondent's remark in his closing submissions that the appellant was "behind bars" further inflamed the jury. The result was an excessive general damages award. [page371]

2012 ONCA 135 (CanLII)

[79] The respondent argues that the photograph was properly admitted as an exhibit at trial. The evidence established that the picture, which hung on the appellant's office door, caused the respondent a great deal of distress in the light of the sexual assaults perpetrated against her by the appellant. The picture was therefore relevant and there was no unfairness in its admission at trial. Further, the trial judge specifically instructed the jury as to the limited use they could make of that photograph.

[80] With respect to counsel's statement that the appellant was in jail, the respondent concedes that the statement ought not to have been made. The respondent's counsel invited the trial judge to provide a correcting instruction in the charge and a clear and blunt correcting instruction was given, including a reminder that the absence of the appellant at trial was due to medical reasons. The instruction clearly stated that the jury was "not to draw any inference, therefore, from the failure of the appellant to be present throughout his trial".

[81] In my view, the trial judge did not err in admitting the photograph into evidence and her correcting instruction on the respondent's counsel's reference to the appellant being in jail was adequate. No unfairness resulted.

(6) Was the costs award inordinately high?

[82] At the conclusion of the trial, the respondent sought costs of $258,382.82 plus disbursements on a full indemnity scale. The appellant took the position that an appropriate amount for costs was $100,000.

[83] Following submissions, the trial judge reviewed the jurisprudence and concluded that in the circumstances, it was appropriate to exercise her discretion to fix costs on a substantial indemnity basis, which she fixed in the amount of $150,000. In coming to this decision, the trial judge specifically adverted to this court's decision in Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.). Considering the significant amount being claimed, the trial judge concluded

2012 ONCA 135 (CanLII)

that a substantial reduction was necessary in order to ensure that the award was fair and reasonable in the circumstances and was in line with the parties' expectations.

[84] In my view, the trial judge carefully reviewed the evidence and applied the correct legal test. She heavily discounted the amount of hours proposed by counsel for the respondent and, in my view, the final award of costs is fair and reasonable. [page372]

The Cross-Appeal

Did the trial judge err by precluding the respondent's claim for loss of income from being put to the jury?

[85] The trial judge ruled that she would not ask the jury to decide whether the respondent had proven a claim for loss of income. In her view, the income loss claim was not sufficiently pleaded by the respondent in her statement of claim and there was insufficient evidence tendered at trial to support it on a balance of probabilities standard. As a result, the trial judge was of the view that the jury would be unable to make a reasonable calculation of the income loss. In effect, the jury would be asked to speculate as to the amount.

[86] In her cross-appeal, the respondent argues that, although the statement of claim does not contain a separate head of damages for loss of income, it does state that, "sick with stress, M.B. avoided attending at Deluxe and suffered a resulting loss of business income". The respondent further states that her reply to the demand for particulars made clear that she had avoided the office. Additionally, the respondent points out that a notice of special damages was given to the appellant in compliance with rule 25.06(9). As a result, the respondent contends that the appellant could not have been misled or prejudiced by the absence of an explicit claim for loss of income in her statement of claim.

[87] Further, the respondent takes the position that there was at least some evidence which, if accepted by the jury, was capable of supporting a finding that the respondent suffered a loss of income as a result of the appellant's tortious conduct.

2012 ONCA 135 (CanLII)

The trial judge therefore erred in weighing the evidence herself as this was properly the province of the jury. The trial judge had an obligation to allow the question of liability and the question of quantum of the loss to be determined by the jury. The appellant should not be relieved of his obligation to account for the respondent's loss of income simply because it would be difficult for the jury to assess the damages.

[88] The appellant submits that the trial judge's decision is to be given deference. The determination of whether or not there was the foundation for a claim for loss of income is one of mixed fact and law.

[89] With respect to the pleading issue, the appellant argues that the trial judge correctly observed that a litigant is entitled to be aware of the case he has to meet. No claim for loss of income was advanced because it was not included in the prayer [page373] for relief nor was it particularized in the body of the claim or in the reply to the demand for particulars.

[90] The appellant further maintains that he would have been prejudiced had the issue gone to the jury. Following the service of her notice of special damages alleging a $24,000 loss, the appellant requested the respondent's income tax returns, further discoveries and production of any expert report she intended to rely on. Further discoveries were denied, the income tax returns were not provided and no expert report was provided or tendered at trial.

[91] In my view, the cross-appeal should be dismissed. The trial judge's ruling demonstrates that she had a full appreciation of the evidence and the pleadings and clearly articulated the shortcomings of both the pleadings and the evidence. She found that the claim lacked detail and substance, and consisted of no more than bald allegations that the respondent would have made more sales but for the assaults.

[92] The trial judge properly took into account the inadequacy of the pleading as well as the respondent's failure

2012 ONCA 135 (CanLII)

to produce her income tax statements and allow further discovery. Considering these factors and the nature of the evidence led at trial, she determined that there was simply no basis to leave the question with the jury. This ruling is entitled to deference as the trial judge was in the best position to evaluate the issue, and she did so in a reasonable manner.

Conclusion

[93] For these reasons, I would allow the respondent's amendment to the statement of claim to increase the claim for general damages to $300,000 and would dismiss the appeal and cross-appeal.

[94] With respect to costs, the parties have agreed on the quantum of costs. As I understand the submissions, the respondent is entitled to her costs for the appeal and for the appeal of the costs award in the amounts of $19,000 and $2,500, respectively. The appellant is entitled to his costs of the cross-appeal, fixed in the amount of $7,500. All of these figures are inclusive of disbursements but exclusive of HST.

Appeal and cross-appeal dismissed.

Notes

Note 1: Erik S. Knutsen is an assistant professor at the Faculty of Law at Queen's University.

2012 ONCA 135 (CanLII)

Her Majesty The Queen in Right of the Province of British Columbia *Appellant/respondent on cross-appeal*

v.

M.B. *Respondent/appellant on cross-appeal*

and

Attorney General of Canada, Nishnawbe Aski Nation, Insurance Corporation of British Columbia, Patrick Dennis Stewart, F.L.B., R.A.F., R.R.J., M.L.J., M.W., Victor Brown, Benny Ryan Clappis, Danny Louie Daniels, Robert Daniels, Charlotte (Wilson) Guest, Daisy (Wilson) Hayman, Irene (Wilson) Starr, Pearl (Wilson) Stelmacher, Frances Tait, James Wilfrid White, Allan George Wilson, Donna Wilson, John Hugh Wilson, Terry Aleck, Gilbert Spinks, Ernie James and Ernie Michell *Interveners*

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Appelante/intimée au pourvoi incident*

c.

M.B. *Intimée/appelante au pourvoi incident*

et

Procureur général du Canada, Nation Aski Nishnawbe, Insurance Corporation of British Columbia, Patrick Dennis Stewart, F.L.B., R.A.F., R.R.J., M.L.J., M.W., Victor Brown, Benny Ryan Clappis, Danny Louie Daniels, Robert Daniels, Charlotte (Wilson) Guest, Daisy (Wilson) Hayman, Irene (Wilson) Starr, Pearl (Wilson) Stelmacher, Frances Tait, James Wilfrid White, Allan George Wilson, Donna Wilson, John Hugh Wilson, Terry Aleck, Gilbert Spinks, Ernie James et Ernie Michell *Intervenants*

INDEXED AS: M.B. *v.* BRITISH COLUMBIA

Neutral citation: 2003 SCC 53.

File No.: 28616.

2002: December 5, 6; 2003: October 2.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

RÉPERTORIÉ : M.B. *c.* COLOMBIE-BRITANNIQUE

Référence neutre : 2003 CSC 53.

Nº du greffe : 28616.

2002 : 5, 6 décembre; 2003 : 2 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Liability — Intentional torts — Sexual assault — Foster child sexually assaulted by foster father — Whether government vicariously liable for sexual abuse — Whether government breached non-delegable duty.

Torts — Damages — Prejudgment interest — Intentional torts — Sexual assault — Foster child sexually assaulted by foster father — Whether government liable for sexual assault — Whether Court of Appeal erred in

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Responsabilité délictuelle — Responsabilité — Délits intentionnels — Agression sexuelle — Enfant placée en famille d'accueil agressée sexuellement par son père d'accueil — L'État est-il responsable du fait d'autrui pour l'agression sexuelle? — L'État a-t-il manqué à une obligation intransmissible?

Responsabilité délictuelle — Dommages-intérêts — Intérêt avant jugement — Délits intentionnels — Agression sexuelle — Enfant placée dans une famille d'accueil agressée sexuellement par son père

2003 SCC 53 (CanLII)

varying trial judge's assessment of damages — Whether trial judge correct in deducting social assistance benefits from award for loss of past opportunity to earn income — Whether Court of Appeal adopted proper approach in calculating prejudgment interest on award for loss of earning capacity — Whether Court of Appeal correct to reduce damage award.

The respondent was apprehended by the Ministry of Social Services at the age of thirteen. She had come from a severely troubled home. Her father was frequently violent and had abused the respondent for eight years beginning when she was four years old. The respondent was made a temporary ward of the Superintendent of Child Welfare, and placed in the foster home of Mr. and Mrs. P. Mr. P. engaged in sexually inappropriate behaviour during this time and sexually assaulted the respondent near the end of June 1976. The respondent brought claims against the Crown for negligence, vicarious liability, breach of non-delegable duty and breach of fiduciary duty. The trial judge found that although the respondent's social workers were negligent in their monitoring and supervision of the placement, this negligence was not a cause of the abuse. However, the trial judge held that the Crown was vicariously liable to the respondent for Mr. P.'s tort, and also for Mr. P.'s breach of his fiduciary duty to her. She also held that his tort constituted a breach of the Crown's non-delegable duty to look after the welfare of foster children. A majority of the Court of Appeal dismissed the Crown's appeal, but reduced the award for non-pecuniary loss on the basis that the trial judge had failed to exclude the effects of the abuse that the respondent received from her biological father before entering foster care. A five-member panel of the court subsequently concluded by a majority that social assistance payments should not have been deducted from the respondent's award for past loss of earnings, but it lowered the award on the basis that due consideration should be given to the effects of the prior abuse by the respondent's biological father. It also held that prejudgment interest on the award should be calculated by treating the award as a stream of income received evenly in six-month intervals over the pre-trial period. The Crown appealed to this Court on the question of liability, and on the question of whether the Court of Appeal was correct in ruling that social assistance payments are not deductible from awards for past loss of earnings. The respondent cross-appealed on whether the Court of Appeal was correct to reduce the damage award

d'accueil — L'État est-il responsable de l'agression sexuelle? — La Cour d'appel a-t-elle commis une erreur en modifiant l'évaluation des dommages-intérêts faite par la juge de première instance? — La juge de première instance a-t-elle déduit à juste titre les prestations d'aide sociale de l'indemnité accordée pour perte de la capacité de gagner un revenu dans le passé? — La Cour d'appel a-t-elle calculé comme il se doit l'intérêt avant jugement sur l'indemnité accordée pour perte de capacité de gain? — La Cour d'appel a-t-elle à juste titre réduit le montant des dommages-intérêts?

L'intimée a été appréhendée par le Ministry of Social Services à l'âge de treize ans. Elle venait d'une famille grandement perturbée. Son père était souvent violent et l'avait agressée alors qu'elle n'avait que quatre ans et pendant les huit ans qui allaient suivre. L'intimée a été placée sous la tutelle provisoire du Superintendent of Child Welfare, puis en famille d'accueil chez M. et M^me^ P. Monsieur P. a commencé à cette époque à se livrer à des comportements sexuellement inappropriés et a agressé sexuellement l'intimée vers la fin de juin 1976. L'intimée a poursuivi l'État, alléguant la négligence, la responsabilité du fait d'autrui, le manquement à une obligation intransmissible et le manquement à une obligation fiduciaire. La juge de première instance a considéré que, bien que les travailleurs sociaux s'occupant de l'intimée aient fait preuve de négligence dans la surveillance et le contrôle du placement, cette négligence n'était pas une cause des agressions. La juge de première instance a toutefois tenu l'État responsable du fait d'autrui pour le délit civil commis par M. P. contre l'intimée ainsi que pour le manquement de ce dernier à son obligation fiduciaire envers elle. Elle a aussi estimé que son délit constituait un manquement à l'obligation intransmissible de l'État de veiller au bien-être des enfants placés en famille d'accueil. Les juges majoritaires de la Cour d'appel ont rejeté l'appel de l'État mais ont réduit l'indemnité pour les pertes non pécuniaires, estimant que la juge de première instance avait omis d'exclure les effets imputables à la violence infligée par le père biologique de l'intimée avant son placement en famille d'accueil. Un comité de cinq juges de la cour a subséquemment conclu à la majorité que les prestations d'aide sociale n'auraient pas dû être déduites du montant accordé au titre de la perte de revenus passée, mais il a réduit ce montant au motif qu'il convenait de prendre dûment en compte les effets des agressions antérieures de l'intimée par son père biologique. Il a de plus statué qu'il fallait calculer l'intérêt avant jugement en considérant l'indemnité comme un revenu reçu à intervalles réguliers de six mois au cours de la période ayant précédé le procès. L'État s'est pourvu devant notre Cour sur la question de la responsabilité et sur celle de savoir

2003 SCC 53 (CanLII)

and whether it adopted the proper method for calculating prejudgment interest on the award.

Held (Arbour J. dissenting in part): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.: The government is not vicariously liable for torts committed by foster parents against foster children in their care on the ground that foster parents are not, in their daily affairs, acting "on account of" or on behalf of the government. For this reason, it would be inappropriate to hold the Crown vicariously liable for the sexual abuse of the respondent by her foster father. On the issue of non-delegable duty, there is no provision in the *Protection of Children Act* that suggests that the Superintendent stands under a general non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents, such as would render the Superintendent liable for their tortious conduct. While the Crown's appeal is accordingly allowed and it is therefore not necessary to decide the three issues pertaining to damages, they should be canvassed briefly in the interest of providing guidance.

The trial judge was correct in deducting social assistance benefits from the respondent's award for loss of past opportunity to earn income. Nothing has been put forward to displace the common sense proposition that social assistance benefits are a form of wage replacement. It follows that the only way in which they can be non-deductible at common law is if they fit within the charitable benefits exception, or if this Court carves out a new exception. Otherwise, retention of them would amount to double recovery. Social assistance does not fit within the charitable benefits exception. Neither of the rationales for the exception — that individuals who wish to help those who are in need should not be discouraged from doing so and that it is difficult to assess the monetary value of certain forms of private charity — seems to apply in the case of social assistance benefits made by the government. The Court should not carve out a new policy-based exception for social assistance. Given that social assistance benefits come out of public funds, and given that taxpayers contribute to these funds in the belief that they will be used for legitimate purposes such as relieving genuine need, it seems unfair to taxpayers to allow certain plaintiffs to

si la Cour d'appel a correctement statué que les prestations d'aide sociale ne sont pas déductibles du montant accordé pour perte de revenus passée. Dans un pourvoi incident, l'intimée a soulevé la question de savoir si la Cour d'appel a eu raison de réduire le montant des dommages-intérêts et si elle a calculé comme il se doit l'intérêt avant jugement.

Arrêt (la juge Arbour est dissidente en partie) : Le pourvoi est accueilli et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel et Deschamps : L'État n'est pas responsable du fait d'autrui pour les délits commis par des parents de famille d'accueil contre les enfants qui leur sont confiés, au motif que ces parents n'agissent pas, au jour le jour, « pour le compte » ou au nom de l'État. Pour ce motif, il serait inopportun de tenir l'État responsable du fait d'autrui pour la violence sexuelle exercée contre l'intimée par son père d'accueil. En ce qui concerne l'obligation intransmissible, rien dans la *Protection of Children Act* ne donne à penser que le surintendant est soumis à une obligation intransmissible de s'assurer qu'aucun enfant ne subisse de préjudice du fait des mauvais traitements ou de la négligence des parents d'accueil, obligation qui le rendrait responsable de leur conduite délictueuse. Bien que le pourvoi de l'État soit en conséquence accueilli, et qu'il ne soit donc pas nécessaire de trancher les trois questions relatives aux dommages-intérêts, il convient de les examiner brièvement pour guider l'analyse.

La juge de première instance a déduit à juste titre les prestations d'aide sociale de l'indemnité accordée à l'intimée pour perte de la capacité de gagner un revenu dans le passé. Aucun argument n'a été avancé pour réfuter la proposition sensée selon laquelle les prestations d'aide sociale constituent une forme de remplacement du revenu. Il s'ensuit que ces prestations ne peuvent être considérées comme non déductibles en common law que si elles tombent sous le coup de l'exception visant les dons de charité, ou si notre Cour crée une nouvelle exception. Autrement, leur non-déduction équivaudrait à une double indemnisation. L'aide sociale ne relève pas de l'exception visant les dons de charité. Aucun des principes sous-jacents à cette exception — la nécessité de ne pas décourager les individus désireux d'aider les plus démunis et la difficulté d'évaluer la valeur pécuniaire de certaines formes de charité privée — ne semble s'appliquer dans le cas des prestations d'aide sociale versées par l'État. La Cour ne devrait pas créer une exception de politique générale visant l'aide sociale. Étant donné que les prestations d'aide sociale proviennent des fonds publics, auxquels les contribuables contribuent en croyant qu'ils

2003 SCC 53 (CanLII)

recover from these funds and then receive a duplicative payment from a tort award.

The Court of Appeal adopted the proper approach in holding that the award for loss of earning capacity should be treated as compensation for the loss of a stream of income received evenly over the pre-trial period, and that prejudgment interest was therefore calculable in six-month intervals under s. 1(2)(b) of the *Court Order Interest Act*. The Court of Appeal erred, however, in substituting its own assessment of the appropriate quantum of damages. The trial judge's assessment of what proportion of the damage sustained by the respondent was caused by the foster father's assault is a judgment of fact, which an appellate court cannot set aside absent "palpable and overriding error", and there was no such error in the trial judge's approach.

Per Arbour J. (dissenting in part): Vicarious liability is made out in this case. The relationship between the state and foster parents is sufficiently close that the relationship is capable of attracting vicarious liability. In addition, the wrongful act is so closely associated with the power and intimacy created by the foster care relationship that it can fairly be said that the government's empowerment of foster parents materially increased the risk of sexual abuse of foster children. There is no breach of non-delegable duty for the reasons set out by the majority in *K.L.B.* There was agreement with the majority on the damages issues.

Cases Cited

By McLachlin C.J.

Applied: *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51; **referred to:** *E.D.G v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52; *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Bustard v. Boucher*, [1997] N.B.J. No. 39 (QL); *Cockerill v. Willms Transport (1964) Ltd.* (2001), 284 A.R. 256, 2001 ABQB 136; *Ramsay (Tichkowsky) v. Bain* (1995), 170 A.R. 298; *M.S. v. Baker* (2001), 309 A.R. 1, 2001 ABQB 1032; *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, 2002 SCC 9; *Lincoln v. Hayman*, [1982] 2 All E.R. 819; *Hodgson v. Trapp*, [1989] 1 A.C. 807; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *The Queen v. Jennings*, [1966]

serviront à des fins légitimes comme le soulagement de besoins réels, il semble injuste du point de vue des contribuables de permettre à certains demandeurs de toucher ces fonds et de recevoir ce montant une deuxième fois sous forme de dommages-intérêts.

La Cour d'appel a correctement statué que le montant accordé au titre de la perte de capacité de gain devait être considéré comme une indemnité pour la perte d'un flux de revenu s'étendant sur la période ayant précédé le procès, et que l'intérêt avant jugement devait donc être calculé semestriellement, conformément à l'al. 1(2)*b*) de la *Court Order Interest Act*. La Cour d'appel a toutefois commis une erreur en substituant sa propre évaluation du montant des dommages-intérêts qu'il convenait d'accorder. L'évaluation par la juge de première instance de la part du dommage subi par l'intimée qui était attribuable à l'agression commise par son père d'accueil constitue un jugement sur les faits qu'une cour d'appel ne peut infirmer en l'absence d'une erreur « manifeste et dominante », et il ne se trouvait aucune erreur manifeste et dominante dans l'approche adoptée par la juge de première instance.

La juge Arbour (dissidente en partie) : La responsabilité du fait d'autrui a été établie en l'espèce. La relation entre l'État et les parents de famille d'accueil est suffisamment étroite pour engager la responsabilité du fait d'autrui. En outre, l'acte fautif est si étroitement lié au pouvoir et à l'intimité qui résultent de la relation existant au sein d'une famille d'accueil qu'on peut à juste titre avancer que l'habilitation des parents d'accueil par l'État a sensiblement accru le risque d'agression sexuelle des enfants confiés à leurs soins. Il n'y a pas manquement à une obligation intransmissible pour les motifs que les juges formant la majorité ont exposés dans *K.L.B.* Il y a accord avec la majorité sur la question des dommages-intérêts.

Jurisprudence

Citée par la juge en chef McLachlin

Arrêt appliqué : *K.L.B c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51; **arrêts mentionnés :** *E.D.G. c. Hammer*, [2003] 2 R.C.S. 459, 2003 CSC 52; *M. (M.) c. F. (R.)* (1997), 52 B.C.L.R. (3d) 127; *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; *Bustard c. Boucher*, [1997] A.N.-B. nº 39 (QL); *Cockerill c. Willms Transport (1964) Ltd.* (2001), 284 A.R. 256, 2001 ABQB 136; *Ramsay (Tichkowsky) c. Bain* (1995), 170 A.R. 298; *M.S. c. Baker* (2001), 309 A.R. 1, 2001 ABQB 1032; *Krangle (Tutrice à l'instance de) c. Brisco*, [2002] 1 R.C.S. 205, 2002 CSC 9; *Lincoln c. Hayman*, [1982] 2 All E.R. 819; *Hodgson c. Trapp*, [1989] 1 A.C. 807; *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *The*

2003 SCC 53 (CanLII)

S.C.R. 532; *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

By Arbour J. (dissenting in part)

K.L.B v. British Columbia, [2003] 2 S.C.R. 403, 2003 SCC 51.

Statutes and Regulations Cited

BC Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27.
Court Order Interest Act, R.S.B.C. 1996, c. 79, s. 1(1), (2).
Guaranteed Available Income for Need Act, R.S.B.C. 1979, c. 158.
Health and Other Services (Compensation) Act 1995 (Cth.).
Protection of Children Act, R.S.B.C. 1960, c. 303 [am. 1968, c. 41], ss. 8(8), 11(1), 11A(1) [am. 1973, c. 71, s. 6], 15(3).
Social Security (Recovery of Benefits) Act 1997 (U.K.), 1997, c. 27.

Authors Cited

Cooper-Stephenson, Kenneth D. *Personal Injury Damages in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1996.
Fleming, John G. *The Law of Torts*, 9th ed. Sydney, Australia: LBC Information Services, 1998.
Great Britain. Royal Commission on Civil Liability and Compensation for Personal Injury. Report, vol. I. London: Her Majesty's Stationery Office, 1978.
Lewis, Richard. "Deducting collateral benefits from damages: principle and policy" (1998), 18 *Legal Studies* 15.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (2001), 197 D.L.R. (4th) 385 (*sub nom. B. (M.) v. British Columbia*), [2001] 5 W.W.R. 6, 151 B.C.A.C. 70, 249 W.A.C. 70, 87 B.C.L.R. (3d) 12, 4 C.C.L.T. (3d) 163, [2001] B.C.J. No. 586 (QL), 2001 BCCA 227, with supplementary reasons (2002), 10 C.C.L.T. (3d) 76, 99 B.C.L.R. (3d) 256, 164 B.C.A.C. 247, 268 W.A.C. 247, 211 D.L.R. (4th) 295, [2002] 5 W.W.R. 327, [2002] B.C.J. No. 390 (QL), 2002 BCCA 142, varying a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 909 (QL), 2000 BCSC 735. Appeal

Queen c. Jennings, [1966] R.C.S. 532; *Earnshaw c. Despins* (1990), 45 B.C.L.R. (2d) 380; *Palmer c. Goodall* (1991), 53 B.C.L.R. (2d) 44; *Pallos c. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33.

Citée par la juge Arbour (dissidente en partie)

K.L.B c. Colombie-Britannique, [2003] 2 R.C.S. 403, 2003 CSC 51.

Lois et règlements cités

BC Benefits (Income Assistance) Act, R.S.B.C. 1996, ch. 27.
Court Order Interest Act, R.S.B.C. 1996, ch. 79, art. 1(1), (2).
Guaranteed Available Income for Need Act, R.S.B.C. 1979, ch. 158.
Health and Other Services (Compensation) Act 1995 (Cth.).
Protection of Children Act, R.S.B.C. 1960, ch. 303 [mod. 1968, ch. 41], art. 8(8), 11(1), 11A(1) [mod. 1973, ch. 71, art. 6], 15(3).
Social Security (Recovery of Benefits) Act 1997 (U.K.), 1997, ch. 27.

Doctrine citée

Cooper-Stephenson, Kenneth D. *Personal Injury Damages in Canada*, 2nd ed. Scarborough, Ont. : Carswell, 1996.
Fleming, John G. *The Law of Torts*, 9th ed. Sydney, Australia : LBC Information Services, 1998.
Grande-Bretagne. Royal Commission on Civil Liability and Compensation for Personal Injury. Report, vol. I. London : Her Majesty's Stationery Office, 1978.
Lewis, Richard. « Deducting collateral benefits from damages : principle and policy » (1998), 18 *Legal Studies* 15.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (2001), 197 D.L.R. (4th) 385 (*sub nom. B. (M.) c. British Columbia*), [2001] 5 W.W.R. 6, 151 B.C.A.C. 70, 249 W.A.C. 70, 87 B.C.L.R. (3d) 12, 4 C.C.L.T. (3d) 163, [2001] B.C.J. No. 586 (QL), 2001 BCCA 227, avec motifs supplémentaires (2002), 10 C.C.L.T. (3d) 76, 99 B.C.L.R. (3d) 256, 164 B.C.A.C. 247, 268 W.A.C. 247, 211 D.L.R. (4th) 295, [2002] 5 W.W.R. 327, [2002] B.C.J. No. 390 (QL), 2002 BCCA 142, qui a modifié une décision de la Cour suprême de la Colombie-Britannique, [2000] B.C.J. No. 909 (QL), 2000

2003 SCC 53 (CanLII)

allowed and cross-appeal dismissed, Arbour J. dissenting in part.

John J. L. Hunter, *Q.C.*, *Thomas H. MacLachlan*, *Q.C.*, and *Karen Horsman*, for the appellant/respondent on cross-appeal.

Gail M. Dickson, *Q.C.*, *Karen E. Jamieson* and *Cristen L. Gleeson*, for the respondent/appellant on cross-appeal.

David Sgayias, *Q.C.*, and *Kay Young*, for the intervener the Attorney General of Canada.

Susan M. Vella and *Elizabeth K. P. Grace*, for the intervener the Nishnawbe Aski Nation.

Christopher E. Hinkson, *Q.C.*, and *Guy P. Brown*, for the intervener the Insurance Corporation of British Columbia.

David Paterson and *Diane Soroka*, for the interveners Patrick Dennis Stewart et al.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ. was delivered by

1 THE CHIEF JUSTICE — The main issue in this appeal is whether the government is liable for the sexual assault of a foster child by her foster father, under the doctrines of vicarious liability or breach of non-delegable duty. Issues also arise on the trial judge's damage awards.

2 The appeal was heard together with *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51, and *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52. In *K.L.B.*, this Court considered in detail whether the government should be held liable for the abuse of foster children by foster parents, and on what basis. The principles established in that case are determinative of this appeal.

BCSC 735. Pourvoi accueilli et pourvoi incident rejeté, la juge Arbour est dissidente en partie.

John J. L. Hunter, *c.r.*, *Thomas H. MacLachlan*, *c.r.*, et *Karen Horsman*, pour l'appelante/intimée au pourvoi incident.

Gail M. Dickson, *c.r.*, *Karen E. Jamieson* et *Cristen L. Gleeson*, pour l'intimée/appelante au pourvoi incident.

David Sgayias, *c.r.*, et *Kay Young*, pour l'intervenant le procureur général du Canada.

Susan M. Vella et *Elizabeth K. P. Grace*, pour l'intervenante la Nation Aski Nishnawbe.

Christopher E. Hinkson, *c.r.*, et *Guy P. Brown*, pour l'intervenante Insurance Corporation of British Columbia.

David Paterson et *Diane Soroka*, pour les intervenants Patrick Dennis Stewart et autres.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel et Deschamps rendu par

LA JUGE EN CHEF — Le présent pourvoi porte principalement sur la question de savoir si, en vertu de la règle de la responsabilité du fait d'autrui ou en raison de son manquement à une obligation intransmissible, l'État est responsable de la violence sexuelle exercée par un père de famille d'accueil contre une enfant placée chez lui. Il y est également question des dommages-intérêts accordés par la juge de première instance.

Le pourvoi a été entendu conjointement avec les affaires *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51, et *E.D.G. c. Hammer*, [2003] 2 R.C.S. 459, 2003 CSC 52. Dans *K.L.B.*, notre Cour a examiné en détail la question de savoir sur quel fondement, le cas échéant, l'État doit être tenu responsable des mauvais traitements que les parents de famille d'accueil infligent aux enfants qui leur sont confiés. Les principes établis dans cette affaire déterminent l'issue du présent pourvoi.

2003 SCC 53 (CanLII)

On the basis of the principles established in *K.L.B.*, and for the reasons that follow, I would allow the appeal.

I. Background

The respondent, M.B., was apprehended by the British Columbia Ministry of Social Services in May 1975, at the age of 13. She had come from a severely troubled home. Her mother was chronically ill and suffered from ongoing drug dependency. Her father was frequently violent and had abused M.B. for eight years beginning when she was four years old. He was eventually convicted of a number of criminal offences relating to his sexual abuse of her.

In July 1975, M.B. was made a temporary ward of the Superintendent of Child Welfare, and placed in the foster home of Mr. and Mrs. P. The couple had been foster parents for many years. Mrs. P. was ill at the time that M.B. lived with them, and so Mr. P. assumed primary care for her and for the two other foster children who lived in the home from 1975 to 1976.

Mr. P. engaged in sexually inappropriate behaviour during this time. This included masturbating in public areas of the home where the foster girls could observe him; engaging in physical contact with M.B. and one other foster girl that caused them discomfort; and offering M.B. a ring and use of a car in exchange for sex, an offer that she rejected. According to the trial judge, neither Mr. P.'s friends nor the children's social workers were in a position to observe this inappropriate behaviour on their visits to the home, since he did not engage in it while adults were visiting. M.B. did not tell anyone about Mr. P.'s inappropriate behaviour while she was living in the home.

During this time, M.B.'s social worker took few if any steps to supervise and monitor the placement. The trial judge found no evidence that she visited the P. home or had any direct contact with M.B. during the time that she was there. She did offer M.B. counselling for her prior experience of sexual

Sur le fondement des principes établis dans *K.L.B.*, et pour les motifs qui suivent, je suis d'avis d'accueillir le pourvoi. 3

I. Les faits

L'intimée, M.B., a été appréhendée par le Ministry of Social Services de la Colombie-Britannique en mai 1975, à l'âge de 13 ans. Elle venait d'une famille grandement perturbée. Sa mère souffrait de maladie chronique et avait développé une dépendance aux médicaments. Son père était souvent violent et avait agressé sexuellement M.B. alors qu'elle n'avait que quatre ans et pendant les huit années qui allaient suivre. Il a par la suite été déclaré coupable d'un certain nombre d'infractions criminelles pour les agressions sexuelles commises contre elle. 4

En juillet 1975, M.B. a été placée sous la tutelle provisoire du Superintendent of Child Welfare, puis chez M. et M^me^ P. qui étaient parents d'accueil depuis de nombreuses années. Madame P. étant malade à l'époque où M.B. vivait avec eux, c'est principalement M. P. qui a pris soin de M.B. et des deux autres enfants hébergés dans la famille en 1975 et 1976. 5

Monsieur P. a commencé à cette époque à se livrer à des comportements sexuellement inappropriés. Il s'est notamment masturbé dans des aires communes de la maison où les filles confiées aux soins de la famille pouvaient l'observer, il a eu des contacts physiques avec M.B. et une autre fille qu'il hébergeait, les mettant toutes deux mal à l'aise, et il a offert à M.B. une bague et l'usage d'une voiture en échange de faveurs sexuelles, ce qu'elle a refusé. Selon la juge de première instance, ni les amis de M. P. ni les travailleurs sociaux s'occupant des enfants n'ont eu l'occasion d'observer ces comportements inappropriés lors de leurs visites, puisque M. P. ne se livrait pas à de tels actes en présence d'adultes. Pendant son séjour chez lui, M.B. n'a jamais parlé à quiconque du comportement inapproprié de M. P. 6

Au cours de cette période, la travailleuse sociale s'occupant de M.B. a pris peu de mesures, sinon aucune, pour surveiller et contrôler son placement en famille d'accueil. La juge de première instance n'a relevé aucune preuve de visites au domicile des P. ou de contacts directs avec M.B. lorsque celle-ci 7

2003 SCC 53 (CanLII)

abuse by her father. However, M.B. either refused or did not continue with this counselling.

8 Mr. P. sexually assaulted M.B. near the end of June 1976. She left the home immediately, and returned to her mother's house. The trial judge found that she did not tell her social worker that the assault had taken place. She also found that the lack of a good relationship between M.B. and her social worker would have made it highly unlikely that further counselling would have induced M.B. to go to a new foster home.

9 M.B.'s life at home with her mother and brother was chaotic. Although her father had stopped visiting the home and was no longer a threat, her mother was still addicted to prescription drugs and was hospitalized from time to time for overdoses. M.B. became primarily responsible for the care of her mother and her brother. She did not finish Grade 9 and was expelled from school in Grade 10. Although social workers attempted to provide help to the family, most of this help was directed towards M.B.'s mother and younger brother. Her mother received drug counselling; and social workers were assigned to her brother to try to motivate him to attend school. Her mother committed suicide in 1983.

10 Both Mr. and Mrs. P. had died by the time that M.B. initiated her action in 1997. M.B. brought claims against the Crown for negligence, vicarious liability, breach of non-delegable duty and breach of fiduciary duty. She initially joined her biological father as a defendant, but a settlement with him was reached prior to trial.

11 At trial, Levine J. found that although M.B.'s social workers were negligent in their monitoring and supervision of the placement, this negligence was not a cause of the abuse ([2000] B.C.J. No. 909 (QL), 2000 BCSC 735). In Levine J.'s assessment, more frequent visits to the P. home would not have enabled social workers to detect the sexually inappropriate behaviour of Mr. P., or to suspect that he would assault M.B. Although regular contact with

y vivait. La travailleuse sociale lui a certes offert une aide psychologique pour avoir été agressée sexuellement par son père, mais soit que M.B. ait refusé cette aide, soit qu'elle y ait mis un terme.

C'est vers la fin de juin 1976 que M. P. a agressé sexuellement M.B. Celle-ci a quitté immédiatement le foyer d'accueil et est retournée chez sa mère. La juge de première instance a constaté que M.B. n'avait pas fait part de cette agression à la travailleuse sociale. Elle a également estimé que, vu l'absence d'une bonne relation entre M.B. et la travailleuse sociale, il aurait été très surprenant qu'une aide psychologique additionnelle incite M.B. à aller vivre dans un autre foyer d'accueil.

La vie de M.B. à la maison, avec sa mère et son frère, était chaotique. Même si son père avait cessé de leur rendre visite et ne représentait désormais plus une menace, sa mère souffrait toujours de pharmacodépendance et était hospitalisée périodiquement pour des surdoses. M.B. a dû s'occuper au premier chef de sa mère et de son frère. Elle n'a pas terminé sa 9^{e} année et a été expulsée de l'école en 10^{e} année. Les travailleurs sociaux ont tenté d'aider la famille, mais leur aide était surtout dirigée vers la mère et le jeune frère de M.B. Sa mère a bénéficié de services pour sa toxicomanie et des travailleurs sociaux ont été chargés de motiver son frère à fréquenter l'école. Sa mère s'est suicidée en 1983.

Monsieur et M^{me} P. étaient tous deux décédés lorsque M.B. a intenté son action en 1997. M.B. a poursuivi l'État, alléguant la négligence, la responsabilité du fait d'autrui, le manquement à une obligation intransmissible et le manquement à une obligation fiduciaire. Le père biologique de M.B. avait initialement été constitué défendeur, mais un règlement est intervenu avant la tenue du procès.

En première instance, la juge Levine a considéré que, bien que les travailleurs sociaux s'occupant de M.B. aient fait preuve de négligence dans la surveillance et le contrôle du placement, cette négligence n'était pas une cause des agressions ([2000] B.C.J. No. 909 (QL), 2000 BCSC 735). À son avis, même si les visites au domicile des P. avaient été plus fréquentes, les travailleurs sociaux n'auraient pu détecter le comportement sexuellement inapproprié

2003 SCC 53 (CanLII)

her social worker and a more trusting and intimate relationship with her might have led M.B. to tell her what was going on, Levine J. felt that this possibility was too speculative to support a finding of causation. However, Levine J. held that the Crown was vicariously liable to M.B. for Mr. P.'s tort, and also for Mr. P.'s breach of his fiduciary duty to her. She also held that his tort also constituted a breach of the Crown's non-delegable duty to look after the welfare of foster children. She held that there was no breach of the Crown's fiduciary duty, on the grounds that the Crown did not take advantage of M.B.'s trust for its own personal advantage.

de M. P. ni soupçonner qu'il allait agresser M.B. Quoiqu'un contact régulier avec la travailleuse sociale chargée de son cas et une relation de confiance plus intime avec elle eussent pu inciter M.B. à lui révéler les incidents, la juge Levine a estimé que cette possibilité était trop hypothétique pour conclure à un lien de causalité. Elle a toutefois tenu l'État responsable du fait d'autrui pour le délit civil commis par M. P. contre M.B. ainsi que pour le manquement de ce dernier à son obligation fiduciaire envers elle. La juge Levine a aussi estimé que le délit commis par M. P. constituait également un manquement à l'obligation intransmissible de l'État de veiller au bien-être des enfants placés en famille d'accueil. Elle a conclu que l'État n'a pas manqué à son obligation fiduciaire parce qu'il n'a pas abusé de la confiance de M.B. pour son propre avantage personnel.

The Crown appealed to the British Columbia Court of Appeal on the issues of vicarious liability and breach of non-delegable duty ((2001), 87 B.C.L.R. (3d) 12, 2001 BCCA 227). A majority of the Court of Appeal dismissed the Crown's appeal, but reduced the award for non-pecuniary loss on the basis that Levine J. had failed to exclude the effects of the abuse that M.B. received from her biological father before entering foster care. Both Prowse J.A. and Mackenzie J.A. upheld the conclusion that the Crown had breached a non-delegable duty. Prowse J.A. also upheld the conclusion that vicarious liability was appropriate. However, Mackenzie J.A. rejected it, on the grounds that the foster parents were not employees of the Crown. McEachern C.J.B.C., in dissent, would have allowed the appeal. In his view, the Crown's lack of control over the day-to-day activities in foster homes rendered vicarious liability inappropriate; and the applicable statute did not, in his mind, impose a non-delegable duty on the Crown to guarantee that no harm came to foster children.

12 L'État a interjeté appel auprès de la Cour d'appel de la Colombie-Britannique sur les questions relatives à la responsabilité du fait d'autrui et au manquement à une obligation intransmissible ((2001), 87 B.C.L.R. (3d) 12, 2001 BCCA 227). Les juges majoritaires de la Cour d'appel ont rejeté l'appel de l'État mais ont réduit l'indemnité pour les pertes non pécuniaires, estimant que la juge Levine avait omis d'exclure les effets imputables à la violence infligée à M.B. par son père biologique avant son placement en famille d'accueil. La juge Prowse et le juge Mackenzie ont tous deux confirmé la conclusion que l'État avait manqué à une obligation intransmissible. La juge Prowse a aussi confirmé la conclusion sur l'opportunité de retenir la responsabilité du fait d'autrui. Le juge Mackenzie a pour sa part rejeté cette conclusion au motif que les parents de famille d'accueil ne sont pas des employés de l'État. Inscrivant sa dissidence, le juge en chef McEachern de la Colombie-Britannique aurait accueilli l'appel. À son avis, l'État ne pouvait être tenu responsable du fait d'autrui parce qu'il n'exerçait aucun contrôle sur les activités quotidiennes des foyers d'accueil; et, dans son esprit, la loi applicable n'imposait pas à l'État l'obligation intransmissible de garantir que les enfants placés en famille d'accueil ne subiraient aucun préjudice.

After the Court of Appeal delivered its judgment, it convened a five-member panel to consider two

13 Après avoir rendu jugement, la Cour d'appel a formé un comité de cinq membres chargé

2003 SCC 53 (CanLII)

2003 SCC 53 (CanLII)

further issues relating to damages. These were whether the social assistance payments received by M.B. should be deducted from her award for past loss of earnings and how prejudgment interest should be calculated on her award for past loss of earnings. The Court of Appeal concluded by a majority of 3-2 that social assistance payments should not have been deducted; but it lowered the award for past loss of earnings on the basis that due consideration should be given to the effects of the prior abuse by M.B.'s biological father ((2002), 99 B.C.L.R. (3d) 256, 2002 BCCA 142). It also held that pre-judgment interest on the award for past loss of earnings should be calculated, not on the entire sum from the time of the tort, as the trial judge had done, but by treating the award as a stream of income received evenly in six-month intervals over the pre-trial period.

14 The Crown now appeals to this Court on the question of liability, and on the question of whether the Court of Appeal was correct in ruling that social assistance payments are not deductible from awards for past loss of earnings. M.B. cross-appeals on two further issues relating to damages: first, whether the Court of Appeal was correct to reduce the awards for non-pecuniary loss and past loss of earnings on the basis that the trial judge failed to factor in the effects of the pre-foster-care abuse, and second, whether the proper method for calculating prejudgment interest on an award for past loss of earnings is by treating the award as a stream of income received evenly in six-month intervals over the pre-trial period.

II. Issues

15 The issues are:

(1) Is the Crown vicariously liable for the sexual abuse of M.B. by her foster father?

de se pencher sur deux autres questions liées aux dommages-intérêts. Il s'agissait de savoir s'il fallait déduire les prestations d'aide sociale versées à M.B. du montant accordé au titre de la perte de revenus passée et de déterminer la façon de calculer les intérêts avant jugement sur ce montant. Par une majorité de trois contre deux, la Cour d'appel a conclu que les prestations d'aide sociale n'auraient pas dû être déduites, mais elle a réduit le montant accordé au titre de la perte de revenus passée au motif qu'il convenait de prendre dûment en compte les effets des agressions antérieures de M.B. par son père biologique ((2002), 99 B.C.L.R. (3d) 256, 2002 BCCA 142). De plus, la cour a statué que les intérêts avant jugement sur l'indemnité pour perte de revenus passée devaient être calculés, non pas sur le plein montant de l'indemnité depuis la commission du délit, comme l'avait fait la juge de première instance, mais bien sur l'indemnité considérée comme un revenu reçu à intervalles réguliers de six mois au cours de la période ayant précédé le procès.

L'État se pourvoit aujourd'hui devant notre Cour sur la question de la responsabilité et sur celle de savoir si la Cour d'appel a correctement statué que les prestations d'aide sociale ne sont pas déductibles du montant accordé pour perte de revenus passée. Dans un pourvoi incident, M.B. soulève deux autres questions liées aux dommages-intérêts, à savoir, premièrement, si la Cour d'appel a eu raison de réduire les montants accordés pour perte non pécuniaire et perte de revenus passée au motif que la juge de première instance a omis de prendre en compte les effets de la violence ayant précédé le placement en foyer d'accueil et, deuxièmement, s'il convient, aux fins de calcul des intérêts avant jugement sur l'indemnité pour perte de revenus passée, de considérer cette indemnité comme un revenu reçu à intervalles réguliers de six mois au cours de la période antérieure au procès.

II. Questions en litige

Nous sommes donc saisis des questions suivantes :

(1) L'État est-il responsable du fait d'autrui pour la violence sexuelle exercée contre M.B. par son père d'accueil?

(2) Did the Crown breach a non-delegable duty?

(3) Did the Court of Appeal err in varying the trial judge's assessment of damages, on the basis of its own judgment regarding apportionment; on the basis that social assistance payments are not deductible; or on the basis that prejudgment interest should be calculated incrementally?

III. Analysis

1. *Is the Crown Vicariously Liable for the Sexual Abuse of M.B. by Her Foster Father?*

This issue is answered in *K.L.B.*, where it is held that the government is not vicariously liable for torts committed by foster parents against foster children in their care on the ground that foster parents are not, in their daily affairs, acting "on account of" or on behalf of the government. For this reason, discussed more fully in *K.L.B.*, it would be inappropriate to hold the Crown vicariously liable for the sexual abuse of M.B. by her foster father. I would therefore allow the Crown's appeal on this issue.

2. *Did the Crown's Conduct Amount to a Breach of a Non-Delegable Duty?*

The applicable statute in the case at bar is the same statute that was considered in *K.L.B.*, albeit with certain amendments which do not affect the substance of the provisions at issue: *Protection of Children Act*, R.S.B.C. 1960, c. 303 (am. S.B.C. 1968, c. 41). (The relevant legislative provisions are reproduced in the Appendix.) As noted in *K.L.B.*, at para. 34, the Act imposes a number of non-delegable duties upon the Superintendent, including: a duty to care for the physical well-being of the child before the child is placed in foster care (s. 8(8)); a duty to place the child in such a place as best meets his or her needs, or to deliver the child to a children's aid society (ss. 11(1) and 11A(1)); and a duty to make a report to the Minister if at any time it appears to the Superintendent that any children's aid society

(2) L'État a-t-il manqué à une obligation intransmissible?

(3) La Cour d'appel a-t-elle commis une erreur en modifiant le montant des dommages-intérêts fixé par la juge de première instance au motif qu'elle les aurait répartis différemment, que les prestations d'aide sociale ne sont pas déductibles ou que les intérêts avant jugement devaient être calculés sur un montant échelonné?

III. Analyse

1. *L'État est-il responsable du fait d'autrui pour la violence sexuelle exercée contre M.B. par son père d'accueil?*

16 La réponse à cette question se trouve dans l'arrêt *K.L.B.*, où l'on a statué que l'État n'est pas responsable du fait d'autrui pour les délits commis par des parents de famille d'accueil contre les enfants qui leur sont confiés, au motif que ces parents n'agissent pas, au jour le jour, « pour le compte » ou au nom de l'État. Pour ce motif, analysé plus en détail dans *K.L.B.*, il serait inopportun de tenir l'État responsable du fait d'autrui pour la violence sexuelle exercée contre M.B. par son père d'accueil. Je suis donc d'avis d'accueillir le pourvoi de l'État sur cette question.

2. *L'État a-t-il manqué à une obligation intransmissible?*

17 Hormis quelques modifications qui ne touchent pas au fond des dispositions en cause, la loi qui s'applique à la présente espèce est la même que celle qui a été examinée dans *K.L.B.* : *Protection of Children Act*, R.S.B.C. 1960, ch. 303 (mod. S.B.C. 1968, ch. 41). (Les dispositions législatives pertinentes sont reproduites dans l'annexe.) Comme on le souligne au par. 34 de *K.L.B.*, la Loi impose au surintendant un certain nombre d'obligations intransmissibles, notamment : veiller au bien-être physique de l'enfant avant son placement en famille d'accueil (par. 8(8)); placer l'enfant dans un établissement propre à répondre le mieux possible à ses besoins ou le confier à une société d'aide à l'enfance (par. 11(1) et 11A(1)); et faire rapport au ministre s'il estime que la société d'aide à l'enfance ou la famille d'accueil

2003 SCC 53 (CanLII)

or foster home is not in the best interests of a child in its custody or care (s.15(3)). These are all non-delegable duties to ensure that certain quite specific actions are performed in connection with the children's care. However, there is no provision in the Act that suggests that the Superintendent stands under a general non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents, such as would render the Superintendent liable for their tortious conduct.

18 For these reasons, laid out in full in *K.L.B.*, I would allow the Crown's appeal on the issue of non-delegable duty.

3. *Was the Court of Appeal Correct to Reduce the Awards for Non-Pecuniary Loss and Past Loss of Earnings?*

19 Given my conclusion that the Crown is not liable to M.B., it is not necessary to decide the three issues pertaining to damages. However, in the interest of providing guidance on the issues raised, I will briefly canvass them.

20 The three issues concerning damage assessment are:

(a) Was the trial judge correct in deducting social assistance benefits from M.B.'s award for "loss of past opportunity to earn income"?

(b) What is the appropriate method for calculating interest on this loss? Should interest be awarded on the full amount of this part of the damage award from the time that the cause of action arose, or should this part of the damage award be treated as a stream of income received evenly over the pre-trial period?

(c) Was the Court of Appeal correct to lower the damage award, on the grounds that Levine J. had failed to exclude the effects of the prior abuse by M.B.'s biological father?

ne sert pas l'intérêt supérieur de l'enfant confié à sa garde ou à ses soins (par. 15(3)). Ce sont toutes là des obligations intransmissibles qui visent à faire en sorte que certains actes bien précis soient accomplis en ce qui concerne les soins aux enfants. Cependant, rien dans la Loi ne donne à penser que le surintendant est soumis à une obligation générale intransmissible de s'assurer qu'aucun enfant ne subisse de préjudice résultant des mauvais traitements ou de la négligence de ses parents d'accueil, obligation qui le rendrait responsable de leur conduite délictueuse.

Pour ces motifs, exposés en détail dans l'arrêt *K.L.B.*, je suis d'avis d'accueillir le pourvoi de l'État sur la question de l'obligation intransmissible.

3. *La Cour d'appel a-t-elle eu raison de réduire le montant de l'indemnité pour perte non pécuniaire et pour perte de revenus passée?*

Étant donné ma conclusion que l'État n'est pas responsable envers M.B., il n'est pas nécessaire de trancher les trois questions relatives aux dommages-intérêts. Cependant, pour guider l'analyse des questions soulevées, je les examinerai brièvement.

Les trois questions relatives à la fixation des dommages-intérêts sont les suivantes :

a) La juge de première instance a-t-elle déduit à juste titre les prestations d'aide sociale de l'indemnité accordée à M.B. pour [TRADUCTION] « perte de la capacité de gagner un revenu dans le passé »?

b) Quelle méthode convient-il d'appliquer pour calculer les intérêts sur cette perte? Les intérêts doivent-ils courir sur le plein montant de cette partie de l'indemnité à compter du moment où la cause d'action a pris naissance, ou cette partie de l'indemnité devrait-elle être considérée comme un flux de revenu, c'est-à-dire comme un revenu reçu à intervalles réguliers au cours de la période ayant précédé le procès?

c) La Cour d'appel a-t-elle eu raison de réduire le montant de l'indemnité au motif que la juge Levine avait omis d'exclure les effets des agressions antérieures de M.B. par son père biologique?

2003 SCC 53 (CanLII)

(a) Deductibility of Social Assistance Benefits

At trial, Levine J. awarded M.B. damages in the amount of $172,726.04. This included damages for "loss of past opportunity to earn income" in the net amount of $10,000. She arrived at the latter figure by deducting social assistance benefits which M.B. had received from a gross award of approximately $132,000. She did not expand on her reasons for deducting the social assistance benefits, save by citing *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127, a decision of the British Columbia Court of Appeal in which that court held that social assistance benefits were deductible.

In its initial judgment on the merits of the case, the Court of Appeal substituted an award of $50,000 for past loss of opportunity to earn income, without deduction of social assistance benefits. Mackenzie J.A. stated, at para. 106, that "the income assistance arrangement is a collateral matter between the plaintiff and the provincial government that should not influence the quantum of the tort award", but did not further elaborate upon the court's reasons for not deducting social assistance benefits.

Counsel applied in writing to the court for clarification of the court's decision concerning the damages award. As a result, the court convened a five-member panel to decide the issues of deductibility of social assistance payments and prejudgment interest. A 3-2 majority held that income assistance benefits should not be deducted from the award for past loss of earnings.

The first question is whether social assistance is a form of income replacement. If it is not, no duplication arises. If it is, the further question arises of whether social assistance can be excluded from the non-duplication rule under an existing or new exception.

a) Déductibilité des prestations d'aide sociale

21 En première instance, la juge Levine a accordé à M.B. des dommages-intérêts de 172 726,04 $. Ce montant comprenait une indemnité au titre de la [TRADUCTION] « perte de la capacité de gagner un revenu dans le passé », au montant net de 10 000 $. Pour arriver à ce dernier montant, elle a déduit les prestations d'aide sociale versées à M.B. d'une indemnité brute d'environ 132 000 $. Elle n'a pas précisé la raison pour laquelle elle déduisait les prestations d'aide sociale, se bornant à renvoyer à l'arrêt *M. (M.) c. F. (R.)* (1997), 52 B.C.L.R. (3d) 127, où la Cour d'appel de la Colombie-Britannique a statué que les prestations d'aide sociale étaient déductibles.

22 Dans son jugement initial au fond, la Cour d'appel a substitué une indemnité de 50 000 $ au titre de la perte de la capacité de gagner un revenu dans le passé, sans déduction des prestations d'aide sociale. Au paragraphe 106 des motifs, le juge Mackenzie dit que [TRADUCTION] « l'arrangement concernant l'aide sociale est une question incidente entre la demanderesse et le gouvernement provincial qui ne devrait pas influer sur le montant des dommages-intérêts », sans autrement préciser pourquoi il ne déduisait pas les prestations d'aide sociale.

23 Les avocats ont présenté à la cour une demande écrite pour obtenir des précisions sur les dommages-intérêts. La cour a donc formé un comité de cinq juges chargé de trancher les questions de la déductibilité des prestations d'aide sociale et des intérêts avant jugement. Par une majorité de trois contre deux, la cour a conclu que les prestations d'aide sociale ne devaient pas être déduites du montant accordé au titre de la perte de revenus passée.

24 Il faut d'abord se demander si l'aide sociale constitue une forme de remplacement du revenu. Dans la négative, il n'y a pas double indemnisation. Dans l'affirmative, il faudra en outre se demander s'il est possible, en vertu d'une exception existante ou nouvelle, de soustraire l'aide sociale à la règle interdisant la double indemnisation.

2003 SCC 53 (CanLII)

(i) *Is Social Assistance a Form of Income Replacement?*

25 It is argued that social assistance is not a form of income replacement, because it is given on the basis of need for the purpose of relieving poverty.

26 In my view, this argument is mistaken. It is true that social assistance benefits are intended to relieve poverty, and that need is the relevant criterion. However, as Smith J.A. pointed out in his dissenting judgment in the Court of Appeal in the case at bar, this does not mean that they are not intended as wage replacement. On the contrary, it suggests that they are intended to replace that part of employment income that would normally be spent on meeting basic needs (para. 162). Most people who require welfare require it because they lack sufficient income to meet their basic needs, and the normal source of sufficient income is employment of one sort or another. Social assistance therefore replaces income that most people would have obtained through employment. It does not purport to replace all of the income they would have obtained if they had a job. It only replaces enough to satisfy basic needs. But it is no less "wage replacement", simply because it only replaces a portion of the income a person might otherwise have had.

27 The arguments to the contrary do not, with respect, withstand scrutiny. Prowse J.A. argued that neither the *Guaranteed Available Income For Need Act*, R.S.B.C. 1979, c. 158 ("*GAIN Act*"), nor the *BC Benefits (Income Assistance) Act*, R.S.B.C. 1996, c. 27 — the legislation under which M.B. received social assistance — describes social assistance as "wage replacement" or "income replacement". However, that is not determinative. Prowse J.A. also argued that past employment and future employability are not prerequisites for obtaining social assistance under this legislation. This too does not seem determinative, since part of the legislature's intent may be to provide a substitute income for those who are unable to work. Prowse J.A.'s third

(i) *L'aide sociale constitue-t-elle une forme de remplacement du revenu?*

On prétend que l'aide sociale n'est pas une forme de remplacement du revenu parce qu'elle est octroyée en fonction des besoins pour soulager la pauvreté.

À mon sens, cet argument est mal fondé. Les prestations d'aide sociale visent assurément à soulager la pauvreté, le besoin étant le critère pertinent à cette fin. Cependant, comme le juge Smith de la Cour d'appel l'a fait remarquer dans ses motifs dissidents en l'espèce, cela ne signifie pas qu'elles ne visent pas à remplacer le salaire. Au contraire, cela indique que ces prestations visent à remplacer la partie du revenu d'emploi qui serait normalement consacrée à la satisfaction des besoins essentiels (par. 162). La plupart des gens qui demandent l'aide sociale le font parce que leur revenu ne leur permet pas de subvenir à leurs besoins essentiels, la source normale d'un revenu suffisant étant l'emploi, quel qu'il soit. L'aide sociale se substitue par conséquent au revenu que la plupart des gens auraient touché grâce à un emploi. Elle n'a pas pour objet de remplacer tout le revenu qu'ils auraient touché s'ils avaient eu un emploi. L'aide sociale ne remplace le revenu d'emploi que dans la mesure nécessaire pour répondre aux besoins essentiels. Elle ne constitue pas moins un « remplacement du revenu » du simple fait qu'elle ne remplace qu'une portion du revenu qu'une personne aurait par ailleurs pu toucher.

En toute déférence, les arguments contraires ne résistent pas à l'examen. La juge Prowse a fait observer que ni la *Guaranteed Available Income For Need Act*, R.S.B.C. 1979, ch. 158 (la « *GAIN* »), ni la *BC Benefits (Income Assistance) Act*, R.S.B.C. 1996, ch. 27 — la loi en vertu de laquelle M.B. a reçu des prestations d'aide sociale —, ne décrivent l'aide sociale comme un « remplacement du revenu » ou un « remplacement du salaire ». Cela n'est toutefois pas déterminant. La juge Prowse a également fait valoir que les emplois antérieurs et l'employabilité future ne constituent pas, sous le régime de cette loi, des conditions préalables à l'octroi de l'aide sociale. Encore une fois, cela ne semble pas déterminant puisque l'intention du

2003 SCC 53 (CanLII)

argument, that the legislation nowhere contemplates repayment of social assistance from the proceeds of a future tort award, again says nothing on the issue of whether social assistance is partial income replacement. Mackenzie J.A. argued that social assistance benefits do not duplicate damages received for a tort because "[t]hey are independent of any loss", such as a loss caused by a tort (para. 104). However, an inability to earn an income through employment is a loss. It is not a loss that is invariably caused by a tort, to be sure. But the test for whether a certain category of collateral benefit "duplicates" a certain head of damages is not whether the benefit was intended as compensation for a loss caused by a tort but simply whether the benefit was of the same type as the particular head of damages in tort law — i.e., in this case, wage replacement. Mackenzie J.A.'s second argument was that the social assistance benefits received by M.B. could not possibly duplicate her entire tort award, because the tort award was made for a much longer period. But an award for loss of earning capacity is really compensation for the loss of the use of that capacity over time. It does not matter, for this purpose, for how much of this period M.B. was on social assistance.

I conclude that nothing has been put forward to displace the common sense proposition that social assistance benefits are a form of wage replacement. It follows that the only way in which they can be non-deductible at common law is if they fit within the charitable benefits exception, or if this Court carves out a new exception. Otherwise, retention of them would amount to double recovery.

législateur était peut-être notamment de fournir un revenu de remplacement à ceux qui sont incapables de travailler. Le troisième argument qu'invoque la juge Prowse, à savoir que nulle part dans la loi on n'envisage le remboursement des prestations d'aide sociale à même le montant d'éventuels dommages-intérêts, ne nous éclaire pas davantage sur la question de savoir si l'aide sociale remplace partiellement le revenu. Le juge Mackenzie a indiqué que les prestations d'aide sociale ne faisaient pas double emploi avec les dommages-intérêts octroyés en indemnisation d'un délit parce qu'elles [TRADUCTION] « sont versées sans égard à quelque perte que ce soit », telle la perte résultant d'un délit (par. 104). Or l'incapacité de gagner un revenu grâce à un emploi est une perte. Certes, il ne s'agit pas invariablement d'une perte résultant d'un délit. Mais pour décider si une certaine catégorie de prestation parallèle « fait double emploi » avec un certain chef de dommage, il ne s'agit pas de se demander si la prestation visait à compenser une perte résultant d'un délit, mais simplement si elle appartient à la même catégorie que le chef précis de dommage invoqué en droit de la responsabilité délictuelle — soit, en l'occurrence, le remplacement du revenu. Comme deuxième argument, le juge Mackenzie a fait valoir que les prestations d'aide sociale versées à M.B. ne pouvaient en aucun cas faire double emploi avec le plein montant des dommages-intérêts, ceux-ci étant accordés pour une période beaucoup plus longue. Or le montant accordé en indemnisation de la perte de capacité de gain compense en réalité la perte de l'usage de cette capacité sur une période quelconque. À cette fin, il importe peu de savoir pendant combien de temps M.B. a reçu de l'aide sociale au cours de cette période.

28 Je conclus qu'aucun argument n'a été avancé pour réfuter la proposition sensée selon laquelle les prestations d'aide sociale constituent une forme de remplacement du revenu. Il s'ensuit que ces prestations ne peuvent être considérées comme non déductibles en common law que si elles tombent sous le coup de l'exception visant les dons de charité, ou si notre Cour crée une nouvelle exception. Autrement, leur non-déduction équivaudrait à une double indemnisation.

2003 SCC 53 (CanLII)

(ii) *Does Social Assistance Fit Within the Charitable Benefits Exception?*

29 Both Prowse J.A. and counsel for M.B. argue in the alternative that social assistance benefits fit within the charitable benefits exception to the rule against double recovery, because they are analogous to charitable benefits in their purpose, which is to relieve need.

30 Although superficially attractive, this argument misconstrues the rationale behind the charitable benefits exception. The rationale for the charitable benefits exception does not concern the purpose of charitable donations. It is therefore irrelevant whether social assistance benefits share the same purpose as charitable donations made by private individuals. The rationale for the exception lies in the effect that a rule of deductibility might have on individuals who wish to help those who are in need: the idea is that they should not be discouraged from doing so. A further rationale is that it is difficult to assess the monetary value of certain forms of private charity — for instance, the value of companionship; the value of assistance with daily errands; or the value of raising and training a "helper dog" to perform tasks that a person who has been rendered disabled can no longer perform (see *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, at p. 370, *per* McLachlin J.).

31 Neither of these rationales for the charitable benefits exception seems to apply in the case of social assistance benefits made by the government, as indeed the Court of Appeal recognized in *M. (M.) v. F. (R.)*, *supra*, where social assistance benefits were deducted from the damage award. It is not difficult to value social assistance benefits. Moreover, since the governmental schemes are already in place, and since individuals are entitled to receive these benefits if they meet the specified criteria, there is no possibility that the government will be discouraged from offering the benefits at all, or will use discretion to deny them to people who may in the future receive a damage award. As for counsel for M.B.'s suggestion that taxpayers will balk at the thought of their money "subsidizing" people who engage in

(ii) *L'aide sociale relève-t-elle de l'exception visant les dons de charité?*

Subsidiairement, la juge Prowse et l'avocate de M.B. soutiennent toutes deux que les prestations d'aide sociale relèvent de l'exception visant les dons de charité et qu'elles échappent ainsi à la règle interdisant la double indemnisation parce qu'elles s'apparentent aux dons de charité par leur objet, qui est de soulager le besoin.

Bien qu'attrayant à première vue, cet argument procède d'une mauvaise interprétation du fondement de l'exception visant les dons de charité. Le fondement de cette exception n'est pas lié à l'objet des dons de charité. Il importe donc peu de savoir si les prestations d'aide sociale ont le même objet que les dons de charité versés par des particuliers. La raison d'être de cette exception réside dans l'impact qu'une règle prescrivant la déductibilité pourrait avoir à l'égard des individus désireux d'aider les plus démunis, l'objectif étant de ne pas les en décourager. De plus, il est difficile d'évaluer la valeur pécuniaire de certaines formes de charité privée — de déterminer, par exemple, ce que vaut la compagnie qu'on apporte, l'aide pour faire les courses, ou le fait d'élever un « chien assistant » et de l'entraîner à exécuter les tâches qu'une personne devenue handicapée ne peut plus désormais accomplir (voir *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359, p. 370, la juge McLachlin).

Aucun de ces principes sous-jacents à l'exception visant les dons de charité ne semble s'appliquer dans le cas des prestations d'aide sociale versées par l'État, comme la Cour d'appel l'a effectivement reconnu dans l'arrêt *M. (M.) c. F. (R.)*, précité, où les prestations d'aide sociale ont été déduites du montant des dommages-intérêts. La valeur des prestations d'aide sociale n'est pas difficile à établir. En outre, les régimes publics étant déjà en place et les prestataires ayant droit à l'assistance s'ils satisfont à certains critères, il n'est guère possible que l'État soit dissuadé de verser ces prestations ou recoure à son pouvoir discrétionnaire pour les refuser aux personnes susceptibles dans l'avenir de se voir octroyer des dommages-intérêts. Pour ce qui est du point soulevé par l'avocate de M.B. à savoir que les

2003 SCC 53 (CanLII)

sexual assaults, it seems doubtful that anyone would favour denying social assistance to someone who was genuinely needy on the grounds that if social assistance were given, a tortfeasor might later benefit from the deduction of this sum from a damage award.

(iii) *A Policy-Based Exception for Social Assistance?*

The remaining possibility is that this Court endorse a new exception for social assistance payments from the general rule of deductibility.

It is difficult to find a principled rationale for carving out a new policy-based exception for social assistance. Given that social assistance benefits come out of public funds, and given that taxpayers contribute to these funds in the belief that they will be used for legitimate purposes such as relieving genuine need, it seems unfair to taxpayers to allow certain plaintiffs to recover from these funds and then receive a duplicative payment from a tort award. A policy-based exception creating a rule of non-deductibility for social assistance payments does not, then, seem justifiable on grounds of fairness. Moreover, a rule of non-deductibility of social assistance payments might also lead to inefficient results. If the courts were to affirm such a rule, then legislatures might move to institute schemes to recoup social assistance funds from successful plaintiffs. Current scholarship suggests that such legislative schemes result in less efficient loss distribution than does a simple rule of deductibility of social assistance benefits: see below. It therefore seems difficult to justify creating a new policy-based exception for social assistance, whether on the basis of fairness or on the basis of efficiency.

A further reason for not creating a new exception to the rule of deductibility is the virtually unanimous view of those who have studied the matter that deductibility should prevail.

contribuables s'indigneront à l'idée de « subventionner » des individus se livrant à la violence sexuelle, il semble peu probable qu'on veuille priver d'aide sociale une personne réellement dans le besoin sous prétexte que si l'aide était accordée, l'auteur d'un délit pourrait éventuellement faire déduire les prestations des dommages-intérêts qu'il serait condamné à verser.

(iii) *Une exception de politique générale pour l'aide sociale?*

32 Une dernière possibilité demeure, soit que notre Cour crée, pour les prestations d'aide sociale, une nouvelle exception à la règle générale de la déductibilité.

33 Il est difficile de justifier rationnellement la création d'une nouvelle exception de politique générale visant l'aide sociale. Étant donné que les prestations d'aide sociale proviennent des fonds publics, auxquels les contribuables contribuent en croyant qu'ils serviront à des fins légitimes comme le soulagement de besoins réels, il semble injuste du point de vue des contribuables de permettre à certains demandeurs de toucher ces fonds et de recevoir ce montant une deuxième fois sous forme de dommages-intérêts. Une exception de politique générale prévoyant la non-déductibilité des prestations d'aide sociale semblerait alors injustifiable pour des motifs d'équité. En outre, une règle prescrivant la non-déductibilité des prestations d'aide sociale pourrait aussi s'avérer inefficace. Si les tribunaux confirmaient une telle règle, les législatures instaureraient peut-être des régimes prévoyant le recouvrement des prestations d'aide sociale auprès des demandeurs ayant gain de cause. Les auteurs font valoir que ces régimes donnent lieu à une répartition moins efficace des pertes que la règle simple de la déductibilité des prestations d'aide sociale : voir plus loin. Il semble donc difficile de justifier la création d'une nouvelle exception de politique générale visant l'aide sociale, qu'on la fasse reposer sur des considérations d'équité ou d'efficacité.

34 Une autre raison milite à l'encontre de la création d'une nouvelle exception à la règle de la déductibilité, soit la quasi-unanimité de ceux qui ont examiné la proposition que la déductibilité soit maintenue.

2003 SCC 53 (CanLII)

35 John Fleming argues in *The Law of Torts* (9th ed. 1998) that, because social assistance is based upon need and comes out of public funds, there is "no justification for allowing a claimant to recover in the aggregate from that source [public funds] and the tortfeasor more than an indemnity for his net loss" (p. 280).

36 Ken Cooper-Stephenson, in *Personal Injury Damages in Canada* (2nd ed. 1996), at p. 581, raises economic considerations and concludes that deduction of the benefits from a tort award is "the most satisfactory loss-distribution mechanism", and that it is preferable to allowing the government to recover the value of the social assistance afterwards.

37 Richard Lewis, in "Deducting collateral benefits from damages: principle and policy" (1998), 18 *Legal Studies* 15, likewise favours deductibility. He points out that a simple rule of deductibility "avoids the wasteful litigation and administrative cost sometimes associated with recoupment" (p. 17).

38 In the courts, as well, a general principle of deductibility is becoming increasingly entrenched. In particular, lower courts have held that the rationale for the charitable benefits exception does not apply to social assistance benefits, and that social assistance benefits should be deducted from tort awards for lost earning capacity: see *M. (M.) v. F. (R.)*, *supra*; *Bustard v. Boucher*, [1997] N.B.J. No. 39 (QL) (Q.B.); *Cockerill v. Willms Transport (1964) Ltd.* (2001), 284 A.R. 256, 2001 ABQB 136; *Ramsay (Tichkowsky) v. Bain* (1995), 170 A.R. 298 (Q.B.); *M.S. v. Baker* (2001), 309 A.R. 1, 2001 ABQB 1032.

39 A rule of deductibility is also consistent with this Court's recent judgment in *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, 2002 SCC 9. This case concerned a claim for the costs of future care in a group home once the respondent reached age 19. The trial judge had declined to award damages for these costs on the grounds that in the future,

Dans son ouvrage *The Law of Torts* (9e éd. 1998), John Fleming fait valoir que l'aide sociale étant accordée en fonction des besoins et provenant des fonds publics, [TRADUCTION] « rien ne justifie qu'un demandeur puisse recouvrer de cette source [les fonds publics] et de l'auteur du délit une indemnité excédant sa perte réelle » (p. 280).

Ken Cooper-Stephenson, dans son ouvrage *Personal Injury Damages in Canada* (2e éd. 1996), p. 581, soulève des considérations d'ordre économique et conclut que la déduction des prestations du montant des dommages-intérêts constitue [TRADUCTION] « le mécanisme le plus satisfaisant de répartition des pertes », cette solution étant préférable au recouvrement subséquent par l'État de la valeur de l'aide sociale versée.

Dans son article « Deducting collateral benefits from damages : principle and policy » (1998), 18 *Legal Studies* 15, Richard Lewis préconise lui aussi la déductibilité. Il fait remarquer qu'une règle simple prescrivant la déductibilité [TRADUCTION] « évite les coûts administratifs et les frais de litige qu'entraîne parfois inutilement le recouvrement » (p. 17).

Les tribunaux adoptent également de plus en plus le principe général de la déductibilité. En particulier, les tribunaux d'instance inférieure ont statué que le raisonnement sous-tendant l'exception visant les dons de charité ne s'appliquait pas aux prestations d'aide sociale, et que celles-ci devaient être déduites des dommages-intérêts accordés en matière délictuelle au titre de la perte de la capacité de gain : voir *M. (M.) c. F. (R.)*, précité; *Bustard c. Boucher*, [1997] A.N.-B. no 39 (QL) (B.R.); *Cockerill c. Willms Transport (1964) Ltd.* (2001), 284 A.R. 256, 2001 ABQB 136; *Ramsay (Tichkowsky) c. Bain* (1995), 170 A.R. 298 (B.R.); *M.S. c. Baker* (2001), 309 A.R. 1, 2001 ABQB 1032.

Le principe de la déductibilité est également compatible avec l'arrêt *Krangle (Tutrice à l'instance de) c. Brisco*, [2002] 1 R.C.S. 205, 2002 CSC 9, que nous avons rendu récemment. Cette affaire portait sur une réclamation pour des dommages-intérêts destinés à pourvoir aux besoins futurs de l'intimé en foyer de groupe lorsqu'il aura atteint

2003 SCC 53 (CanLII)

2003 SCC 53 (CanLII)

the respondent would be eligible for monthly social security benefits paid under the very same legislation that is at issue in the case at bar — the *GAIN Act* — which would cover these costs. The Court deemed this the correct conclusion. Although the Court's reasoning turned on the issue of whether it was the parents' or the state's obligation to absorb the costs of their child's disabilities once the child reached adulthood, the case has relevance to the case at bar in that it was clearly an underlying aim of the Court to avoid double recovery in such a situation. If it is appropriate to deduct social assistance benefits that might be received in the future from a damage award, in order to eliminate the risk of double recovery, then it seems it must also be appropriate to deduct social assistance benefits that have been received in the past.

l'âge de 19 ans. Le juge de première instance avait refusé d'accorder des dommages-intérêts pour ces frais au motif que, dans l'avenir, l'intimé serait admissible aux prestations sociales versées mensuellement en vertu de la même loi que celle qui est en cause dans le présent pourvoi — la *GAIN* —, et que ces prestations couvriraient alors ces frais. La Cour a estimé que cette conclusion s'imposait. Quoique le raisonnement de la Cour ait reposé sur la question de savoir si c'est aux parents ou à l'État qu'incombe la responsabilité d'absorber les frais associés à l'invalidité d'un enfant lorsque celui-ci aura atteint l'âge adulte, cet arrêt revêt une certaine pertinence en l'espèce en ce que la Cour visait fondamentalement à éviter la double indemnisation dans une telle situation. S'il convient de déduire du montant des dommages-intérêts les prestations d'aide sociale qui pourraient être versées dans l'avenir, en vue d'éliminer le risque d'une double indemnisation, il conviendrait également, me semble-t-il, de déduire les prestations d'aide sociale qui ont été versées dans le passé.

Finally, other jurisdictions are increasingly moving toward a policy of deductibility. In England, the Pearson Commission concluded in 1978 that:

> . . . the time has come for full co-ordination of the compensation provided by tort and social security. An injured person, or his dependants, should not have the same need met twice, not only because it is inequitable, but because it is wasteful.

(Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978), vol. I, p. 107, at para. 475)

Parliament followed this advice in 1989, introducing a recoupment scheme whereby the state may recoup the value of a number of benefits paid out to those who subsequently receive damage awards. The scheme is now in force through the *Social Security (Recovery of Benefits) Act 1997* (U.K.), 1997, c. 27. Public benefits that fall outside the recoupment scheme are subject to a common law rule of deductibility.

40

Enfin, les autorités d'autres pays tendent de plus en plus à favoriser une politique de déductibilité. En Angleterre, la Commission Pearson concluait en 1978 que :

> [TRADUCTION] . . . le temps est venu de coordonner à tous égards les dommages-intérêts pour la commission d'un délit et la sécurité sociale. Il ne faut pas permettre qu'une personne lésée, ou les personnes à sa charge, soient indemnisées deux fois, non seulement parce que ce serait inéquitable, mais aussi parce que ce serait un gaspillage.

(Rapport de la Royal Commission on Civil Liability and Compensation for Personal Injury (1978), vol. I, p. 107, par. 475)

Suivant ce conseil, le législateur a instauré en 1989 un régime de recouvrement par lequel l'État peut recouvrer le montant de certaines prestations versées à ceux qui se voient par la suite accorder des dommages-intérêts. Ce régime a été mis en vigueur par la *Social Security (Recovery of Benefits) Act 1997* (U.K.), 1997, ch. 27. Les prestations publiques qui ne sont pas visées par le régime de recouvrement sont assujetties à la règle de la déductibilité de la common law.

41 Prior to the enactment of this legislation, both the English Court of Appeal and the House of Lords had recommended deductibility of social assistance benefits (reversing the earlier common law rule of non-deductibility). In *Lincoln v. Hayman*, [1982] 2 All E.R. 819, the Court of Appeal held that a statutory income support payment received by the plaintiff was deductible from an award for past loss of earnings. Lord Waller, at p. 823, gave a helpful statement of why deductibility was necessary to avoid double recovery. The rationale that he put forward there seems also to apply to the case at bar:

> When he [the plaintiff] became unemployed he did not lose the total of his wages because part of that loss was replaced by supplementary benefit. If the supplementary benefit is not taken into account and deducted the plaintiff will recover more damages than he has suffered. It will be a fortuitous windfall.

Similarly, in *Hodgson v. Trapp*, [1989] 1 A.C. 807, the House of Lords stated that statutory benefits in the form of mobility and attendance allowances were deductible from a tort damage award, on the grounds that "[t]o allow double recovery . . . at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground" (p. 823, *per* Lord Bridge).

42 Australia, too, has now enacted legislation to compel reduction or repayment of all social security benefits upon receipt of any form of compensation for the injury, under the *Health and Other Services (Compensation) Act 1995* (see Fleming, *supra*, at p. 280).

43 I conclude that this Court should not carve out a policy-based exception to the rule of deductibility.

(b) Calculation of Prejudgment Interest

44 A second issue pertaining to damages is whether the Court of Appeal adopted the proper approach in

Avant l'édiction de cette loi, la Cour d'appel de l'Angleterre et la Chambre des lords avaient toutes deux recommandé la déductibilité des prestations d'aide sociale (modifiant la règle antérieure de non-déductibilité en common law). Dans *Lincoln c. Hayman*, [1982] 2 All E.R. 819, la Cour d'appel a statué que les prestations versées au demandeur en vertu d'un régime public de soutien du revenu étaient déductibles du montant accordé au titre de la perte de revenus passée. À la p. 823, lord Waller a donné un exposé utile de la raison pour laquelle la déductibilité s'imposait pour éviter la double indemnisation. L'explication qu'il a avancée semble également s'appliquer à la présente espèce :

> [TRADUCTION] Lorsqu'il [le demandeur] a perdu son emploi, il n'a pas perdu tout son revenu étant donné qu'une partie de cette perte a été compensée par une prestation additionnelle. Si la prestation additionnelle n'est pas prise en compte ni déduite, le demandeur sera indemnisé au-delà des dommages qu'il a subis. Il réalisera un profit inattendu.

De même, dans l'arrêt *Hodgson c. Trapp*, [1989] 1 A.C. 807, la Chambre des lords a dit que les prestations prévues par la loi sous forme d'allocations pour les soins et le transport de personnes handicapées étaient déductibles du montant des dommages-intérêts au motif que [TRADUCTION] « [p]ermettre la double indemnisation [. . .] au détriment à la fois des contribuables et des assureurs ne saurait à mon avis se justifier par quelque motif rationnel » (p. 823, lord Bridge).

L'Australie, elle aussi, a adopté une loi prescrivant la réduction ou le recouvrement de toutes les prestations de sécurité sociale dès la réception d'une forme quelconque d'indemnité pour le préjudice subi, en vertu de la *Health and Other Services (Compensation) Act 1995* (voir Fleming, *op. cit.*, p. 280).

Je conclus que notre Cour ne devrait pas créer de nouvelle exception de politique générale à la règle de la déductibilité.

b) Calcul des intérêts avant jugement

La deuxième question relative aux dommages-intérêts consiste à savoir si la Cour d'appel a calculé

2003 SCC 53 (CanLII)

calculating prejudgment interest on the award for loss of earning capacity. The Court of Appeal held that this award should be treated as compensation for the loss of a stream of income received evenly over the pre-trial period, and hence, that prejudgment interest was calculable in six-month intervals under s. 1(2)(b) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 ("*COIA*").

Section 1(1) of the *COIA* establishes a general rule that prejudgment interest at a rate that the court considers appropriate must be added to pecuniary damages. Section 1(2) of the *COIA* provides an exception for this rule in the case of "special damages", the interest for which must be calculated on an incremental basis. It stipulates that:

1 . . .

(2) Despite subsection (1), if the order consists in whole or part of special damages, the interest on those damages must be calculated from the end of each 6 month period in which the special damages were incurred to the date of the order on the total of the special damages incurred

(a) in the 6 month period immediately following the date on which the cause of action arose, and

(b) in any subsequent 6 month period.

Counsel are agreed that the damage award for loss of earning capacity constitutes "special damages". They disagree, however, over how to characterize this loss, and consequently, over when these damages were incurred, for the purposes of s. 1(2). Counsel for M.B. argues that loss of earning capacity is the loss of a capital asset. She contends that it was therefore incurred entirely in "the 6-month period immediately following the date on which the cause of action arose". Consequently, on her view, s. 1(2) requires that the interest on this award be calculated on the full amount of the award from the

comme il se doit les intérêts avant jugement sur le montant accordé au titre de la perte de capacité de gain. La Cour d'appel a statué que ce montant devait être considéré comme une indemnité pour la perte d'un flux de revenu s'étendant sur la période ayant précédé le procès et, partant, que les intérêts avant jugement devaient être calculés semestriellement, conformément à l'al. 1(2)*b*) de la *Court Order Interest Act*, R.S.B.C. 1996, ch. 79 (la « *COIA* »).

45 Le paragraphe 1(1) de la *COIA* énonce la règle générale suivant laquelle les dommages pécuniaires doivent être majorés des intérêts avant jugement au taux que le tribunal estime indiqué. Le paragraphe 1(2) de la *COIA* prévoit une exception à cette règle dans le cas des [TRADUCTION] « dommages-intérêts particuliers », dont les intérêts doivent être calculés à des termes périodiques. Il dispose :

[TRADUCTION]

1 . . .

(2) Par dérogation au paragraphe (1), lorsque l'ordonnance consiste en tout ou en partie en des dommages-intérêts particuliers, les intérêts calculés sur cette somme doivent l'être à compter de la fin de chaque période de 6 mois au cours de laquelle ces dommages particuliers ont été subis jusqu'à la date de l'ordonnance sur le plein montant des dommages particuliers subis

a) au cours de la période de 6 mois suivant immédiatement la date à laquelle la cause d'action a pris naissance et

b) au cours de toute période subséquente de 6 mois.

46 Les avocats s'entendent pour dire que les dommages-intérêts accordés en indemnisation de la perte de capacité de gain constituent des [TRADUCTION] « dommages particuliers ». Ils ne s'accordent cependant pas sur la façon de qualifier cette perte et, par le fait même, sur le moment où ces dommages ont été subis, pour l'application du par. 1(2). L'avocate de M.B. soutient que la perte de capacité de gain équivaut à la perte d'un avoir en capital. Elle prétend donc que cette perte a été entièrement subie [TRADUCTION] « au cours de la période de 6 mois suivant immédiatement la date

2003 SCC 53 (CanLII)

end of the first six months after the tort. Counsel for the Crown argues that the loss for which these damages compensate is not the loss of a capacity *per se*, but rather the loss of the earnings that this capacity would have yielded — earnings that would have been received in a steady stream over the pre-trial period. In his view, s. 1(2) therefore requires that the interest be calculated in six-month increments, beginning six months after the commission of the tort.

à laquelle la cause d'action a pris naissance ». En conséquence, fait-elle valoir, le par. 1(2) exige que l'intérêt applicable soit calculé sur le montant total des dommages-intérêts dès la fin de la première période de six mois suivant la commission du délit. L'avocat de l'État plaide pour sa part que la perte que ces dommages-intérêts visent à compenser n'est pas la perte d'une capacité en soi, mais bien la perte des gains que cette capacité aurait générés — gains qui auraient été obtenus à intervalles réguliers au cours de la période avant procès. Selon lui, le par. 1(2) prescrit donc que l'intérêt soit calculé par tranche de six mois, à compter de la fin de la première période de six mois suivant la commission du délit.

47 There is considerable case law establishing that an award for loss of earning capacity is intended to compensate for the loss of an asset, the capacity to earn. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 251, Dickson J. (as he then was), following *The Queen v. Jennings*, [1966] S.C.R. 532, stated that:

> It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra.* A capital asset has been lost: what was its value?

Subsequent decisions have followed this approach: see *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.), at p. 399; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), at p. 59; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 27. As Finch J.A. noted in *Pallos*, these cases "all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury".

Il existe une jurisprudence abondante établissant que l'indemnité pour perte de capacité de gain vise à compenser la perte d'un avoir, soit la capacité de gain. Dans l'arrêt *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229, le juge Dickson (plus tard Juge en chef), suivant l'arrêt *The Queen c. Jennings*, [1966] R.C.S. 532, a déclaré à la p. 251 :

> La victime doit être indemnisée non pas de la perte de revenus, mais plutôt de la perte de sa capacité de gagner un revenu : *La Reine c. Jennings*, précité. Un avoir en capital a été perdu; quelle était sa valeur?

Cette approche a été retenue dans des décisions subséquentes : voir *Earnshaw c. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.), p. 399; *Palmer c. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), p. 59; *Pallos c. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), par. 27. Comme le juge Finch l'a fait observer dans l'arrêt *Pallos*, ces décisions [TRADUCTION] « considèrent toutes la capacité de gain d'une personne comme un avoir en capital dont la valeur peut être perdue ou diminuée par la réalisation d'un préjudice ».

48 This does not, however, settle the issue of how interest is to be calculated under s. 1(2) of the *COIA*. As Dickson J. noted in *Andrews*, *supra*, there is a further question that must be asked — namely, how do we determine the value of the lost asset?

Cela ne règle cependant pas la question de la méthode de calcul des intérêts sous le régime du par. 1(2) de la *COIA*. Comme le juge Dickson l'a souligné dans l'arrêt *Andrews*, précité, on doit se poser une autre question — à savoir comment déterminer la valeur de l'avoir qui a été perdu.

2003 SCC 53 (CanLII)

As Cooper-Stephenson notes, *supra*, at p. 138, damages under this head are universally quantified on the basis of what the plaintiff would have earned, had the injury not occurred.

As far as concerns lost income, the courts fluctuate between the notion of "loss of earnings" and "loss of earning capacity", not for the most part intending any aspect of the substance of an assessment to depend on the particular wording, since damages are universally quantified on the basis of what the plaintiff *would have*, not what he or she *could have* earned absent the injury. [Emphasis in original.]

These damages are not, then, based on a fixed value that has been assigned to an abstract capacity to earn. Rather, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time, had the tort not been committed. It follows that the loss of this value — the loss that the plaintiff has sustained, and that the damage award is intended to compensate for — should be treated as a loss sustained over time, rather than as a loss incurred entirely at the time that the tort was committed. Section 1(2) of the *COIA* therefore requires that interest be calculated in six-month increments, beginning six months after the commission of the tort.

A further consideration supporting this approach, as Mackenzie J.A. noted, is the desirability of avoiding overcompensation for the effects of inflation. Since the loss in this case occurred 20 years prior to the trial and inflation was considerable over the interim, an award of interest of the full amount of the damages from the time of the tort would give M.B. more than is necessary to compensate her for her loss, and would vastly overcompensate her for the effects of inflation. While this consideration alone might not provide sufficient reason to calculate interest in six-month increments, it shows that the approach we have recommended on conceptual grounds, far from having objectionable policy implications, seems to be the only adequate approach from the standpoint of policy.

Ainsi que l'a fait remarquer Cooper-Stephenson, *op. cit.*, p. 138, les dommages sous ce chef sont universellement quantifiés en fonction du revenu que le demandeur aurait gagné si le préjudice ne s'était pas réalisé : 49

[TRADUCTION] En ce qui concerne le revenu perdu, les tribunaux oscillent entre la notion de « perte de revenus » et celle de « perte de la capacité de gain », non pas généralement qu'ils veuillent faire reposer quelque aspect fondamental d'un examen sur un libellé en particulier, puisque les dommages sont universellement quantifiés en fonction du revenu que le demandeur *aurait gagné*, et non pas de celui qu'il *aurait pu gagner* n'eût été le préjudice. [En italique dans l'original.]

Par conséquent, ces dommages ne sont pas établis suivant une valeur fixe correspondant à une capacité abstraite de gain. La valeur attribuée à la capacité de gain d'un demandeur équivaut plutôt à la valeur des revenus qu'il aurait touchés au fil des années, n'eût été le délit. Il s'ensuit que la perte de cette valeur — la perte que le demandeur a subie et que les dommages-intérêts visent à compenser — devrait être considérée comme une perte subie au fil des années plutôt que comme une perte subie entièrement au moment de la commission du délit. Le paragraphe 1(2) de la *COIA* prescrit donc que l'intérêt soit calculé semestriellement, à compter de la fin de la première période de six mois suivant la commission du délit. 50

Comme le juge Mackenzie de la Cour d'appel l'a souligné, une autre considération militant en faveur de cette approche est l'opportunité d'éviter de surcompenser les effets de l'inflation. Vu que la perte en l'espèce est survenue vingt ans avant le procès et que l'inflation a été considérable dans l'intervalle, accorder à M.B. des intérêts sur le plein montant des dommages-intérêts depuis la commission du délit irait au-delà de ce qui est nécessaire pour qu'elle soit indemnisée de la perte subie, en plus de surcompenser considérablement les effets de l'inflation. Quoique cette considération ne suffise pas en soi à justifier le calcul semestriel des intérêts, elle montre que, loin d'avoir des incidences indésirables sur le plan de la politique générale, l'approche conceptuelle que nous préconisons semble être la seule qui soit satisfaisante du point de vue de l'intérêt public. 51

2003 SCC 53 (CanLII)

(c) The Court of Appeal's Reduction of the Damage Award

52 It remains to consider whether the Court of Appeal was correct to reduce the damage award. The court did so on the grounds that because the damage award was at the high end of the spectrum, Levine J. must have failed to exclude the effects of the abuse that M.B. had received at the hands of her biological father, prior to entering foster care.

53 When assessing damages, Levine J. explicitly acknowledged that M.B.'s "'original position' must be taken into account in awarding damages" (para. 265). She then went on to note that "[t]his does not relieve J.P. [the foster father] of his measure of responsibility for the plaintiff's injuries" (para. 266). With respect to the foster father's contribution to M.B.'s injuries, she concluded that "[t]he plaintiff's condition was significantly exacerbated by the repetition of a type of behaviour that could only serve to reinforce a distrustful and flawed view of human relationships" (para. 266 (emphasis added)). It was this damage for which she held the Crown liable.

54 The trial judge's assessment of what proportion of the damage sustained by M.B. was caused by the foster father's assault is a judgment of fact, which an appellate court cannot set aside absent "palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. I can find no palpable and overriding error in the trial judge's approach. The Court of Appeal therefore erred in substituting its own assessment of the appropriate quantum of damages.

IV. Conclusions

55 For the reasons given above, I would allow the appeal and dismiss the cross-appeal.

c) La réduction du montant des dommages-intérêts par la Cour d'appel

Il reste à examiner la question de savoir si la Cour d'appel a eu raison de réduire le montant des dommages-intérêts. Cette réduction s'imposait selon elle parce que, le montant accordé se situant à l'extrémité supérieure du spectre, la juge Levine a dû omettre d'exclure les effets attribuables à la violence que M.B. avait subie de la part de son père biologique avant d'être placée en famille d'accueil.

Dans son évaluation des dommages, la juge Levine a expressément reconnu que [TRADUCTION] « la "situation initiale" [de M.B.] doit être prise en compte dans l'attribution des dommages-intérêts » (par. 265). Elle a ensuite souligné que [TRADUCTION] « [c]ela n'exonère pas J.P. [le père d'accueil] de sa part de responsabilité pour le préjudice qu'a subi la demanderesse » (par. 266). S'agissant de la faute contributive du père d'accueil, la juge a conclu que [TRADUCTION] « [l]'état de la demanderesse a été considérablement aggravé par la répétition d'un type de comportement qui ne pouvait que renforcer une perception erronée des rapports humains, teintée de méfiance » (par. 266 (je souligne)). C'est précisément pour ce dommage qu'elle a tenu l'État responsable.

L'évaluation par la juge de première instance de la part du dommage subi par M.B. qui était attribuable à l'agression commise par son père d'accueil constitue un jugement sur les faits qu'une cour d'appel ne peut infirmer en l'absence d'une « erreur manifeste et dominante » : *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33. Je ne relève aucune erreur manifeste et dominante dans l'approche adoptée par la juge de première instance. La Cour d'appel a donc commis une erreur en substituant sa propre évaluation du montant des dommages-intérêts qu'il convenait d'accorder.

IV. Conclusions

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi et de rejeter le pourvoi incident.

2003 SCC 53 (CanLII)

The following are the reasons delivered by

ARBOUR J. (dissenting in part) — This case, like its companion case *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51, raises the issue of whether, and on what grounds, the government can be held liable for abuse committed by a foster parent against a child in foster care. Specifically, this case requires the Court to consider whether the government can be held liable for the sexual assault of the respondent by her foster father while she was living in foster care based on the doctrines of vicarious liability and breach of non-delegable duty.

I find that vicarious liability is made out in this case, substantially for the reasons I provide in *K.L.B.* In brief, it is my view, the relationship between the state and foster parents is sufficiently close that the relationship is capable of attracting vicarious liability. In addition, the wrongful act is so closely associated with the power and intimacy created by the foster care relationship that it can fairly be said that the government's empowerment of foster parents materially increased the risk of sexual abuse of foster children.

I am in agreement with the Chief Justice, however, that there is no breach of non-delegable duty for the reasons she set out in *K.L.B.* and I would dispose of the damages issues as she does. I would accordingly dismiss the appeal on the issue of liability and allow the appeal on the issue of damages. I would allow the cross-appeal in part.

APPENDIX

Relevant Legislative Provisions

Protection of Children Act, R.S.B.C. 1960, c. 303 (am. S.B.C. 1968, c. 41)

8. . . .

(8) Subject to subsection (7), from the time that a child is apprehended under section 7 until final disposition of

Version française des motifs rendus par

56 LA JUGE ARBOUR (dissidente en partie) — Le présent pourvoi, tout comme le pourvoi connexe *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51, porte sur la question de savoir sur quels fondements, le cas échéant, l'État pourrait être tenu responsable des mauvais traitements infligés par un parent de famille d'accueil à un enfant qui lui a été confié. Plus particulièrement, la Cour est appelée à étudier la question de la responsabilité de l'État pour l'agression sexuelle commise contre l'intimée par le père de la famille d'accueil où elle était placée, suivant les règles de la responsabilité du fait d'autrui et du manquement à une obligation intransmissible.

57 Je suis d'avis que la responsabilité du fait d'autrui a été établie en l'espèce, et ce, essentiellement pour les motifs que j'ai exposés dans *K.L.B.* En bref, j'estime que la relation entre l'État et les parents de famille d'accueil est suffisamment étroite pour engager la responsabilité du fait d'autrui. En outre, l'acte fautif est si étroitement lié au pouvoir et à l'intimité qui résultent de la relation existant au sein d'une famille d'accueil qu'on peut à juste titre avancer que l'habilitation des parents d'accueil par l'État a sensiblement accru le risque d'agression sexuelle des enfants confiés à leurs soins.

58 Je conviens toutefois avec la juge en chef McLachlin qu'il n'y a pas manquement à une obligation intransmissible pour les motifs qu'elle a exposés dans *K.L.B.*, et je trancherais la question des dommages-intérêts comme elle le fait. En conséquence, je rejetterais le pourvoi en ce qui a trait à la question de la responsabilité et je l'accueillerais en ce qui concerne la question des dommages-intérêts. J'accueillerais en partie le pourvoi incident.

ANNEXE

Dispositions législatives pertinentes

Protection of Children Act, R.S.B.C. 1960, ch. 303 (mod. S.B.C. 1968, ch. 41)

[TRADUCTION] **8.** . . .

(8) Sous réserve du paragraphe (7), la personne qui appréhende un enfant est, dès l'appréhension fondée sur

2003 SCC 53 (CanLII)

the case by the Judge, the person who apprehends the child is responsible for the care, maintenance, and physical well-being of the child, and no liability shall attach either to such person or to any duly qualified physician or surgeon by reason only that the child is provided with necessary medical or surgical care during such time.

11A. (1) Where a child is committed to the care and custody of the Superintendent by an order, or delivered to him pursuant to subsection (2) of section 11, the Superintendent is thereupon the legal guardian of the person of the child, and he is authorized to take, and shall receive, the child into his custody. The Superintendent shall make arrangements as soon as may be for the placement of the child in a foster home, or such other place as will best meet the needs of the child.

(2) Where a child is committed to the care and custody of a society by an order, or delivered to a society pursuant to subsection (1) or (2) of section 11, the society is thereupon the legal guardian of the person of the child, and the society is authorized to take, and shall receive, the child into its custody.

(3) It is the duty of the society to use special diligence in providing suitable foster homes for such children as are committed to its care, and the society is hereby authorized to place such children in foster homes on a written agreement, during minority, or for any less period in the discretion of the society. . . .

14. Every society to whose care any child is committed under the provisions of this Act, and every person entrusted with the care of the child by any such society, shall from time to time permit the child to be visited, and any place where the child may be, or reside, to be inspected by the Superintendent or by any person authorized by the Superintendent for the purpose.

15. (1) Every organization that deals with or cares for children . . . shall, in addition to all other requirements of this Act, upon request of the Superintendent or of any person authorized by the Minister,

(*a*) furnish to the Superintendent or person so authorized full information and particulars concerning every child with whom the organization has dealt, or to whom the organization has given care, or of whom the organization has had the custody; and

(*b*) permit the Superintendent or person so authorized to have access to all parts of the premises and buildings of the organization . . . and to all children therein, and to all books and records of the organization.

. . .

l'article 7 et jusqu'à ce qu'un juge statue définitivement sur le cas, responsable des soins, de l'entretien et du bien-être physique de l'enfant, et ni elle ni le médecin ou chirurgien dûment qualifié n'engagent leur responsabilité du seul fait que l'enfant reçoit des soins médicaux ou chirurgicaux nécessaires pendant cette période.

11A. (1) Lorsqu'un enfant est confié par ordonnance aux soins et à la garde du surintendant, ou lorsqu'un enfant lui est confié en vertu du paragraphe 11(2), le surintendant devient de ce fait le tuteur légal de l'enfant, qu'il peut dès lors prendre et doit recevoir sous sa garde. Le surintendant prend le plus tôt possible les mesures voulues pour le placer dans la famille d'accueil ou l'établissement qui répondra le mieux possible à ses besoins.

(2) Lorsqu'un enfant est confié par ordonnance aux soins et à la garde d'une société, ou lorsqu'un enfant lui est confié en vertu des paragraphes 11(1) ou 11(2), la société devient de ce fait le tuteur légal de l'enfant, qu'elle peut dès lors prendre et doit recevoir sous sa garde.

(3) La société est tenue d'exercer la diligence particulière requise dans ses démarches pour placer les enfants confiés à ses soins dans des familles d'accueil convenables; elle est habilitée par la présente à le faire par entente écrite, pour toute la durée de leur minorité ou, à sa discrétion, pour une période plus courte . . .

14. La société aux soins de laquelle l'enfant est confié sous le régime de la présente Loi, ainsi que toute personne à qui elle en délègue les soins, permet de temps à autre au surintendant ou à toute personne qu'il autorise à cette fin de rendre visite à l'enfant et d'inspecter les lieux où il se trouve ou réside.

15. (1) À la demande du surintendant ou de toute personne qu'autorise le ministre, et outre les autres exigences imposées par la présente Loi, tout organisme qui vient en aide aux enfants ou leur prodigue des soins . . .

a) fournit au surintendant ou à toute personne autorisée tout renseignement relatif aux enfants qu'il a aidés, auxquels il a prodigué des soins ou dont il a eu la garde;

b) permet au surintendant ou à toute personne autorisée d'avoir accès à ses locaux [. . .] d'y rencontrer les enfants et de consulter tous ses livres et registres.

. . .

2003 SCC 53 (CanLII)

(3) If it appears to the Superintendent that the management of any organization referred to in subsection (1) is not such as to be in the best interests of the children in its care or custody . . . the Superintendent shall report the circumstances to the Minister . . . .

Appeal allowed and cross-appeal dismissed, ARBOUR J. *dissenting in part*.

Solicitor for the appellant/respondent on cross-appeal: Ministry of Attorney General of British Columbia, Victoria.

Solicitors for the respondent/appellant on cross-appeal: Dickson Murray, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitors for the intervener the Nishnawbe Aski Nation: Goodman and Carr; Lerner & Associates, Toronto.

Solicitors for the intervener the Insurance Corporation of British Columbia: Harper Grey Easton, Vancouver.

Solicitors for the interveners Patrick Dennis Stewart et al.: David Paterson Law Corp., Surrey, B.C.; Hutchins, Soroka & Grant, Vancouver.

(3) S'il estime que la direction de l'organisme visé au paragraphe (1) ne sert pas l'intérêt supérieur des enfants confiés à sa garde ou à ses soins [. . .] le surintendant fait rapport au ministre et lui expose les circonstances . . .

Pourvoi accueilli et pourvoi incident rejeté, la juge ARBOUR *est dissidente en partie.*

Procureur de l'appelante/intimée au pourvoi incident : Ministère du Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intimée/appelante au pourvoi incident : Dickson Murray, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Sous-procureur général du Canada, Ottawa.

Procureurs de l'intervenante la Nation Aski Nishnawbe : Goodman and Carr; Lerner & Associates, Toronto.

Procureurs de l'intervenante Insurance Corporation of British Columbia : Harper Grey Easton, Vancouver.

Procureurs des intervenants Patrick Dennis Stewart et autres : David Paterson Law Corp., Surrey, C.-B.; Hutchins, Soroka & Grant, Vancouver.

2003 SCC 53 (CanLII)

1937 CanLII 1 (SCC)

D. McCANNELL (DEFENDANT).....APPELLANT; 1937

AND

F. C. McLEAN (PLAINTIFF).....RESPONDENT. *Feb. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Verdict of jury—Appeal—Discussion of principle acted upon in setting aside, on appeal, the verdict of a jury as against the weight of evidence.

This Court dismissed the defendant's appeal from the judgment of the Court of Appeal for Ontario affirming (by a majority) the judgment at trial on verdict of a jury in favour of the plaintiff in an action for damages resulting from a collision of motor vehicles.

Discussion of the principle on which this Court acts in setting aside the verdict of a jury as against the weight of evidence. Authorities cited.

The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Jeffrey J. on the verdict of a jury, in an action (and counterclaim) for damages suffered through a motor vehicle collision.

The collision occurred on September 5, 1935, about 9.30 p.m. The defendant had been driving a truck in a northerly direction when there was a break-down in its electrical equipment and its lights went out and its motor stopped. Defendant and some men to whom he had been giving a lift pushed the truck some distance along the highway and then

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1937

McCANNELL v. McLEAN.

partially off the travelled portion, on the east (right hand) side of the road, but part of the truck projected on to the paved part. On the opposite side of the highway there were a store and a gasoline station. There was a space at the gasoline station where there would have been room for the truck to have been placed clear of the travelled portion of the highway. Leaving the truck parked as aforesaid, the defendant went into the store to telephone for assistance. There were no lights (there was a reflector) on the rear of the truck and no steps were taken to warn oncoming traffic. It was a clear moonlight night. The highway was straight. The plaintiff in a motor car, travelling also in a northerly direction, collided with the truck. There were other factors or alleged factors in the situation, as, the position in which the truck was parked, and whether or not at an angle, interference with outlook by reason of lights at the gasoline station, lights from a motor car coming behind the plaintiff.

At the trial questions were given to the jury and answered as follows:

1. Were the injuries of which the parties complain caused by the negligence of the defendant? Answer: Yes.

2. If so, in what did such negligence consist? Answer: In not taking proper precaution, as he and the men were able to move the truck along highway, he should have moved truck to the clear space at left hand of highway, where it would have been clear of pavement at store or station.

3. Was the plaintiff guilty of negligence which caused or contributed to cause the injuries and damages of which the parties complain? Answer: No.

4. If so, in what did such negligence consist? Answer fully: [No answer.]

5. Could the plaintiff notwithstanding the negligence of the defendant, if any, by the exercise of reasonable care, have avoided the accident? Answer: No.

6. Q. If you answer question 5 "Yes," say what he should have done or failed to do? Answer fully. [No answer.]

The jury found damages for the plaintiff in the sum of $3,300. Judgment was entered for the plaintiff for that sum and costs.

The defendant's appeal to the Court of Appeal for Ontario was dismissed with costs, Fisher J.A. dissenting (who would allow the appeal and dismiss the action, with costs). The defendant appealed to the Supreme Court of Canada (and, by special leave granted by the Court of Appeal for Ontario, also appealed as to the dismissal of his counterclaim).

1937 CanLII 1 (SCC)

709

1937

MCCANNELL v. MCLEAN.

On behalf of the defendant (appellant) it was claimed (*inter alia*) that the jury's answer to the second question was not supported by the evidence and further that it was not a finding of negligence in law and did not support a judgment for the plaintiff; and that the jury's answers to the third and fifth questions were perverse and unreasonable and not such as a reasonable jury might find on the evidence and should be set aside.

By the judgment of this Court, now reported, the appeal was dismissed with costs.

J. R. Cartwright K.C. for the appellant.

M. A. Miller K.C. and *R. B. Hungerford* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We are all agreed that the questions involved in this appeal are questions of fact and that the majority of the Court of Appeal were right in their conclusion that the findings of the jury are sufficient and that the verdict could not properly be set aside.

We do not consider it necessary to review at large the questions raised in the able argument of Mr. Cartwright which were fully discussed on the hearing of the appeal. It seems desirable, however, to add a word or two in respect of the principle on which this Court acts in setting aside the verdict of a jury, as against the weight of evidence, with a view to granting a new trial or giving judgment in favour of one of the parties.

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported. It will be sufficient to refer to the judgments in one of the most recent decisions, *C.N.R.* v. *Muller* (1). In the course of the

(1) [1934] 1 D.L.R. 768.

1937 CanLII 1 (SCC)

710

1937

McCANNELL v. McLEAN.

Duff C.J.

reasons delivered by the majority of the judges who heard the appeal (p. 769) there occurs this passage:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially (C.C.P., Arts. 501 and 508 (3); *Metropolitan Ry. Co.* v. *Wright* (1)). In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

Mr. Justice Lamont, who delivered a separate judgment, said this (p. 772):

> The same principle was followed in *Metropolitan Ry. Co.* v. *Wright* (2). There, as in the case at bar, there was evidence given on both sides and on all the issues proper to be submitted to and considered by a jury. In neither case could the trial judge properly have withdrawn the evidence from the consideration of the jury who are the proper judges of the facts. In both cases the jury found negligence on the part of the company.
>
> In the *Wright* case (2) the House of Lords held that, under these circumstances, the well established rule should apply, namely, that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust, so unreasonable and unjust as to justify the court in concluding that the jury had not really performed the judicial duty cast upon them.

That the guide indicated in these judgments is precisely the guide by which judges in England have governed themselves in considering such questions is plain from the judgment of Lord Wright delivered in the recent case, *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin* (3), a judgment which, as to form and as to substance, was adopted by Lord Atkin and Lord Macmillan. In view of what was said in the Court below, it is, perhaps, desirable to transcribe the following passage (p. 374):

> The objection in *Wood* v. *Gunston* (4) was that the damages were excessive, and a new trial was there ordered. The use of the phrase "miscarriage of juries" is significant. It indicates what there must be to justify the appellate Court in interfering with or controlling the verdicts of juries. Since then many cases have been reported on these matters, but I think most useful guidance to help the appellate Court is to be found in *Metropolitan Ry. Co.* v. *Wright* (2). Lord Fitzgerald (5) states the question to be "whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust": and he adds that the onus is on the appellants to establish that this condition is fulfilled. But the most illuminating statement is, I think, to be found in the observations of Lord Halsbury (6). He refers to the case of *Solomon* v.

(1) (1886) 11 App. Cas. 152, at 156.
(2) (1886) 11 App. Cas. 152.
(3) [1935] A.C. 346.
(4) (1665) Style, 466.
(5) 11 App. Cas. 152, at 155.
(6) 11 App. Cas. 152, at 156.

1937 CanLII 1 (SCC)

1937

McCANNELL v. McLEAN.

Duff C.J.

Bitton (1), where the question according to the report (the correctness of which was afterwards disputed in *Webster* v. *Friedeberg* (2) was stated to be "whether the verdict was such as reasonable men ought not to have come to." Lord Halsbury said (3) that was an erroneous statement of the principle. "If a Court,—" he proceeded, "not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all,—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. * * * I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word 'might" were substituted for 'ought to' in *Solomon* v. *Bitton* (1) I think the principle would be accurately stated."

Lord Halsbury in these valuable observations is, I think, going back to the test applied in *Wood* v. *Gunston* (4), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

This, as we have observed, is the principle on which this Court has always acted in dealing with such questions, but the principle is so completely settled and so well known that in many cases it has not been considered necessary to state it in terms.

There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In exercising this power under the guidance of the general principles stated in the judgment of Lord Wright, the court has not the advantage of more specific rules of general

(1) (1881) 8 Q.B.D. 176.
(2) (1886) 17 Q.B.D. 736.
(3) 11 App. Cas. 152, at 156.
(4) (1655) Style, 466.

1937 CanLII 1 (SCC)

1937

McCANNELL v. McLEAN.

Duff C.J.

application; and it may be worth while to advert to the risk of treating decisions dealing with controversies touching its exercise in relation to the facts of a particular case and expressions found in judgments as binding authorities constraining other courts to a particular course in dealing with a different case involving different facts. It would, perhaps, not be entirely without value to cite a passage from the judgment of Lord Macnaghten in *Colls* v. *Home and Colonial Stores Ltd.* (1). The judgment, it is true, concerns generally an entirely different head of law, but the passage has, we think, no little relevancy to the topic now under discussion. It is in these words:

* * * Speaking for myself, I doubt very much whether it is a profitable task to retry actions which depend simply on questions of fact, or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statement which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett L.J. in *Ecclesiastical Commissioners* v. *Kino* (2). "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

I do not think Lord Macnaghten means to say that the course taken by judges of great experience in applying a principle to particular facts may not be exceedingly instructive and helpful as illustrating the practical working of the principle; but it is a very different matter to treat such expressions and such decisions as absolving the judges who are called upon to exercise this power to set aside verdicts as against the weight of evidence from the responsibility of determining in each particular case whether or not the conditions have arisen under which the power can properly be put into effect.

It is, perhaps, advisable to observe that what has been said above does not contemplate cases in which there is

(1) [1904] A.C. 179, at 191. (2) (1880) 14 Ch. D. 213.

1937 CanLII 1 (SCC)

some valid objection to directions given by the court to the jury in respect either of insufficiency or impropriety, or where the court may have to consider some circumstance connected with the conduct of the proceedings at the trial as having a bearing upon the question whether, consistently with justice, the verdict can be allowed to stand.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Miller & Hungerford.*

1937 CanLII 1 (SCC)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCormick v. Plambeck,*
2020 BCSC 881

Date: 20200612
Docket: S148167
Registry: Vancouver

Between:

Calder McCormick

Plaintiff

And

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Alan Francis Coupland and Joy Coupland

Defendants

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Megan Coupland, Andrew Coupland, Alan Francis Coupland and Joy Coupland

Third Parties

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:	M.D. Wilhelmson R. Bacha
Counsel for the Defendants/Third Parties Stephen Patrick Pearson and Lidia Diana Pearson:	J.A. Doyle J.G. Smith
Place and Date of Trial:	Vancouver, B.C. February 19-21, 24-28, 2020 March 2-4, 6, 10, 13, 2020
Place and Date of Judgment:	Vancouver, B.C. June 12, 2020

2020 BCSC 881 (CanLII)

[1] In the early morning of September 16, 2012, following a party at the home of the defendants Stephen Patrick Pearson and Lidia Diana Pearson ("the Pearsons"), a 1992 Subaru motor vehicle left the roadway on North End Road on Salt Spring Island ("the accident"). After leaving the roadway, the vehicle crashed into the woods beside the road.

[2] The Subaru was owned by the defendants Megan and Andrew Coupland ("the Couplands"). The driver of the Subaru, the defendant Ryan Plambeck ("Ryan"), was killed in the accident, and the plaintiff, a passenger in the vehicle, sustained serious injuries.

[3] The plaintiff has settled his claims against the Couplands and Ryan, but seeks a finding of liability for the accident against the Pearsons on the basis of what is referred to in a number of authorities as "social host liability".

Background

[4] The plaintiff was born on March 24, 1995. He is one of three children of his parents Michael McCormick and Cornelia Jones. His older sister is Sarah, and his twin brother is Tom. He also has an older half-sister, Charlotte Jones, from his mother's prior relationship. His family had lived on Salt Spring Island since the time of his birth.

[5] At the time of the accident, the plaintiff lived with his family on Fruitvale Road on Salt Spring Island.

[6] The plaintiff's parents, his twin brother Tom, and his older half-sister Charlotte all testified at trial. I will refer to the plaintiff's parents as Mr. McCormick and Ms. Jones, respectively. Meaning no disrespect, but to avoid confusion, I will refer to his siblings by their first names.

Alcohol and Marijuana Consumption on Salt Spring Island

[7] Salt Spring Island is one of the Southern Gulf Islands. It was described by a number of witnesses as a "laid-back" community, where the lifestyle is slower paced

2020 BCSC 881 (CanLII)

than in larger urban centers. Several witnesses commented on the habit of many on the Island leaving their homes and vehicles unlocked, and of some leaving car keys in unlocked vehicles.

[8] In 2012, The use of marijuana and the consumption of alcohol by minors was apparently widespread, and condoned by many Salt Spring Island parents, despite the illegality of the use of the former at the time of the accident, and the prohibition of the latter pursuant to s. 33 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, in force at the time of the party.

[9] Prior to 2012, when the plaintiff and his brother were in grades 8 and 9, they worked at Blackburn Meadows Golf Club in the clubhouse. They also cut lawns and did other labouring jobs at the Golf Club. The plaintiff worked at Moby's Pub in the kitchen around grade 9, and in the kitchen of the Harbour House Hotel in grade 11. Prior to the accident, the plaintiff worked for a neighbor, Vernon Smith, doing odd jobs. He also did some landscaping for an individual named Barry Haines working on the "rich homes", and did some work for Dave McLeod including carpentry.

[10] At the time of the accident, the plaintiff was 17 years of age and about to begin grade 12 at the Gulf Islands Secondary School. His interests included BMX biking, disc golf, photography, and he regularly frequented the local skate park. To his mother's knowledge, the use and sale of alcohol and marijuana were regular activities at that park.

[11] Prior to the accident, he had commenced a work experience program in high school and began gaining hands on experience working for carpenters as an apprentice. He also worked on building a new library on Salt Spring Island.

[12] Mr. McCormick testified that prior to the accident, the plaintiff had reached a point where he was not interested in classroom, sit-down type work. He had two classes that he needed to finish in order to graduate from secondary school, but had expressed a desire to "move on". To that end, he had enrolled and been accepted

2020 BCSC 881 (CanLII)

into the Camosun College Red Seal carpentry program. He was scheduled to begin grade 12 classes, the week following the accident.

[13] The plaintiff testified that his dream was to finish high school a semester early and start working as a carpenter. His parents had told him that a trade was a wonderful place to start in life and one would make good money and enjoy the work.

[14] The plaintiff thought that he was in grade 9 when he first met Ryan. The plaintiff thought that Ryan lived with his mother in Chetwynd and on occasion with his brother Kris Plambeck on Salt Spring Island. He described Ryan as coming from a broken family. He thought that Ryan was a year older than him, and was not sure if he had attended the secondary school on Salt Spring Island.

[15] Ms. Jones thought she first met Ryan the weekend before the party. She said that her intuition told her he was troubled and that he seemed very sad. She said that she told her sons this, and said that troubled people have a way of getting others into trouble.

[16] Ms. Jones recalled that in the summer of 2012, the plaintiff sold his video game console, as he was becoming more serious about his future. She stated that early in the summer he indicated that he wanted to become a carpenter and begin working.

[17] Mr. McCormick testified that, prior to the accident, the plaintiff was learning to drive. He was scheduled to take his driving test to obtain his “N” licence three days after the accident. Mr. McCormick had participated in “quite a lot” of driving with his son in preparation for that test and described his son as a “very cautious driver” who was “very wary of the dangers of driving”. Indeed, Mr. McCormick was the only member of the family that the plaintiff would drive with. Mr. McCormick stated that he specifically observed that his son would not get in a car without a seatbelt and would not drive if his father did not have his seatbelt on.

2020 BCSC 881 (CanLII)

[18] Tom, the plaintiff's twin brother, testified that although their parents did not want him or his brother using marijuana, both smoked marijuana regularly and did so together at home, mostly on weekends.

[19] Tom said that before the accident, he and his brother and their friends attended parties together and drank alcohol. He said that the plaintiff was similar to his peers with respect to his alcohol consumption.

[20] Mr. McCormick stated that he knew his sons consumed alcohol and used marijuana but that he and Ms. Jones did not condone it, and, in fact, discouraged it. He stated that there was alcohol and marijuana "everywhere" on Salt Spring Island and it was very much part of the culture. He and Ms. Jones sought to limit their children's exposure to these substances and navigate their teenage years so that the impact of that culture was reduced. He said that he and Ms. Jones were strongly against having underage drinking parties in their home and would not allow one to occur.

[21] According to Mr. McCormick, the rule at his home was that minors were not allowed to have alcohol, nor were friends permitted to use marijuana. He said that there may have been an instance or two where Gordie Fletcher was invited to have a single beer after finishing working on a shed, but that was an isolated case. Mr. McCormick acknowledged that friends of his sons may have come over and brought alcohol, but he was unaware of this and condemned it. He was also unaware if friends of his boys had come over and used marijuana, but he would not have allowed it had he known.

[22] Mr. McCormick gave evidence that he suspected the plaintiff would, on occasion, drink beer with his friends when they socialized, but there were limits on who he should associate with and have over. For instance, Kyle Matheson was generally not welcome, although the plaintiff's father could not remember if this was a rule and could not remember if Mr. Matheson had ever actually come over to his home.

2020 BCSC 881 (CanLII)

[23] Mr. McCormick stated that his sons were allowed to consume marijuana on the property but not in the house. He did not like it and said that they knew that. They did not do so in his presence, but he thought they would share a joint from time to time when he was not around.

[24] Mr. McCormick gave evidence that if the plaintiff wanted to drink alcohol or smoke marijuana with friends, he had to do it somewhere other than at his parents' home. This could include at a house, at the beach or in the bush, with or without parents present. Mr. McCormick did not want the plaintiff and his friends doing these activities at a place where he was to be responsible.

[25] Mr. McCormick testified that while the plaintiff's friends were not encouraged to consume alcohol or smoke marijuana at his house, it might have happened.

[26] Mr. McCormick gave evidence that he was unaware of the full extent of what he now understands to be the drinking culture on Salt Spring Island prior to the accident. He denied having knowledge that the Pearsons had hosted "drinking parties" in the past, or of his sons attending a "full blown teenage drinking party" prior to September 2012. He said that he was unaware of his sons attending a party and drinking alcohol prior to the accident, but conceded that he knew that they consumed alcohol and used marijuana and understood that it was typical behavior for teenagers.

[27] Ms. Jones stated that there were to be no parties at their home. There was also to be no serving of alcohol to minors. Ms. Jones gave evidence that she and her partner did not like the idea of drinking parties and discouraged their children from participating in them.

[28] Ms. Jones stated that she and Mr. McCormick did not buy their sons beer or allow drinking in the home. They knew that drinking parties for minors occurred but were not aware of any specific ones. The boys' friends may have consumed alcohol in their home, but she was not aware of it and discouraged it.

2020 BCSC 881 (CanLII)

[29] Ms. Jones stated that she and her partner also did not like marijuana and did not like it being consumed on their property. Ms. Jones stated that there was a “pot culture” on Salt Spring Island, and while she knew her boys used it, she did not want them to do so on their premises. She understood that they would go down to the beach and do so.

[30] Dylan McLeod, a close friend and classmate of the plaintiff, stated that the plaintiff consumed marijuana and alcohol prior to the accident and was no different than himself or their peers. He stated that the plaintiff and his friends were opposed to drinking and driving prior to the accident.

[31] The plaintiff and his friends also drank at their friends’ houses, sometimes with parents present, and sometimes without the presence of the parents.

[32] The plaintiff gave evidence that he had attended high school parties prior to the date of the accident, including parties at Madison Greggain’s and Kyle Matheson’s homes. His evidence, as well as that of his brother, one of his sisters, and his parents was that he knew the dangers of drinking and driving prior to the accident, and that he would never get in a car with someone who had been drinking. This was a firm rule, and expectation, with no exceptions.

[33] Mr. McCormick stated that he and Ms. Jones had talked often to the plaintiff about drinking and driving and the consequences of both driving and being a passenger under such circumstances. Drinking and driving was absolutely not allowed. He never observed any resistance to this idea from the plaintiff, and, indeed his experience of teaching the plaintiff to drive was that he was very cautious.

[34] The plaintiff stated that prior to the accident he was opposed to drinking and driving, and held the opinion that, if you could tell a driver was intoxicated, you should not get in their car. He stated that he would not get in a vehicle with someone who was intoxicated.

[35] The plaintiff said that his parents had made clear to him that if he became too intoxicated or sick he could call home and they would pick him up. They had

2020 BCSC 881 (CanLII)

reiterated this on a number of occasions. His parents had also indicated that he was not to drink too much inside the house and, when he was outside the home, if he was drinking, he was to have a plan for where to sleep.

[36] William “Chip” Chipman was the plaintiff’s wood shop teacher. He gave evidence about a teenage party that his daughter hosted approximately 20 years ago. It was his evidence that if he thought attendees were becoming drunk, he told them to slow down. As the night ended, he made sure that all the attendees had safe rides home or he drove them home.

[37] I find that the plaintiff began experimenting with alcohol between his grade 8 and grade 11 years, and that by the summer of 2012 had begun the somewhat regular use of marijuana. I accept that by the summer of 2012, he consumed alcohol a number of times per month and smoked marijuana three to four days per week.

[38] The plaintiff was presented with photographs from his Instagram account. He admitted that some of the photographs depicted events where he drank beer, hard liquor, and smoked marijuana, at home or elsewhere.

[39] With respect to the Instagram photos, Mr. McCormick gave evidence that he was disappointed by what he saw, as he and Ms. Jones were trying to teach their son to limit his exposure to alcohol and drugs. He said that he later realized that the photos spanned a long period of time and said that they did not show or suggest consumption aside from a few instances. He had never seen what was depicted in the photographs in live or photographic form. Had he seen the photos prior to the accident, he said that the plaintiff would have lost all his privileges and Mr. McCormick and Ms. Jones would have done whatever they could to ensure their son was safe.

[40] Ms. Jones stated that she saw no sign of alcohol or marijuana addiction in the plaintiff or his brother. They performed well in both school and their employment. Ms. Jones disputed that her son was a heavy marijuana user prior to the accident.

2020 BCSC 881 (CanLII)

She gave evidence that she understood that in the summer of 2012 the plaintiff quit smoking marijuana and drinking.

[41] Each of the plaintiff's parents dismissed the photographs depicting the plaintiff's use of both in his Instagram account, as unrepresentative of his use, or posed for effect, and not a true representation of his use. In all, there were 164 photographs placed into evidence from that account. I appreciate that the photographs were not the complete account, but of the 164 in evidence, 50 were from the time period of February 16 to September 2, 2012. Of the 164, 19 depicted alcohol or alcohol use, 13 depicted marijuana or marijuana use, three depicted the use of both marijuana and alcohol, and 11 depicted marijuana paraphernalia.

[42] The plaintiff said that the Instagram entries did not show actual use of marijuana or alcohol, but the captions suggest otherwise. I find that the entries do represent a regular use of both alcohol and marijuana by the plaintiff during 2012.

[43] I find that the plaintiff's parents either chose to be deliberately blind to the extent of his use of marijuana and alcohol, or have recast their recollections out of guilt for the fact that their son was injured in the accident. In any event, I do not believe their evidence about their perceptions of the plaintiff's use of marijuana or alcohol.

The Relationship between the Plaintiff's Family and the Pearson Family

[44] The defendant Stephen Pearson has worked as a carpenter for the past 40 years. He is 57 years old. He and his wife reside at 313 Epron Road, the same home they occupied at the time of the party. They have three children. Their eldest, Mackenzie, a son, is 26 years-old. Their twin daughters, Hannah and Elise, are 24 years-old. At the time of the accident, Stephen Pearson, his wife and their daughters resided together, their son having moved to Montreal.

[45] The Pearsons and their daughters gave evidence at trial. I will refer to the parents as Mr. Pearson and Ms. Pearson in these reasons. In order to avoid

2020 BCSC 881 (CanLII)

confusion, and again meaning no disrespect, I will refer to the Pearson daughters as Hannah and Elise.

[46] The plaintiff's mother was a good friend of Lidia Pearson's sister, Lilian "Lil" Rumi. Prior to the accident, the three families had some family get-togethers. The plaintiff knew the defendants as Steve and Lidia, and was aware that they had a son and two twin daughters.

Pre-Party Planning

[47] I will refer to the gathering at the Pearsons' home on September 15-16, 2012 as "the party".

[48] The plaintiff and the Pearsons and their daughters testified about the party.

[49] At the outset, I pause to say that I have serious reservations about the reliability of the plaintiff's evidence. These reservations are not because I consider that the plaintiff was dishonest or deliberately untruthful, but rather because, due to his brain injury, he is incapable of giving reliable evidence.

[50] I accept the evidence of the Pearsons as credible and reliable.

[51] In addition to the plaintiff, the Pearsons, and their daughters, the following witnesses were called to give evidence about the party:

a) Tom McCormick;

b) Samantha Clemente;

c) Michael Elsser;

d) Ethan Frigon;

e) Luke Hylands;

f) Kyle Matheson;

2020 BCSC 881 (CanLII)

g) Dylan McLeod; and

h) Paige Rumi

[52] I will review the evidence of the party given by these witnesses, including the events immediately before and after the party. I will then make findings in respect of the credibility and reliability of this evidence.

[53] Elise testified that the party was for her friend Olivia's birthday. She and her sister asked their parents if they could host a party for her.

[54] Ms. Pearson gave evidence that she had just come back from visiting her son in Montreal when her daughter Hannah asked to host the party. She agreed but was adamant that there was to be no drinking and driving. Ms. Pearson agreed that she knew that some of the attendees would bring alcohol. Her expectation was that parents would come and pick up attendees.

[55] Elise gave evidence that her parents agreed to the party and stipulated that car keys would be taken from the people who drove, and that she, her sister, and their parents would circulate throughout the party, which would end at 1:00 a.m.

[56] Mr. Pearson testified about parties he and his wife had allowed their son to host prior to the party. He recalled two such parties and testified to the basic guidelines established at those parties: he and his wife would be present in the home inside their room, giving the partygoers the home, but would walk around on occasion; there was to be no drinking and driving; if attendees drove, their keys would be collected; alcohol could be consumed but would not be provided; and, there would be a time limit of 1:00 a.m. for the party to end.

[57] Mr. Pearson gave evidence that at 1:00 a.m., it was expected that people would begin calling for rides home, except for those attendees who lived close enough to walk home, would do so, and the closest friends "and maybe a stray kid or two" would spend the night. If there were attendees who needed a ride, he and his wife would facilitate that.

2020 BCSC 881 (CanLII)

[58] The plaintiff stated that he both received an invitation to the Pearson party over Facebook and had heard rumors about it at school. The description of the Facebook event page requested those invited to "just please … don't drive under the influence". The invitation included a posting by Hannah that linked to a video produced by an anti-drinking and driving campaign. This was the first posting on the Facebook event page, and it was posted prior to the party.

[59] Mr. McCormick thought he heard about his sons going to the Pearsons' home for a party prior to the event, but understood that it was for a birthday party to which 30-40 people were invited, half of whom were unlikely to attend. He denied hearing about alcohol consumption, but expected that alcohol would be consumed at the party and that the plaintiff would bring and consume alcohol.

[60] Given what he had heard about where his sons were going, Mr. McCormick did not see any "red flags" and had no concerns. He stated that he had known the Pearsons for 20 years, knew they would look after his children and thought they would be safe in their home.

[61] Dylan McLeod gave evidence that he was invited to the party over Facebook and face to face by one of the Pearson daughters. He said that he understood it was to be a typical party with what he described as "a decent number of people". He thought it was for someone's birthday and understood drinking would be allowed and that he could bring his own alcohol.

[62] The plaintiff stated that initially he was not interested in attending the party, but on the day of, his friends Evan Pearson and Dylan McLeod showed up at his home and pressured him to go. He said they indicated they had alcohol, some of which he could have. His recollection was they had six Heineken beers and a bottle of Olde English, a beer with an approximate 7% alcohol content. He said he told them that he had chores to complete and that they offered to help him.

2020 BCSC 881 (CanLII)

[63] Ms. Jones testified that a plan for the plaintiff staying at Kris Plambeck's place was discussed, however her understanding was that her boys would only stay at the party until 10:00 p.m. or 11:00 p.m. and then come home.

[64] The plaintiff thought the plan was that he would either leave his road bike at Kris Plambeck's house or would sleep there. He did not recall planning to sleep at the Pearsons' home.

[65] The plaintiff recalled that he and his friends left his parents' home at around 7:00 p.m. or 8:00 p.m. and drove to Kris Plambeck's residence. He said he believed that the party was to commence at approximately 8:00 p.m. or 9:00 p.m. and did not recall consuming alcohol before going to the party.

[66] The plaintiff and his friends waited at Kris Plambeck's home for the party to start. It was twilight when they arrived at the party.

[67] Dylan McLeod stated that he and a few friends, including Ryan, walked over to the party from Kris Plambeck's house, leaving at approximately 10:00 p.m., drinking and smoking as they walked. He said that the walk lasted approximately 15 or 20 minutes. It was dark out and the area was forested. He recalled people walking on the road.

The Party

[68] The party occurred during the evening of September 15 - 16, 2012.

[69] Mr. Pearson recalled that his daughters had a few friends over before 8:00 p.m. By 9:00 p.m. things were getting busier and he and his wife retired to their bedroom, giving the attendees the use of the main floor and basement. Mr. Pearson stated that he and his wife would circulate once an hour, "give or take". He remained in his bedroom for a good part of the evening. When asked who was supervising the party while he and his wife were in their room, Mr. Pearson stated that he thought his daughters and their friends were very responsible and that they would come and find him if something required his attention.

2020 BCSC 881 (CanLII)

[70] Mr. Pearson and his wife provided their daughters with two liters of alcoholic cider. He understood that his daughters would be socializing and drinking and would not be standing by the door for the entire party. He also understood that attendees would be arriving throughout the party.

[71] Ms. Pearson stated that, at the beginning of the night, they had set out a bowl in which to place car keys that were collected. She explained that her daughters knew which of their friends may have had an “N” licence and were driving. She did not think any of the attendees had difficulty giving up their car keys. She did not collect any keys herself, but some were brought to her and her husband. She stated that perhaps five sets of car keys were brought to them.

[72] With respect to the collection of car keys, Mr. Pearson testified that this relied on people being seen driving up to the house and the fact that he believed his daughters knew who would drive. He recalled taking a single set of car keys, and his daughters bringing car keys to his wife who put them in a ceramic bowl on the nightstand. Collection of the car keys was delegated to his daughters, as he understood that keys would be taken if cars were driven up their driveway and parked. He acknowledged that it was possible that drivers could be missed and car keys would not be requested from them.

[73] Tom created an incomplete list of the attendees at the party. He was able to recall 67 attendees, including his brother and himself. He gave evidence that he briefly saw each of the Pearsons on one occasion, in the kitchen on the main floor. He believed they were in their room during the party.

[74] Ethan Frigon described the party as quiet. He stated that the attendees were trying to be respectful of the fact that the Pearson parents were at home. Other than being respectful, the only rule was that drinking and driving was not permitted.

[75] Mr. Frigon gave evidence that he believed that his friend Jackson, who parked at Mr. Frigon’s home, had his car keys taken. He thought he saw one or both of the Pearsons’ daughters with a bowl of keys.

2020 BCSC 881 (CanLII)

[76] Hannah Pearson had little reliable memory of what occurred at the party. She stated that her general memory of the events was “foggy” and she was unsure what were real memories and what she had pieced together. She said she recalled that her friends came to the party and people had a good time. She was at the door at the beginning of the party, taking car keys and putting them into a bowl. She did not have much memory of what else she did at the party. She consumed alcohol, but did not remember how much. She recalled that she was mingling.

[77] In total, there are four doors into the home including two from the patio, as well as the front door and a door in the basement. Mr. Pearson acknowledged that the party was going on outside the home and that someone who did not enter the home via the front door could be missed and their keys not taken. He said that he also understood that teenagers could lie about driving. He did not know if attendees were parking near other homes and did not consider that they might park up the street from his home.

[78] Mr. Pearson observed cider, coolers, and beer being consumed by the guests. He did not tell any attendees to slow down their consumption of alcohol nor restrict the kinds of alcohol that could be consumed that night. He did not have a recollection of seeing hard liquor, nor did he recall seeing any drinking games. He saw kids dancing and having fun. The music was quite loud. He smelled marijuana outside.

[79] Mr. Pearson said that no one was turned away from the party, and neither he nor his wife took alcohol from any of the attendees. He agreed that had he seen anyone extremely intoxicated, he would have taken some steps as a matter of safety. Not surprisingly, he agreed that bad things such as falling, passing out or being struck by a car could occur to an intoxicated minor walking down the street. None of these things occurred.

[80] Mr. Pearson recalled seeing the plaintiff at the party twice and saying hello. He said that he did not see the plaintiff in a state of intoxication.

2020 BCSC 881 (CanLII)

[81] Ms. Pearson went to her bedroom when more guests began arriving at the party. She gave evidence that she came out occasionally to check on the attendees, and that her husband did the same. She agreed that she came out of her room at least two or three times but did not remember the exact number of times.

[82] Ms. Pearson felt that the attendees were responsible, independent kids. She said that she had a "good vibe" when she walked around. She did not feel that any bad behavior came to her attention nor did she see anything out of the ordinary. She did not see anything that alarmed her. She further clarified that she felt that the teenagers were not consuming more alcohol than the limit, although she then acknowledged that the legal limit for both alcohol and marijuana for minors was zero.

[83] Ms. Pearson testified that she felt the party seemed well controlled. She agreed that she saw minors with beer and bottle-type drinks during the party. She agreed that nothing was done to control the kinds of alcohol coming into the home and there was no rule against hard liquor being consumed. She did not take any alcohol from the attendees as she saw no signs that doing so was necessary.

[84] Ms. Pearson said that she was unaware of the use of marijuana in the house but did not go outside.

[85] In her evidence Elise described a well organized, well monitored and controlled party. She testified that while the majority of their guests arrived, she and her sister stood by the door and took car keys away from anyone who had driven. The keys were put in a bowl which was handed to her father. She stated that she would have known who had cars, and only a handful of her friends would have driven. She said that she had a recollection of those guests parking on her parents' property.

[86] Elise gave evidence that her mother bought her and her sister a two-litre bottle of alcoholic cider for the party. She could not remember if it was shared, but thought she had two alcoholic drinks. She could not remember what they were.

2020 BCSC 881 (CanLII)

[87] Elise stated that she was drinking, socializing and circulating throughout the party. She did not remember if she spent time upstairs with Olivia but stated that she may have been upstairs circulating. She agreed that she did not stand by the front door all night. She said that she saw the plaintiff in passing at the party, and that he seemed fine to her. Her contact with the plaintiff that night lasted a few seconds. She could not say whether she saw Ryan.

[88] Elise recalled that beer pong, a drinking game, was played at some point, but said that she asked for the ping-pong table being used for that game to be put away to make space for dancing.

[89] Kyle Matheson testified that he arrived at the party at about 10:00 p.m. when it was dark out. He did not recall seeing any adults at the party. He stated that the party was starting to get bigger when he arrived. He remembered socializing with both the plaintiff and Ryan. He said that they drank a few beers and had two or three shots of rum from the bottle. He said that was the "total" number of shots consumed by the three of them. He stated that he did not recall the fine details of the plaintiff's demeanour, but the plaintiff did not seem to stand out.

[90] Dylan McLeod gave evidence that he thought he saw the Pearsons during the party, but he did not remember where they were or what they were doing.

[91] Luke Hylands gave evidence that he socialized with both the plaintiff and Ryan at the party. He said they all were drinking. He said that he consumed a couple of beers at the party, though he could not remember exactly how many. He also remembered people consuming both beer and hard liquor. He recalled people "shot gunning" beers, an activity he described as creating a hole at the base of a beer can and then pulling up the tab and opening the can. The effect of this exercise is that one drinks the beer faster.

[92] Paige Rumi is Lil Rumi's daughter. Paige Rumi was 31-years old at the date of the trial. At the time of the accident, Ms. Rumi resided on Salt Spring Island, working at Moby's Pub. She attended the Fall Fair the day of the party, and stated

2020 BCSC 881 (CanLII)

that she had a couple of pints there, which had a greater effect on her than she expected. After attending at the fair, she went to work, broke a glass and was asked by her manager to leave. Her friend Dara picked her up and the two went to a Chinese food restaurant for the birthday of a friend.

[93] On their way home, Ms. Rumi and Dara stopped by the Pearson home to say hello. Ms. Rumi said that she went into the Pearson home, but Dara did not. Ms. Rumi testified that her memory was patchy, but her evidence was that she recalled seeing the plaintiff downstairs at the Pearsons' home. Ms. Rumi stated that the plaintiff was swaying and his speech was slurred. She said that she asked him what he was drinking and he took her to the oven, opened it and showed her an empty bottle of whiskey.

[94] Tom said he thought he consumed at most four beers over the three to four hours he was at the party. He observed his brother briefly at the party and saw him consuming beer. He left around midnight. He had arranged for Evan Henshall to drive him home. He asked his brother if he needed a ride before he left, but the plaintiff declined. Tom thought his brother's level of intoxication was in line with other party guests.

[95] The plaintiff gave evidence that he did not recall drinking any hard liquor and thought that he consumed less than six beers throughout the night. He admitted that it was hard to fully remember the party, though he also stated that his memory of the night is "pretty strong", as he did not consume too much alcohol. He recalled his friends trying to outdrink people and people sharing alcohol.

[96] The plaintiff said that he recalled his brother offering him a ride, but telling his brother that he did not need one as he intended to stay at Kris Plambeck's residence. While I accept that Tom offered the plaintiff a ride from the party, I reject, as confabulation on his part, the plaintiff's evidence that he recalled that offer.

[97] Michael Elsser was one of the young people who attended the party. His evidence was that his friend Carrysa got physically ill at the party as they walked

2020 BCSC 881 (CanLII)

down the driveway. Despite her throwing up, it was Mr. Elsser's view that Carrysa seemed completely coherent and functional and did not seem impaired.

[98] Mr. Elsser provided a statement to the police on March 1, 2013, some six months after the accident.

[99] He testified at trial that he could not remember the questions he was asked or the answers that he gave, but conceded the obvious; that his memory was fresher when he made the statement to police than at trial, and that listening to the recording of his interview could help refresh his memory. The recording was played in its entirety.

[100] After hearing the recording, Mr. Elsser stated that it did not in fact refresh his memory. He did, however, accept that the recording would have accurately captured what he believed when he spoke with the police. He identified himself as being the one recorded and confirmed that the recording is of the statement that he provided to the police.

[101] Counsel for the Pearsons took no issue with the accuracy or validity of the recording, so it was unnecessary to call the interviewing officer to testify with respect to the taking of the statement.

[102] In the statement, Mr. Elsser stated that:

a) He was invited to the party over Facebook. The party was for drinking, but he was not supplied alcohol. Everyone brought their own alcohol. He said that this was stated on the invitation one of the defendants' daughters sent him;

b) He consumed alcohol at a friend's home prior to attending the party;

c) Prior to attending the party, he was at his friend Carson's house, where he consumed alcohol. Carson's mother dropped them off at the party. When he arrived at the party it was fairly early and there were about 20 people in the house. People were arriving already intoxicated;

2020 BCSC 881 (CanLII)

d) He did not see any parents at the party. He was not aware that adults were in the house or on the premises and he thought they were upstairs or at someone else's house for the night;

e) 50-60 people attended the party ranging from 15 to 18 or 19 years old. Approximately 70% of the attendees were drinking;

f) He was inside the defendants' residence from approximately 9:30 p.m. to 11:30 p.m., then outside for the rest of the party aside from 15 minutes when he stepped inside again;

g) The party occurred "upstairs", in the "kitchen and living room sort of area", "downstairs", where beer pong was played and the driveway;

h) Prior to leaving the party, Mr. Elsser was "hanging out with Ryan for most of the night […] outside on the driveway", though they did go into the house at some point and played beer pong;

i) He and Ryan consumed alcohol together. They "drank a couple of beers and [took] shots of Jack Daniels";

j) Later in the night, a friend of his "started puking" at about 12:00 a.m. or 12:30 a.m., and as a result, he left the party;

k) He and his friend who was "very drunk" walked away from the party; his friend vomiting for a bit before they left. He then returned to the party at approximately 1:00 a.m.;

l) When he returned to the party, he socialized with some friends and stepped inside the house for awhile. The party was winding down, so he phoned his father and walked down the road "a little ways" and was picked up;

m) He was not with the plaintiff or Ryan when they went to the Stibbard residence;

2020 BCSC 881 (CanLII)

[103] The plaintiff submits that the recording fulfills the requirements of admission of the evidence as past recollection recorded: *R. v. Sipes*, 2012 BCSC 834. In *Sipes* at paras. 9-12, Mr. Justice Smart wrote:

> 9 The Supreme Court of Canada identified the criteria for the admission of evidence as past recollection recorded in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, at para. 63:
>
> > ... [T]he officer's testimony does not qualify for admission as "past recollection recorded". This doctrine would apply only if the prosecutor could satisfy the four *Wigmore* criteria, usefully summarized by the Alberta Court of Appeal in *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345, *per* Kerans J.A., at p. 352:
> >
> > > The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, s.744 *et seq.* provided:
> > >
> > > > 1. The past recollection must have been recorded in some reliable way.
> > > >
> > > > 2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
> > > >
> > > > 3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
> > > >
> > > > 4. The original record itself must be used, if it is procurable.
>
> 10 Paciocco and Stuesser discuss past recollection recorded and present recollection revived, and the tendency for the two rules to be misunderstood or blended into one: David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011), at pp. 422-430.
>
> 11 The authors summarize past recollection recorded at pp. 422-423:
>
> > A witness may, with leave of the court, refresh her memory in court from a document or an electronic record that was recorded reliably. The witness must use the original, if it is available, but where it is not, an authenticated copy can be relied on. If the record is a document created by the witness, it must have been created at a time when the memory of the witness was sufficiently fresh to be vivid and probably accurate. .... The witness can rely on the document or

2020 BCSC 881 (CanLII)

> electronic record to assist in presenting his testimony only if the witness is able to assert that the document...accurately represents his recollection at the time it was made.
>
> 12 Paciocco and Stuesser explain that it is the document that is the evidence and why, therefore, it is important to ensure strict compliance with the Wigmore criteria. They state at p. 426:
>
> > Since "past recollection recorded" permits witnesses who have no personal memory of an event to rely on the contents of the record and to incorporate the contents of the record into their testimony, it is artificial to suggest that the witness is the immediate source of the evidence. The witness, who has no personal memory of the details and facts recorded, is vouching for the record, but it is the record that is supplying those details and facts. For this reason, many believe that "past recollection recorded" is actually a hearsay exception, with those portions of the record incorporated into the testimony serving as the evidence. This is more realistic than pretending that the testimony of a witness who is simply parroting the document is original testimony. Recognizing this also reaffirms the importance of ensuring strict compliance with the requisites of the rule - effectively, they furnish the kind of necessity and reliability requirements that operate for other forms of hearsay evidence.

[104] Given Mr. Elsser's evidence before me, this is clearly not a case of present recollection revived. For me to be able to rely upon the statement, it must strictly comply with the criteria for past recollection recorded.

[105] I am satisfied that the first, third, and fourth Wigmore criteria for past recollection recorded are met in this case. The issue is whether the statement taken on March 1, 2013, some six months after the accident, meets the second criterion and was sufficiently fresh when made to be vivid and probably accurate.

[106] The parts of the statement that I have referred to as a) through e) and g) add nothing new to the evidence that I have heard from other witnesses, and f), h), and i), while personal to Mr. Elsser, do not assist me in determining the sobriety or otherwise of the plaintiff, and I have independent evidence of Ryan's level of intoxication from Mr. Image, a forensic alcohol consultant and registered toxicologist whose evidence I review later in these reasons.

2020 BCSC 881 (CanLII)

[107] The balance of the information in the statement supports the argument that there were some intoxicated young people at the party, but again, I have that evidence from other sources.

[108] Given the minimal use that could be served by the admission of the statement as past recollection recorded and the inability to establish strict compliance with the second Wigmore criterion, I place no reliance on the statement.

[109] I am not satisfied that the party differed from other similar parties involving similarly aged minors, and find that their conduct and sobriety was consistent with the conduct and sobriety of the same young people, or others like them on Salt Spring Island before and during 2012.

[110] I accept the evidence of Elise, supported by that of Ethan Frigon that the party was reasonably well organized, well monitored and controlled, but find that it was attended by minors who exhibited varying states of sobriety from the use of alcohol or marijuana, or both.

[111] I reject the plaintiff's evidence about his alcohol consumption as confabulation on his part.

[112] I accept that the Pearsons had a plan in place to take keys from drivers on their arrival at the party, and presented a minimal presence by circulating during the party.

[113] The plaintiff contends that the evidence of his alcohol use included:

a) His brother's evidence that alcohol was taken by them to the party;

b) Kyle's evidence of taking shots of rum with the plaintiff and Ryan;

c) Paige Rumi's observations; and

d) Out of character behaviour indicative of intoxication.

2020 BCSC 881 (CanLII)

[114] I find the plaintiff did not drink alcohol nor smoke marijuana before the party and that his alcohol consumption at the party was limited to beer alone, and that he did not smoke marijuana that evening.

[115] I accept that the plaintiff likely had some alcohol to drink at the party, but I reject the evidence of Kyle Matheson, who I find to be a young man who, at the time of the party, was engaged in the regular use of both alcohol and marijuana, and incapable of distinguishing one of the parties he attended from another. Due to his own intoxication I find that Kyle Matheson simply recalled what the plaintiff had done at other parties and believed that he must have done the same at this party.

[116] I also reject Ms. Rumi's evidence about the plaintiff's state of sobriety, and his showing her a bottle of whiskey in the oven. She was herself intoxicated, and conceded that she was thus in no position to judge the sobriety of another person.

[117] The plaintiff points to the theft of the Subaru and his getting into that car with an intoxicated driver as indicative of "out of character" behaviour, and thus his level of intoxication.

[118] There is no reliable evidence as to how and why the Subaru was taken and what the plaintiff believed about the circumstances. With respect to the argument that the plaintiff got into a car with a drunk driver, as I will explain below, I find that Ryan was not intoxicated. Therefore, it would not have been out of character for the plaintiff to get into a car with Ryan.

After the Party

[119] At around 1:00 a.m., Elise said that her father started organizing a clean up of the residence and people began being picked up. After most of the attendees had been picked up, her mother drove some home.

[120] Mr. Pearson said that around 1:00 a.m., the music was turned off, the lights were turned up, and the partygoers were told to call for rides. He said that there was a general migration of partygoers out of the home. Some were picked up, and some

2020 BCSC 881 (CanLII)

simply walked away. He acknowledged that there was no plan for the attendees who showed up at the party on foot. Mr. Pearson did not see Tom or the plaintiff leave.

[121] Mr. Pearson said that it took some time for him to ascertain the attendees who did not have a ride. Once they were identified, his wife coordinated driving them home. She made one such trip. He thought she left the residence at 1:30 a.m. to do so.

[122] Ms. Pearson gave evidence that at around 1:00 a.m., she went into the kitchen area and turned the music off. She saw cars driving up to her home. She and her husband cleaned up while rides were organized. When it became known that five attendees required a ride, she drove them home. One was Dylan McLeod.

[123] The Pearson daughters' closer friends stayed and helped clean up. They then went to bed as did Mr. Pearson. He believed his wife returned home at approximately 2:00 a.m. to 2:15 a.m.

[124] Elise stated that she was standing on the porch by the front door keeping tabs on people as they were leaving. She stated that she saw the plaintiff and Ryan with a group of people who were heading to Ethan Frigon's home. She stated that they were standing outside the front door and heard someone suggest they were headed to Ethan's home. The plaintiff and Ryan seemed fine to her. She did not see "Jade" leave or her condition, as described by Samantha Clemente, whose evidence I review later in these reasons.

[125] Ms. Pearson stated that, while she was driving five of the partygoers she got to the point where Byron Road meets Epron Road. Dylan McLeod asked to be let out of her car there as he said he wanted to walk to the Stibbard household. She stated that he seemed fine to her and she let him out of her car. She then dropped two boys off, one of whom was Liam Murray, and then two girls. She returned home at around 2:15 a.m. She denied dropping Liam off at the wrong location. When she returned home, her husband was tidying up and the guests who were sleeping over were getting into bed.

2020 BCSC 881 (CanLII)

[126] The plaintiff's evidence was that he left the party at around midnight to walk to Ryan's house. He gave evidence that Ryan drove a car up the Pearsons' driveway and everyone ran up to the car to see who was driving. The plaintiff said that Ryan was offering rides to people, and he was concerned that Ryan was intoxicated.

[127] The plaintiff gave evidence that Nicole Love indicated that she would only accept a ride if there was a sober passenger. The plaintiff was then asked to get in the backseat of the car and refused to do so. He gave evidence that he was then pushed into the car by a bunch of older "more sporty" people including Kyle Matheson and Byron Muscle who locked the door, rendering him unable to get out. Ryan then drove Ms. Love to the Stibbard home. There the plaintiff said he got out of the car. He then recalled being back in the car, though he could not remember how this happened.

[128] In cross-examination the plaintiff suggested that he may have walked to the Stibbard residence.

[129] Mr. Frigon gave evidence that when he and his companions left the party, they returned to his home. He testified that the plaintiff, Ryan, and Ms. Love then arrived at his home. He thought that they arrived on foot as he saw them walking up his driveway. Mr. Frigon said that he believed that the plaintiff and Ryan did not enter the home and left shortly after.

[130] Luke Hylands could not recall when he left the party. He stated that he and a group of people, the number of which he could not recall, walked to Ethan Frigon's home to spend the night. He believed this was an approximately 10-minute walk from the Pearson home.

[131] Dylan McLeod stayed at the party until approximately 1:00 a.m. He stated that people had begun to leave and he could not find his friends. He recalled that the plan was to return to the Plambeck household after the party and he set off to the home. He had no recollection of being given a ride by the defendants.

2020 BCSC 881 (CanLII)

[132] When he arrived at the Plambeck residence he found that the sliding door was locked. All his things were downstairs and he did not want to cause a commotion. He thought about calling his father, but then decided to return to the defendants' home as Ruby, a young woman in whom he was interested, was there.

[133] When he arrived at the defendants' home he entered through the wrong door and walked into the defendants' bedroom. He stated that he was "pretty intoxicated" and did not know what he was walking into. He gave evidence that the defendants then took him outside and put him on the porch sofa with a sleeping bag.

[134] Samantha Clemente testified that she did not attend the party as a guest. She was, however, a designated driver for her friend, Mr. Levi Mundy, and an exchange student, as previously arranged between herself and Mr. Mundy.

[135] Ms. Clemente testified that she arrived at the defendants' residence to pick up Mr. Mundy at sometime between 1:30 a.m. and 2:00 a.m. She said that she did not enter the home, but did walk up to the door where she was greeted exuberantly by a friend she had not seen in some time. She testified that this display of friendliness was strange and indicative of her friend's level of intoxication.

[136] Ms. Clemente said that when Mr. Mundy appeared, either he or someone else asked if Ms. Clemente would also drive two other individuals. One of the other two was a female by the name of Jade, who Ms. Clemente observed to be extremely intoxicated, as she was slouching over in the backseat of her vehicle, unresponsive and needed to be helped to the car and from the car to her front door.

[137] Ms. Clemente did not see the plaintiff; however, she did see Ryan standing on the shoulder of the road. Ms. Clemente testified that she exchanged text messages with him. Ms. Clemente kept the messages, and they were identified and marked as an exhibit at trial. The first message is time stamped 2:00 a.m. and was received by her approximately 10 minutes after she saw Ryan, and her friend responded to it, because she was driving.

2020 BCSC 881 (CanLII)

[138] Ms. Clemente lives close to the accident scene. She testified that, later that night, she heard a car she believed to be travelling quickly outside her home. The sound of the car seemed to abruptly disappear and she thought that she heard some rustling. She did not hear a crash, nor could she identify what a car without a muffler sounded like. She did, however, testify that she heard nothing unusual about the car other than the speed.

[139] Kyle Matheson gave evidence that at approximately 2:00 a.m., he and some other party attendees left the Pearsons' home and walked to Ethan Frigon's home. Mr. Matheson stated that the basis for this decision was the desire to keep socializing. The plaintiff, Ryan, and Nicole Love were among the group, which splintered into two separate subgroups. Kyle Matheson stated that, once his group arrived at Mr. Frigon's residence, Nissa Marie asked Ryan and the plaintiff to leave.

[140] Notwithstanding my reservations about the evidence of the plaintiff and Mr. Matheson, the evidence of Mr. Frigon and Ms. Clemente satisfy me that the plaintiff and Ryan left the party on foot.

[141] I reject the submission of the plaintiff's counsel that the plaintiff was so impaired that he was incapable of a reasonable thought process when he left the party. I find that the plaintiff was no more, and likely a lot less intoxicated at the party than he had been on many prior occasions when attending similar parties.

The Acquisition of the Subaru Motor Vehicle

[142] At the time of the accident, the Couplands were in the process of trying to sell the Subaru. They had been trying to do so for some time, and, to that end, had advertised the vehicle on a local online bulletin board and mentioned its status to friends and family.

[143] Andrew Coupland testified that at some point in the weeks leading up to the accident, he was contacted by a potential buyer via telephone. He testified that the caller sounded to him to be a young male. He arranged to leave the keys to the vehicle under the hand brake so that the interested young man could test drive the

2020 BCSC 881 (CanLII)

vehicle. His expectation was that the individual would come by to test drive the vehicle that night.

[144] Mr. Coupland stated that no one ever came to the house, that he was aware of, to inquire about the car before or after the accident.

[145] The plaintiff testified that he knew that prior to the accident, Ryan was looking for a car. He knew this because, on the way to the party, Ryan told people they were walking with that there was a car just up the road, that he had contacted the owner, and that the keys to the vehicle would be left with him for a test drive.

[146] I reject this evidence as confabulation on the part of the plaintiff.

[147] Mr. Coupland testified that he was at home on the evening of September 15, 2012. He was sleeping in his bedroom at the front of the home with the window open when he was awoken by the sound of at least one male and one female voice. The voices stopped, some time passed, during which he remained awake, and then the car started up. When he looked outside, the vehicle was gone. He did not see the individuals who took the vehicle.

[148] He called the police and reported that his car had been stolen and was traveling north on North End Road.

[149] The plaintiff contends that the theft of the Couplands' vehicle was foreseeable because of the practice of leaving unlocked cars with keys in them on Salt Spring Island. I reject this contention. A number of witnesses testified about a "culture" on Salt Spring Island of leaving cars unlocked with keys in them. There is enough consistency among these witnesses on this point that I accept it was common for many residents to leave their cars unlocked, sometimes with keys in those cars. However, I find this was a common practice precisely because these residents did not foresee theft of their cars. In particular, there is no evidence of a concern that cars would be stolen in the more remote area of Salt Spring Island where the Couplands had left the Subaru.

2020 BCSC 881 (CanLII)

[150] The accident occurred on North End Road at a point that would have required the Subaru to travel away from rather than towards Kris Plambeck's residence. I find that Ryan and the plaintiff stole the Subaru and rather than using it to return to Kris Plambeck's residence, they used it to joy ride.

The Accident

[151] The plaintiff said that once he was back in the car, Ryan then began driving. The plaintiff said that he recalled laying in the back seat with multiple seatbelts on. He recalled Ryan driving erratically and leaving the road. His next memory was waking up in the backseat with Ryan's elbow poking him. He believed Ryan was decapitated, but also suggested that Ryan may have spoken to him.

[152] The Coroner's Report on Ryan was included in a binder entitled "Clinical Records Pursuant to s. 42 of the *Evidence Act*", and marked as an exhibit before me. It indicates that the passenger of the vehicle driven by Ryan, namely, the plaintiff, was "ejected during the incident and found nearby with serious injuries". The Coroner's Report indicates that neither Ryan nor the plaintiff were wearing seatbelts.

[153] I accept that the Subaru left the paved roadway, failing to negotiate a curve in the road because it was travelling too fast to safely make the curve.

[154] I accept that the plaintiff was rendered unconscious in the accident, but I reject his version of his ride in the Subaru, and his evidence of his recollection of coming to after the accident, as that evidence is inconsistent with the findings of the Coroner.

Ryan's Condition at the Time of the Accident

[155] The Coroner's Report cited "alcohol and cannabis impairment" as a significant condition contributing to death. It described Ryan as an unrestrained driver, and the road he was travelling on as a "paved country road". It stated that Ryan previously had a learner's licence that had expired and the vehicle he was driving as unlicensed and uninsured.

2020 BCSC 881 (CanLII)

[156] It was agreed by the parties that Ryan was born on October 4, 1993, and had previously had a learner's licence that had expired before the accident. It was agreed that at the time of the accident, he was driving a vehicle that was both unlicensed and uninsured. It was also agreed that at the time of the accident he was driving at a speed in excess of 70 kilometres per hour, and that the critical curve speed at the curve where his vehicle left the road was 70 kilometres per hour.

[157] Mr. Brian Image is a forensic alcohol consultant and registered toxicologist. He provided an opinion on Ryan's blood alcohol concentration and his state of impairment at the time of the accident and estimated the amount of alcohol Ryan might have consumed that night. He estimated that Ryan's blood alcohol concentration was likely 69 mg%, being less than the legal limit of 80 mg%.

[158] Mr. Image opined that a youth of Ryan's weight would have consumed conservatively a minimum of 3.75 ounces of alcohol or approximately 0.8 ounces per hour from the time his drinking commenced, to allow for alcohol elimination. It was his opinion that this was a sufficient level to afford visible signs of impairment, like bloodshot eyes, but his report also states that the "average social drinker" with a 69 mg% blood alcohol level would exhibit few, if any symptoms. I find that Ryan was more than an "average social drinker" by September 2012. In any case, Mr. Image stated that he "would not expect to see slurred speech, poor balance, or motor in-coordination at a BAC of 69 mg%."

[159] I conclude that Ryan was not intoxicated when he left the Pearsons residence in the early morning hours of September 16, 2012.

The Events during the day on September 16, 2012

[160] The plaintiff had committed to move a wood stove the morning following the party. He was also scheduled to work at the Fall Fair as part of a school fundraiser for the dry grad.

[161] Mr. McCormick realized that the plaintiff was not home at about 7:30 a.m. Some efforts were made to ascertain his whereabouts by members of his family, but

2020 BCSC 881 (CanLII)

none seemed particularly concerned nor alarmed by the fact that the plaintiff was not home that morning. The plaintiff's father went to the Fall Fair that afternoon to complete his duties there and see if the plaintiff arrived for his shift.

[162] Ms. Pearson recalled meeting Lil Rumi and Ms. Jones at the Fall Fair the next day. She denied stating that she was driving guests home from 2:00 a.m. to 4:00 a.m. or that the party was out of control. She accepted that she likely complained about being tired. Lil Rumi was not called as a witness.

[163] When Mr. McCormick returned home from the Fall Fair, there was still no news of the plaintiff. Sometime later, police arrived at their home, told them two boys had been in an accident and that one was dead with the other being rushed to hospital. The police told them that they needed to head to Victoria as soon as possible to determine whether the boy who had been taken to hospital was their son.

Positions of the Parties

[164] At the time of the accident, Ryan was a minor, who had no driver's licence nor a vehicle to drive. It is alleged that he drove the Couplands' motor vehicle in an unsafe manner at an illegal speed, thus causing the accident.

[165] The plaintiff asserts that liability for the accident rests with both the Pearsons and the defendant Ryan.

[166] The plaintiff contends that the Pearsons owed him a duty of care, and that they breached that duty of care by allowing him to become intoxicated on their property, and failing to stop him from leaving their property in that state.

[167] For their part, the Pearsons contend that there is no evidence that the plaintiff got into a car with an impaired driver, that his judgment was seriously affected by the alcohol he consumed, or that alcohol impairment was a contributing cause of the accident. They say that there is no evidence that the plaintiff or Ryan left the party in an obvious state of intoxication or that the partygoers were uncontrolled.

2020 BCSC 881 (CanLII)

[168] The Pearsons deny any liability for the accident. They contend that the accident was caused by Ryan's negligent operation of the Couplands' vehicle and that the plaintiff is contributorily negligent.

[169] In the alternative, and in the event that they are found partially liable for the plaintiff's injuries, the defendants submit that liability should be apportioned to the plaintiff's parents and the Couplands.

[170] Neither the plaintiff's parents nor the Couplands remain parties to this action. The defendants rely on *MacDonald v. Cunniff*, 2016 BCSC 559, in which the Court considered the *Negligence Act*, R.S.B.C. 1996, c. 333 and *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86 at 94 (C.A.) [*Wells*], to conclude that a defendant in a claim of negligence can plead apportionment of a non-party. In *Wells*, our Court of Appeal held that the essential aspect of a claim against a non-party is that "fault was properly raised in the course of the action so that it could be dealt with by evidence and argument."

[171] In their response to civil claim, the defendants pleaded apportionment under the *Negligence Act* against the Couplands, but did not plead apportionment against the plaintiff's parents.

[172] The defendants contend that liability, if any, would arise from having quasi-parental responsibility over the plaintiff due to his status as a minor; and implicitly permitting him to consume alcohol at their home. Those same factors were, or should have been equally apparent to the plaintiff's parents who had even greater parental responsibility over him than did the Pearsons.

[173] For reasons that will become apparent, I do not need to resolve whether and to what extent I can consider apportionment against the plaintiff's parents.

Discussion

[174] As Chief Justice McLachlin explained in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 [*Mustapha*], at para. 3:

2020 BCSC 881 (CanLII)

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

(a) Duty of Care

[175] In advancing his claim, the plaintiff is asking this Court to extend the ambit of a duty of care previously recognized in the jurisprudence.

[176] The plaintiff submits that the Pearsons' duty of care is that duty of care that exists between adults and minors who such adults invite or knowingly allow to be invited to their homes, when it is or becomes known that the minors' attendance is for the purpose of consuming alcohol or drugs or participating in activities in the course of which alcohol or drugs will be, or are consumed, to take reasonable steps so that the minors do not injure themselves and are not injured by other partygoers.

[177] The existence of a novel duty of care is resolved by a two-part inquiry commonly referred to as the "*Anns/Cooper*" test.

Test for Duty of Care

[178] In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce, speaking in the House of Lords, articulated a two-part test for determining whether a duty of care in negligence arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care. The second stage asks whether there are countervailing policy considerations that negate the duty of care.

[179] The two-stage approach discussed in *Anns* was adopted by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 and further refined in *Cooper v. Hobart*, 2001 SCC 79.

[180] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 49, the Court explained that the proximity analysis concerns whether the relationship between the plaintiff and defendant is the type of relationship in which a duty of care to guard

2020 BCSC 881 (CanLII)

against foreseeable harm may rightly be imposed. At para. 50, the Court determined:

> 50 … the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk, supra*, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23, and *Cooper*, *supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

2020 BCSC 881 (CanLII)

[181] Once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons to negate this duty of care: *Rankin (Rankin's Garage & Sales) v. J.J.,* 2018 SCC 19 at para. 20 [*Rankin*].

Social Host Liability Cases

[182] The existence of a general duty of care between a social host and users of public highways injured by an adult party guest was rejected by the Supreme Court of Canada in *Childs v. Desormeaux*, 2006 SCC 18 [*Childs*].

[183] In *Childs*, the defendant driver was known to his hosts to be a heavy drinker. As he was leaving, he was walked to his car by one of the hosts who asked him if he was alright to drive, to which he replied that he was. The plaintiff was the occupant of a vehicle that the defendant driver struck as he was driving away from the party.

[184] The trial judge found that the defendant driver, "had probably consumed 12 beers at the party over two and a half hours, producing a blood-alcohol concentration of approximately 235 mg per 100 ml when he left the party and 225 mg per 100 ml at the time of the accident – concentrations well over the legal limit for driving of 80 mg per 100 ml."

[185] The difference between proximity and foreseeability was explained by the Supreme Court of Canada in *Childs*, in the following terms:

> 12 …Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g., *Kamloops*. *Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the narrower sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a prima facie duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.

[186] At para. 26 in *Childs*, Chief Justice McLachlin concluded that the injury to the plaintiff was not reasonably foreseeable on the facts found by the trial judge, and that even if it were, no duty would arise because the wrong alleged was a failure to act or nonfeasance in circumstances where there was no positive duty to act.

[187] In describing the difference between nonfeasance and misfeasance, the Chief Justice noted at paras. 31-33 that:

> 31 … Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.
>
> 32 In this case, we are concerned not with an overt act of the social hosts, but with their alleged failure to act. The case put against them is that they should have interfered with the autonomy of Mr. Desormeaux by preventing him from drinking and driving. It follows that foreseeability alone would not establish a duty of care in this case.
>
> 33 The appellants' argument that Mr. Courrier and Ms. Zimmerman committed positive acts that created, or contributed to, the risk cannot be sustained. It is argued that they facilitated the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.

2020 BCSC 881 (CanLII)

[188] In *Childs*, at paras. 35-37, the Court enumerated three different categories of relationships that have given rise to a positive duty to act:

(a) Where the defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls;

(b) Paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and

(c) Where the defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

[189] At paras. 38 – 39 the Court discussed themes common to the three categories:

> 38 Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing. In the example of the parent or teacher who has assumed control of a vulnerable person, the vulnerability of the person and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk. The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.
>
> 39 Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.
>
> [Emphasis added].

2020 BCSC 881 (CanLII)

[190] In applying the law to the facts in *Childs* and deciding that no duty of care was owed, the Chief Justice wrote at paras. 44-47:

> 44 Holding a private party at which alcohol is served — the bare facts of this case — is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. The host creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest. All this falls within accepted parameters of non-dangerous conduct. More is required to establish a danger or risk that requires positive action. …
>
> 45 Nor does the autonomy of the individual support the case for a duty to take action to protect highway users in the case at bar. As discussed, the implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. …
>
> 46 This brings us to the factor of reasonable reliance. There is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving. This represents an important distinction between the situation of a private host, as here, and a public host. The public host provides alcohol to members of the public, under a strict regulatory regime. It is reasonable to expect that the public provider will act to protect the public interest. There is public reliance that he will comply with the rules that prohibit serving too much alcohol to a patron and that if this should occur and the patron seeks to drive, that the public host will take reasonable steps to prevent the person from driving. The same cannot be said of the private social host, who neither undertakes nor is expected to monitor the conduct of guests on behalf of the public.
>
> 47 I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. The injury here was not shown to be foreseeable on the facts as found by the trial judge. Even if it had been, this is at best a case of nonfeasance. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant cases and legal principles. A social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. On the facts of this case, I agree with the Court of Appeal, at para. 75, *per* Weiler J.A.:

2020 BCSC 881 (CanLII)

> The person sought to be held liable must be implicated in the creation of the risk. . . . The social hosts had no statutory duty to monitor the consumption of alcohol or to control the structure of the atmosphere in which alcohol was served. There is no evidence that anyone relied on them to do so. . . . I cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests, . . . It would not be just and fair in the circumstances to impose a duty of care.
>
> [Emphasis added]

[191] The plaintiff placed considerable reliance on the trial decision in *Prevost v. Vetter*, 2001 BCSC 297, supplemental reasons at 2001 BCSC 312; a case that predates *Childs.* There, Mr. Justice Coultas found two homeowners liable for serious injuries sustained by the plaintiff, a minor, when he was thrown from an automobile being driven by the homeowners' niece, when the automobile left the highway and overturned. The niece and the plaintiff began the short trip that culminated in the accident from her uncle and aunt's home. She had consumed alcoholic beverages on their property and was intoxicated when she and the plaintiff entered her automobile.

[192] In reasons for judgment indexed at 2002 BCCA 202, the Court of Appeal held that the determinations and conclusion reached by the summary trial judge could not have been arrived at using a summary judgment procedure, and his decision was set aside, as explained at para. 18:

> In order to find that the appellants owed a duty of care to Adam Prevost, it was necessary for the summary trial judge to find not only that Desiree Vetter's ability to drive was impaired by alcohol but also that the appellants ought reasonably to have foreseen that she intended to drive and that her driving while in that condition posed a risk of harm to passengers in her automobile...
>
> [Emphasis added]

[193] The plaintiff submits that the following decisions on unsuccessful summary judgment applications that post-date the decision in *Childs*, support a duty of care in the present case: *Oyagi v. Grossman*, [2007] O.J. No. 1087; *Hamilton v. Kember*, [2008] O.J. No. 734; *Sidhu v. Hiebert*, 2011 BCSC 1364; *Lutter v. Smithson*, 2013

2020 BCSC 881 (CanLII)

BCSC 119; *Wardak v. Froom*, 2017 ONSC 1166; and *Williams v. Richard,* 2018 ONCA 889 [*Williams*].

[194] In *Williams*, the Court commented that:

> [27] Much of the post-*Childs* jurisprudence regarding proximity has engaged in a factually specific evaluation of whether "something more" is present to suggest that a positive duty to act may exist. While there is no definitive list, the case law has looked at a variety of factors to determine what could qualify as "something more" that would make a social gathering an inherent and obvious risk, including: whether alcohol was served at the party or whether guests were invited to bring their own alcohol, the size and type of the party, and whether other risky behaviour was occurring at the party, such as underage drinking or drug use: see generally *Childs*, *Sidhu*, *Wardak*, *Lutter*, *Sabourin*, *Kim, Allen v. Radej*, 2014 ABQB 171, *Oyagi v. Grossman*, 2007 CanLII 9234 (Ont. Sup. Ct); *Wenzel v. Desanti,* 2011 ABCA 226, 510 A.R. 327, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 437.
>
> [28] There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is *Childs*, which was a "bring your own alcohol" party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see *Robinson v. Lewis*, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker's home to have dinner and after-work drinks outside is not inherently dangerous or risky: see *Allen*, at para. 78. Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see *Kim*, at paras. 9-10, 25. On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk: *Oyagi*, at paras. 6-7, and 12.

[195] I do not find these cases to be of assistance. In none of them was liability established. While each discusses the potential for such a finding, the absence of such a finding limits their application to this case.

[196] The Pearsons submit the following cases as examples where the court refused to conclude social hosts owed a duty of care in similar circumstances.

[197] In *Desanti v. Gray*, 2011 ABCA 226, leave to appeal ref'd [2011] S.C.C.A. No. 437, the Alberta Court of Appeal dismissed an appeal against parents whose 17-year-old son held a party where the plaintiff became intoxicated. A young man

2020 BCSC 881 (CanLII)

left the party and waited for the plaintiff to leave. He and the plaintiff engaged in a fight, following which the young man returned to his vehicle and then accidentally or intentionally twice hit the plaintiff with the vehicle. The plaintiff sued the young man for his injuries suffered. The young man alleged the respondent parents were liable to the plaintiff for failing to ensure that the plaintiff did not consume alcohol and not preventing the plaintiff from confronting the appellant.

[198] The Court of Appeal held that the young man's claim could not satisfy either branch of the *Anns* test for determining the existence of a duty of care:

> 23. In these circumstances, the appellants cannot satisfy the first prong of the *Anns* proximity test *(Anns* v. *Merton London Borough Council,* [1978] A.C. 728 (H.L.)) for determining the existence of a duty of care, namely the foreseeability of the physical harm suffered by the plaintiff at the hands of a third party due to his consuming alcohol at the party. It is Simply not reasonably foreseeable to a householder that a guest who has left a party at that house would be the victim of an assault at some place outside of the control of the householder simply because the guest was consuming alcohol at the party: see by comparison *Kauk v. Dickson*, 2008 ONCA 97, 53 C.C.L.T. (3d) 223 (a commercial host *case*); *Dickerson v. 1610396 Ontario Inc.,* 2010 ONCA 894, 329 D.L.R. (4th) 542 (a commercial host case). To conclude otherwise would unreasonably extend social host liability beyond that presently envisioned by the law. This is so even if the social host hears something that suggests that the plaintiff guest might act in an unwise manner after he has left.
>
> 24. As pointed out to counsel during argument, the extension of social host liability thus proposed by the appellants would not be limited to situations where the guest is intoxicated. The potential plaintiff guest might be sober but angry or sad or insouciant to a degree that makes it foreseeable that the guest might fall into some harm at some stage in the future. The factor of intoxication here is not a moral hook on which to hang liability. The only relevance of Wenzel's level of insobriety, if anything, is said to be in influencing his decision to confront Desanti. Wenzel's insobriety did not cause his injury. He was injured in a dispute with Desanti. On the other hand, the introduction of insobriety as a factor demonstrates the indeterminate nature of the liability thus proposed, since presumably the level of insobriety, or how long it might last, or its effect on the mental state of the guest, would all be factors to consider in assessing any such foreseeability. And all of this ignores the lack of any "control" by the social host from which a duty to take protective measures (for whatever time and space is said to be predictably involved) would spring.
>
> 25. Thus, even if proximity at the first phase of *Childs* were to be assumed, the indeterminate liability concern would certainly rise to the occasion at the second level of the *Anns* analysis. Implicit in an extension of social host liability for voluntary guests becoming crime victims after they

2020 BCSC 881 (CanLII)

> have left any area in which the hosts have any control of the situation would be an undefined form of extended guardianship. This form of liability cannot be reconciled in a legally manageable way with the proper limits of personal liability in negligence as discussed in *Childs.* Indeed, it is even conceptually in tension with the restrictions on vicarious liability: see e.g. *E. (B.) v. Oblates.* In practical terms, it is not easy to define such an extension of social host liability.

[199] In *Jampolsky v. Shattler*, 2011 BCSC 494, the defendant hosted a party. One of the guests stole the host's car and caused an accident, injuring the 18-year-old plaintiff. The Court held that the risk of the guest stealing the host's car and engaging in unsafe driving was not reasonably foreseeable.

[200] In *Baumeister (guardian ad litem of) v. Drake* (1986), 5 B.C.L.R. (2d) 382 (S.C.), [*Baumeister*] Mr. Justice Gould dismissed a claim against the party hosts who gave a party for their grade 12 son and his friends who were graduating from high school. Although the guests were underage and the hosts had provided alcohol, Mr. Justice Gould refused to hold the hosts liable, stating at page 389:

> Neither Shane Baumeister [the plaintiff] nor Gary Drake [the driver] were permitted, induced, encouraged or enabled by the Carefoots [the hosts], or either of them, to get themselves into their dangerous state of impairment. They did that themselves before they ever arrived at the Carefoots' party, and aggravated their disability themselves after they arrived at the party with alcohol supplied by themselves or other guests, but not by the Carefoots.

[201] Gould J. found that there was no way for the hosts to prevent guests from drinking their own alcohol, and found the driver and the plaintiff equally at fault for the accident.

[202] Lastly, I have considered *Ferrier v. Hubbert*, 2015 ONSC 5286, in which Mr. Justice Belch granted summary judgment dismissing a claim against parents whose adult son and girlfriend hosted a party at his parents' cottage while the parents were there. Belch J. found the following:

> [57] While [the defendants] Mr. and Mrs. Sangster were present at their property that day, they were not invited to the birthday celebrations. From their testimony during discovery, [the injured plaintiff] Daniel Ferrier and [the defendant/driver] Justin Hubbert were not acquainted with Mr. and Mrs. Sangster. Mr. and Mrs. Sangster, in addition to not serving alcohol, provided no food to the guests either. The only contribution made by Mr. Sangster to the event is he operated the boat and motor used in the

2020 BCSC 881 (CanLII)

> water skiing and tubing when it was [the defendants' son] Joey Sangster's turn, otherwise, Joey Sangster operated the boat and motor when the guests were towed behind it. The operation of the boat and motor did not lead to any accident or injuries.
>
> [58] Mrs. Sangster's involvement occurred around midnight or shortly after midnight when she appeared at the cabin to inquire whether the boys, Joey, Daniel, and or Justin had left from the cabin in a motor vehicle. Evidently, she then discovered Joey's car was missing and phoned him demanding he return with the car and not to remove it from the property. About 20 minutes later, he and the car returned. I am satisfied these actions do not make her a social host.
>
> [59] Her additional involvement took place when she returned to the cabin on a second occasion after the boys had again left the property, this time with Justin Hubbert operating his motor vehicle. This does not make her a social host. When the boys returned after the accident, she helped clean up the blood on Justin Hubbert's face which was a result of injuries he received in the accident. She later drove him to the hospital. Cleaning the blood from his facial injuries and driving him to the hospital for treatment do not make her a social host, but are consistent with the actions of a caring person.

[203] While I have reviewed and considered these cases, my task remains to determine reasonable foreseeability, proximity, and ultimately whether a duty of care was owed on the facts as I have found them.

Application of the Test for Duty of Care

[204] The first stage of the *Anns/Cooper* analysis asks whether the relationship between the plaintiff and the defendants discloses reasonable foreseeability and sufficient proximity to establish a *prima facie* duty of care.

[205] The duty of care asserted by the plaintiff here is confined to minor attendees of a party hosted by adult social hosts. He says that his status as a minor adds the additional element contemplated by the Court in *Childs* at para. 47 as the harm in such a case is far more foreseeable and the relationship between him and the Pearsons far more proximate than in *Childs*.

[206] Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendants ought reasonably to have contemplated the type of harm the plaintiff suffered.

2020 BCSC 881 (CanLII)

[207] As the Court stated in *Rankin* at paras. 21-22, it would be unjust to impose liability in cases where there was no reason for the defendant to have contemplated that their conduct could result in the harm complained of.

[208] In *Rankin*, the Court clarified how the inquiry into foreseeability is to be undertaken:

> [24] … the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged": A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 322 (emphasis added). This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff: p. 150; see also *Anns*, at pp. 751-52; *Childs*, at para. 25.
>
> [25] The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
>
> [26] Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered — personal injury — was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.
>
> [Emphasis added]

[209] First, I consider reasonable foreseeability.

[210] The fact that something is possible does not mean it is reasonably foreseeable. Obviously, any harm that has occurred is by definition possible. Thus,

2020 BCSC 881 (CanLII)

as discussed in *Rankin* at para. 46, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met.

[211] The plaintiff contends that the proper question to be asked here is whether the type of harm suffered; personal injury, was reasonably foreseeable to someone in the position of the Pearsons when considering the safety of minors who have consumed alcohol and/or smoked marijuana, leaving their home at approximately 1:00 a.m. into the unlit, rural roads of Salt Spring Island.

[212] The plaintiff submits that as such, unlike *Childs* and *Rankin,* foreseeability in this case is clear cut and easily made out on the facts. He says that the evidentiary gaps in *Rankin* are filled here. When the defendants failed to properly control and supervise the party and the intoxication of the minor attendees, and then allowed those attendees to venture out, it was reasonably foreseeable that personal injury could occur in any number of ways.

[213] The plaintiff argues that given the rural, forested setting, lack of light and intoxication of the minors being released into this environment, foreseeable causes of personal injury were abundant. Trips and falls on the roads, being hit by a car, the hazards that accompany wandering on foot intoxicated, fights and scuffles, just to name a few, were all said by the plaintiff to have been foreseeable.

[214] The plaintiff further contends that the foreseeability of harm when minors are consuming alcohol is informed by the fact the Legislature through the *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19 has prohibited minors from possessing, purchasing, and consuming alcohol as well as the sale of alcohol to minors, employment of minors in business where alcohol is being consumed and, most importantly allowing minors to consume alcohol. Section 77 states that:

> Supplying liquor to minors
>
> 77(1) Subject to the regulations, a person must not
>
> (a) sell, give or otherwise supply liquor to a minor,
>
> (b) possess liquor for the purposes of selling, giving or otherwise supplying the liquor to a minor, or

2020 BCSC 881 (CanLII)

> (c) allow a minor to consume or possess liquor in or at a place under the person's control.

[215] The provision replicates the language of s. 33(1) of the former *Liquor Control and Licensing Act*, in force at the time of the party. For the purpose of my analysis, it does not matter which statute is relied upon by the plaintiff.

[216] The Pearsons contend that the Court in *Childs* concluded social hosts did not owe a duty of care to a plaintiff injured in a car accident caused by an intoxicated adult guest, and that if the accident occurred in Alberta (or any of the other provinces where the drinking age is 18), the application of *Childs* would preclude liability.

[217] The Pearsons argue that the mere fact that the accident occurred in British Columbia instead of Alberta does not create liability on their part. I disagree, and I am not prepared to ignore the legislation in this province.

[218] In *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, a majority of the Court, made the following comments concerning the requirement in the BC *Motor Vehicle Act* that passengers under the age of 16 were to wear seatbelts, which are directly applicable to the present case:

> It is clear that the breach of a statutory provision is not conclusive of liability. Yet the existence of the section does provide further support for finding that a duty of care rests on the driver to take all reasonable steps to see that seat belts are worn by children. The statute reflects the public importance placed on safety measures and a societal concern for promoting the safety of children. It is, as well, a public recognition that children often require the help and supervision of adults, particularly in ensuring that when they are passengers in a vehicle, they are made reasonably safe.

[219] Similarly, in *S.C. (Next friend of) v. Boy Scouts of Canada*, 2002 ABQB 152 [*S.C.*], a case involving the molestation of a 5 year old boy at a Boy Scout camp that a family friend brought him to, Madam Justice Acton found that:

> [20] Thus, the *Child Welfare Act*, like the *B.C. Motor Vehicle Act*, identifies general societal values and interests that can be taken into account when ascertaining underlying duties and policy goals in negligence law. The Act is relevant, in my view, to both parts of the *Anns* test.

[220] The societal values and interests represented by the provisions of the *Liquor Control and Licensing Act* mentioned above can inform the first part of the *Anns* test,

2020 BCSC 881 (CanLII)

but it is well-established that a breach of statute does not create liability in negligence: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225.

[221] While I accept that the societal values and interests represented by the provisions of the *Liquor Control and Licensing Act* should be considered in applying the first part of the *Anns* test, I find that they are overwhelmed by the community standards on Salt Spring Island at the time of the accident.

[222] The plaintiff submits that theft of the Subaru need not have been foreseeable. For the purposes of foreseeability in the duty of care analysis, he submits that *Rankin* makes clear that all that is required in this case is that personal injury to the plaintiff, an intoxicated minor, was reasonably foreseeable, including injury arising from ending up in a car with an intoxicated driver.

[223] The plaintiff contrasts his situation to that in *Rankin* where the foreseeability inquiry failed because all of the evidence was directed at the issue of theft. The evidence did not, however, suggest that if a vehicle was stolen from Rankin's Garage, that vehicle would be operated in an unsafe manner. Further, the evidence did not address the risk of theft by minors or the risk of theft leading to an accident causing personal injury. As such, the Court found that, while theft was foreseeable, further evidence establishing that it was reasonably foreseeable that the vehicle would be operated in an unsafe manner was required in order for the plaintiff to make personal injury reasonably foreseeable from the act of theft.

[224] In the recent decision of the Court of Appeal in *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2020 BCCA 86 [*Provost*], Mr. Justice Butler wrote at para. 5:

> This appeal raises difficult questions about the duty of care owed by a car dealership whose negligent actions result in the theft of a vehicle and the thief's negligent driving results in injury to persons and damage to property. The issues raised are particularly contentious because the judge relied on the decision of the Ontario Court of Appeal in *J.J. v. C.C.*, 2016 ONCA 718 in concluding that the Dueck Appellants owed a duty of care. That decision was subsequently overturned after the trial decision in this case: *Rankin (Rankin's*

2020 BCSC 881 (CanLII)

> *Garage & Sales) v. J.J.*, 2018 SCC 19. Justice Karakatsanis, writing for the majority in *Rankin*, concluded that a garage business that negligently stored vehicles by leaving them unlocked with the keys in the ashtray did not owe a duty of care to the plaintiff who was seriously injured by the negligent driving of a minor who stole the vehicle. In arriving at that conclusion, Justice Karakatsanis determined that while the risk of theft was reasonably foreseeable, the plaintiff presented insufficient evidence to establish that it was foreseeable that someone could be injured by negligent operation of the stolen vehicle subsequent to the theft. She summarized her conclusion:
>
> > [2] … A business will only owe a duty of care to someone who is injured following the theft of the vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.

2020 BCSC 881 (CanLII)

[225] The plaintiff alleges that his case is different in that the acts in *Rankin* and *Provost* were relatively innocuous; leaving a vehicle where it could be stolen but not create a danger of injury, whereas here, the plaintiff contends that multiple failures of the Pearsons releasing minors, whose judgment and capacities were impaired by the consumption of alcohol and/or the use of marijuana, into the dark did create such a risk.

[226] The plaintiff contends that *Rankin* and *Provost* required two intervening steps; theft of the vehicle and then dangerous operation of the vehicle, whereas here, the only step was the release of the impaired plaintiff into the dark.

[227] In *Rankin*, the Court addressed the duty of care analysis on the basis that the foreseeability question must be framed in a way that links the impugned act (in *Rankin*, leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).

[228] Here, the impugned act was described as allowing intoxicated minors to venture off on foot from the party in the middle of the night. Applying *Rankin*, the question of foreseeability in this case must be framed in a way that links that act to the harm suffered by the plaintiff; in other words: was physical injury reasonably foreseeable as a result of letting minors who have consumed alcohol and/or marijuana leave the Pearsons' premises on foot at night?

[229] As I have discussed above the Court in *Rankin* at para. 46 held that simply because something is *possible* does not mean it is *foreseeable*. The plaintiff submits that trips and falls, being hit by a car, fights and scuffles, and the hazards that accompany wandering on foot intoxicated were all foreseeable. I am unable to accept that contention. These harms may have all been possible, but my inquiry must focus on whether personal injury was foreseeable. I find that these harms were not foreseeable.

[230] The post-*Childs* jurisprudence has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, and I have rejected the submission that the plaintiff was intoxicated when he left the party. In the result, I find that there were no obvious signs that the plaintiff would suffer injury by walking home from the party.

[231] Despite his argument that the foreseeability inquiry should focus on the foreseeability of his injury, rather than the theft of a car, he submits that the theft of a car was nevertheless foreseeable in the circumstances.

[232] The plaintiff contends that several witnesses, including Paige Rumi and Mr. Pearson, testified as to the local custom of storing vehicles, particularly that they are commonly left unlocked with the keys inside them. As such, the plaintiff contends that theft of a vehicle was the very type of thing that was reasonably foreseeable in the circumstances; the very kind of evidence that was missing in *Rankin*.

[233] I am unable to accept this contention. I find that the culture of leaving vehicles unlocked, even with keys somewhere in or near them existed because the risk of vehicle theft was too remote to create a duty on the Pearsons to anticipate that guests from their party would steal a vehicle to drive after drinking alcohol.

[234] I have already indicated above that I am not persuaded that the plaintiff was an intoxicated minor at the time he left the party.

[235] The evidence does not support the assumption inherent in the contention that the plaintiff was so intoxicated that he was incapable of responsible conduct. The

2020 BCSC 881 (CanLII)

plaintiff was, by all accounts, a responsible young man whose own father could not conceive of his riding with a drunk driver, let alone participating in the theft of a car.

[236] He had walked to and from this and other parties where he and his contemporaries had consumed alcohol and/or smoked marijuana, and was trusted by his parents to find a safe means of getting home from such parties, or finding a place to spend the night.

[237] By all accounts, the plaintiff was not a bad or unreliable young man. In these circumstances, should the defendants have foreseen that someone from the party would leave on foot, and then steal a car?

[238] I find that duty did not extend to foreseeing that one or more of the party guests would steal a car and drive it unsafely.

[239] I nevertheless turn to proximity.

[240] The plaintiff submits that the duty of care for which he contends is fully in keeping with the already established duties of care in cases, “where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls” and “paternalistic relationships of supervision and control, such as those of parent-child or teacher-student”: *Childs* at paras. 35 and 36.

[241] The plaintiff agreed that, while illegal, not all parties involving alcohol and minors are necessarily risky, but he emphasized the comments of Mr. Justice Hourigan for the Ontario Court of Appeal in *Williams* at para. 28 regarding the spectrum of risk:

> [28] There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is *Childs*, which was a “bring your own alcohol” party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see *Robinson v. Lewis*, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker’s home to have dinner and after-work drinks outside is not

2020 BCSC 881 (CanLII)

> inherently dangerous or risky: see *Allen*, at para. 78. Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see *Kim*, at paras. 9-10, 25. On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk: *Oyagi*, at paras. 6-7, and 12.

[242] At a minimum, the Pearsons acquiesced in the plaintiff's presence in their home at the party.

[243] The plaintiff submits that a large party where alcohol is being consumed by dozens of minors with little to no supervision is an obvious risk, and to the extent that parents of the hosts knowingly allowed this to happen, it implicates them in the creation of the risk. The plaintiff says that those adults also put themselves in a position of supervision and control over the intoxicated minors. In this way, the specific iteration of a social host duty of care being advanced by the plaintiff is manifestly different than the one discussed in *Childs*, and is best seen as an extension of two already existing positive duties of care, in a very specific, social host, context.

[244] The plaintiff contends that the Pearsons accepted control over him and the other minor party attendees when they invited them into their home and allowed them to stay and become intoxicated. In doing so, he contends that as in *C.S.,* they "willingly and knowingly undertook to care for children in a situation where the children's parents would not be present".

[245] I find that the reasoning in this case is of limited application. C.S. was sexually molested by the defendant Miller while the two of them were visiting a Boy Scout camp, Camp Bones, at Skeleton Lake, Alberta. He was 5 years of age at the time, a factor that significantly distinguishes his vulnerability and need for supervision from the plaintiff's circumstances.

[246] The plaintiff contends that the argument that house parties for minors who can be expected to drink alcohol or smoke marijuana are safer than parties at the

2020 BCSC 881 (CanLII)

beach or in the bush, assumes that a home environment is in fact safer than those alternatives. This, of course depends the kind and level of supervision provided.

[247] The plaintiff also disagrees with the argument that minors of a certain age are going to drink regardless, and doing so in a safe environment is preferable to on their own or in small groups. He contends that this argument overlooks the fact that the minors may be more likely to drink or more likely to drink excessively at a large gathering, especially when such a gathering is an event which excessive alcohol consumption is associated with, such as a house party. No evidence was presented to support this contention, and given the widespread history and practice of such parties on Salt Spring Island prior to the party at the Pearsons, I do not accept that his contention is accurate.

[248] The Pearsons permitted minors to come to their home, and acquiesced in the use of marijuana and the consumption of alcohol at their home. They accept that they could have refused entry to their home of anyone they did not wish to attend the party and that they had the ability to prohibit excessive drinking. The Pearsons did assert some supervisory role and made some attempt to control the activities of the attendees at the party. Thus, they asserted some paternalistic relationship with the guests of the party.

[249] I find as well that the Pearsons assumed some element of control over the minors who attended the party, but I am not prepared to find that they created an inherent and obvious risk that the minor guests would or could be injured.

[250] Although I have found that the defendants were in a paternalistic relationship with the guests of the party, I find that no duty of care has been established in this case because the injury complained of was not reasonably foreseeable as a result of the defendants' conduct. The plaintiff's case thus fails on the duty of care analysis.

[251] Having concluded that a *prima facie* duty of care has not been established, I find it unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the *Anns* test.

2020 BCSC 881 (CanLII)

(b) Breach of the Standard of Care

[252] In case my conclusion about the duty of care is incorrect, I will consider whether the defendants nevertheless met the standard of care in the circumstances.

[253] Mr. Justice Major, writing for the Court, in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 [*Ryan*] explained at para. 28:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
>
> [Emphasis added]

[254] The plaintiff submits that *Bingley v. Morrison Fuels,* 2009 ONCA 319 makes it clear that, "[i]t is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable". As such, the plaintiff submits that the relevant question is whether the guests having access to cars and driving was reasonably foreseeable and this must be answered in the affirmative.

[255] The plaintiff submits that the defendants were in a "paternalistic relationship" of supervision and control over him, a category of relationship contemplated in *Childs* at para. 36. The standard of a "careful and prudent parent", typically applied to such cases, may therefore be relevant to this analysis.

[256] The Supreme Court of Canada discussed that standard of care of a careful and prudent parent in *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21 and in *K.L.B. v. British Columbia*, 2003 SCC 51 at para. 14, among others. The Court of Appeal also referred to the standard of a careful and prudent parent most recently in *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 364.

2020 BCSC 881 (CanLII)

[257] In *Laplante (Guardian ad litem of) v. Laplante* (1995) 8 B.C.L.R. (3d) 119 (C.A.) [*Laplante*] at para. 14, the Court of Appeal explained the standard of care as follows:

> A parent, or other person responsible for small children, has, of course, a duty to take reasonable care not to expose them to unreasonable risk of foreseeable harm. The test to be applied in determining whether that duty has been discharged is an "objective" one in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances. But the test is "subjective" to the extent that the reasonable parent must be put in the position in which the defendant found himself or herself, and given only that knowledge which the defendant parent had, when deciding what the reasonable parent in Mr. LaPlante's position would have understood or believed, and as a consequence have done or not have done. Ms. McGee says that "error of judgment" alone will not amount to negligence. That must, of course, be right, in the sense that there may be several courses of conduct any of which a reasonably careful parent might follow in a given situation, and it will be enough to answer a claim in negligence that the course adopted by the defendant parent was one of those which the reasonable careful parent might have taken, even though events may, of course, have shown the choice to have been unfortunate.
>
> [Emphasis added]

[258] As the Court in *Laplante* explains, the conduct of the defendant will be measured against what the careful and prudent parent would do according to the “community standards of the time”. Insofar as community standards are concerned, it is the *immediate* community that is of concern: *Arnold v. Teno*, [1978] 2 S.C.R. 287 at 313.

[259] The careful and prudent parent standard is also informed by the age of the child. In *Newton v. Newton*, 2002 BCSC 789, rev’d on other grounds 2003 BCCA 389, Mr. Justice Burnyeat cited *Lelarge v. Blakney* (1978), 92 D.L.R. (3d) 440 (N.B.C.A.) to describe the parental duty of care at para. 21:

> The parental duty of care is a duty personally imposed upon the parent irrespective of the wrongdoing or the liability of a child. The duty is to supervise and control the activities of the child and, in doing so, to use reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child. The degree of supervision and control

2020 BCSC 881 (CanLII)

> required of a young child may be very different from that required of a child approaching the age of majority. As the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish.
>
> [Emphasis added]

[260] Whether the standard of care is that of a "ordinary, reasonable and prudent person", as articulated in *Ryan*, or "careful and prudent parent", as articulated in *Laplante*, does not alter my analysis. I find that the factors and circumstances to consider are substantively the same for both. For instance, the Court in *Laplante* speaks of "community standards", and the Court in *Ryan* speaks of "custom" as an "external indicator of reasonable conduct". In addition, the careful and prudent parent standard is informed by the age of the child. Where the child is 17 years old, as in this case, I accept that the degree of supervision and control required is on the lower end.

[261] As hosts, the Pearsons had to take all reasonable steps to minimize the risks of harm to their guests, including the plaintiff. The standard is one of reasonableness, not perfection.

[262] I find that parents on Salt Spring Island took different approaches to managing teenage alcohol and marijuana consumption. Some chose to host house parties. The rationale for this approach is that it is safer for teenagers to experiment with alcohol and marijuana in a reasonably controlled and supervised environment, as opposed to going to bush parties or beach parties where participants are driving to and from the parties with no adults present. This was the Pearsons' view. Mr. McCormick acknowledged that others on Salt Spring Island shared this view.

[263] The plaintiff argues that the factors in *Ryan* support the finding that the defendants' conduct fell well below the standard of care to be expected in the circumstances.

[264] The plaintiff contends that there were many things the Pearsons could have done differently, such as: limiting the number of guests; monitoring the party more

2020 BCSC 881 (CanLII)

fully, both by taking a more active role and asking friends or family to help them; or, prohibiting alcohol consumption in accordance with the statutory regime or past an excessive point.

[265] Failing that, the plaintiff contends that the Pearsons could have instituted rules about the kind of alcohol that could be consumed; for instance, no hard alcohol; and the way alcohol was consumed; for instance, no drinking games or activities such as shots or shot gunning alcohol; identified overconsumption and taken steps; or, stopped the party.

[266] The plaintiff submits that these actions, which would have been reasonable in the circumstances, would have required little or no cost to the defendants.

[267] I find it unhelpful to list all of the things that the Pearsons might have done in an effort to avoid liability. Their duty of care cannot extend beyond the foreseeable. The question is whether the risk that arose here was foreseeable.

[268] The plaintiff submits that it was foreseeable that party guests would have access to cars and drive them. While this submission might apply with respect of those guests who arrived at the party by car, the evidence establishes that many guests, including the plaintiff and Ryan, arrived at the party on foot. I find that it was not reasonably foreseeable that guests who arrived at the party on foot would subsequently have access to cars and would drive them.

[269] In my view, the standard proposed by the plaintiff is essentially one of perfection; anticipating all possibilities and avoiding any risks. That is simply not the way the world works. The duty is to act reasonably, not to act perfectly. It is never possible to eliminate all risks and the Pearsons were not required to do so.

[270] The plaintiff argues that the Pearsons were unable to track the intoxication of their guests or the happenings at the party and cannot use the circumstances that they permitted as a defence. They cannot, for instance, create a situation they could not monitor and then allege that they were unable to foresee what could happen because they were unaware of the situation.

2020 BCSC 881 (CanLII)

[271] I do not accept that the Pearsons were unaware of the general nature of the party. While they were not hovering over the attendees, they did circulate through the party at various times and had a general sense of the atmosphere.

[272] As Mr. Frigon observed, the attendees were trying to be respectful of the fact that the Pearson parents were at home.

[273] The plaintiff contends that it is clear that both he and Ryan were intoxicated and became so on the Pearsons' premises. As I have stated above, the plaintiff was no more, and likely a lot less intoxicated at the party than he had been on many prior occasions when attending similar parties.

[274] The defendants had collected or had their daughters collect car keys from those who were thought to have driven to the party. There is no evidence that any of the partygoers who had consumed alcohol drove from the party.

[275] The plaintiff contends that the Pearsons should have ensured that the minors leaving their home had a safe means of getting home. I find that the Pearsons not only foresaw this issue, they addressed it.

[276] While Mr. Pearson conceded that there was no plan for minors who attended the party on foot and then decided to walk away, as he did not feel that there needed to be any such plan, I find that this mischaracterizes the circumstances. The plan was to let those who walked to the party walk home from the party.

[277] The Pearsons did not encounter minors who were intoxicated and had no safe way of getting home. They asked the partygoers who needed a ride to call their parents. For those without rides who needed them, Ms. Pearson offered to drive them. She eventually drove home five guests of the party. The Pearsons also allowed Dylan McLeod to stay over and sleep on their porch when he returned later in the early morning hours.

[278] There is no evidence that any of the guests at the party, other than Ryan or the plaintiff, drove whilst impaired or rode with a driver who had been drinking. I find

2020 BCSC 881 (CanLII)

that the Pearsons' plan of taking keys from anyone who might have intended to drive after consuming alcohol at their home and offering rides to those who had no safe way of leaving the party was successful in avoiding reasonably foreseeable harm to their guests.

[279] Finally, I address an additional aspect of the plaintiff's argument. The plaintiff submits that the defendants are subject to a higher standard of care because they chose to host a party in violation of the statutory regime which prohibits the consumption of alcohol by minors. This, the plaintiff says, makes the Pearsons akin to commercial hosts.

[280] While I acknowledge that the party constituted a breach of the statutory regime governing alcohol consumption by minors, I cannot accept that this fact alone demands a higher standard of care. It did not make the Pearsons akin to commercial hosts. As Gould J. found in *Baumeister*, the court takes judicial notice of the fact that graduation parties are an established custom in British Columbia, notwithstanding that they constitute, when minors are involved, a breach of the law.

[281] In the result, I find that if they owed a duty of care to the plaintiff, the Pearsons met the required standard of care.

(c) Damages

[282] Clearly the plaintiff sustained serious injuries as a result of the accident. His injuries included:

1. Right scalp hematoma.
2. Left mandibular fracture.
3. Right posterior maxillary sinus wall fracture.
4. Right upper lid contusion.
5. Right lower eyelid contusion.
6. Left subdermal hematoma.
7. Multiple areas of intracerebral contusion and hemorrhage.
8. Transverse process fractures of C7, TI, T2, undisplaced.

2020 BCSC 881 (CanLII)

9. Scapular tip fracture.
10. Right distal radius and ulnar styloid fractures with associated rhabdomyolysis/compartment syndrome.
11. Left anterior axillary abrasion/ligature.
12. Right anterior biceps abrasion/contusion.
13. Laceration right third PIP dorsally.
14. Blisters, erythema suggesting burn or prolonged downtime bilateral forearms.
15. Partial thickness laceration left anterior medial lower thigh.
16. Acute renal injury.
17. Probable aspiration pneumonitis.

(d) Causation

[283] The Pearsons can only be liable if permitting minors to consume alcohol on their property and subsequently letting those minors leave on foot caused the plaintiff's injuries in fact and in law.

[284] The test for factual causation is the "but for" test. To satisfy the "but for" test, the plaintiff must demonstrate a substantial connection between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22.

[285] The test for proof of causation was reiterated as the "but for" test by Chief Justice McLachlin in *Clements v. Clements*, 2012 SCC 32 at paras. 8 - 12.

[286] The issue of causation in law is often referred to as "remoteness". The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable": *Mustapha* at para. 12.

[287] Having found that the Pearsons owed no duty of care to the plaintiff and, if they did, met their required standard of care, it follows that the plaintiff's damage was not caused by any breach of a duty of care by the Pearsons.

2020 BCSC 881 (CanLII)

[288] Despite that finding, I will, however, deal with the parties' submissions on damages, and assess the plaintiff's entitlement to damages, had he in fact succeeded on the liability aspects of his case.

The Plaintiff's Present Circumstances

[289] Following the accident, the plaintiff was taken to Victoria General Hospital. He was in a coma in the Intensive Care Unit for 12 days before being transferred to the neurology wing. He remained in the neurology wing until December 2012, when he was transferred to Sunny Hill Health Centre for Children.

[290] The plaintiff's condition improved at Sunny Hill. He regained the ability to speak and eat, and his mobility improved. The plaintiff was discharged from Sunny Hill and returned to Salt Spring Island in June 2013. He remained on Salt Spring Island living with his parents until January 2018, when he moved to Mary Cridge Manor in Victoria ("MCM"). MCM is an assisted living facility.

[291] After the plaintiff returned from the hospital in 2013, the family moved to a new home on Mountain View Road where the plaintiff resided with them. Mr. McCormick still resides on Salt Spring Island, but he now lives in a house on Creekside Drive.

(a) Lay Witnesses

[292] Tom, the plaintiff's twin brother, visits the plaintiff monthly in Victoria. The two are not as close as they were prior to the accident. Communicating with the plaintiff is difficult and his memory poses problems. His personality has changed drastically and he lacks motivation. He stated that his brother's ability to walk is severely affected. His speaking is also impaired.

[293] He has noticed that his brother is unable to make financial decisions or decisions regarding his home and daily decisions such as with respect to cooking.

[294] When he enters his brother's residence, he sees that very little has changed from the last time he was there. The state of the apartment is the same, and he

2020 BCSC 881 (CanLII)

routinely finds items in the fridge that he bought during his last visit. While visiting his brother, Tom will go grocery shopping with him, help with cleaning and meal preparation and may go out for coffee or lunch.

[295] He has noticed that his brother is quick to become angry and frustrated and can be unpredictable. He is unable to be rational in conversations.

[296] Charlotte, the plaintiff's older sister, spent time with the plaintiff on Salt Spring Island following the accident. She stated that he was very happy to be out of the hospital and motivated and positive. He was different though. She stated that he was very immature, like a 12-year-old, and there was a lot he did not know or realize and he experienced memory issues.

[297] Charlotte testified that she feels that the plaintiff has gotten worse since moving to MCM. He seems angrier and more upset. She felt he was clearer and had more of a grasp on reality when he first returned home. She stated that she feels that he has "gone down a dark hole" and he is "worse and worse" each time she sees him.

[298] She stated that she feels that he is "not really there anymore". All the plaintiff talks about is the accident. While he does seem to sometimes be motivated, he does not seem to be able to make anything happen or maintain positivity or start something. She stated that he seems to be stuck.

[299] She stated that the plaintiff became depressed over time and this manifested by him becoming very angry and negative and losing his motivated and hopeful nature and that he seemed lonely and isolated. She stated that he seemed to feel stuck and without friends. She saw angry outbursts where he would scream or yell at her or others. She described him becoming trapped in loops which escalated situations.

[300] Charlotte testified that the plaintiff forgets to eat and seems unable to understand where to begin when making himself something. She said that his

2020 BCSC 881 (CanLII)

cleanliness and hygiene seemed okay, but that there were limitations with respect to his physical injuries, most notably his right arm.

[301] She stated that the plaintiff's mobility has become worse since he moved to MCM. When he first moved home, he attended physiotherapy and rehabilitation and was motivated to exercise. She stated that he was walking "straighter and stronger" when he first got home compared to now. He is now more "tippy" and she has seen him almost fall over a few times.

[302] She stated that the plaintiff is also vulnerable. He is lonely and desperate for friends and someone to talk to him like a normal person. He wants to be included.

[303] Ms. Jones said that the plaintiff has difficulty using his right arm. His grip is poor, and he has difficulty opening things and writing.

[304] Ms. Jones agreed that the plaintiff walks with a funny gait, dragging his left foot, and said that his balance is "not great" but is better when he is rested. She gave evidence that he becomes fatigued easily, especially if he has a strenuous morning. This results in increased confusion and slurred speech.

(b) Medical Evidence

[305] Dr. Susan Lazar, a psychiatrist, expressed the opinion that the plaintiff sustained a severe traumatic brain injury in the accident, and as a result, experiences cognitive impairments consistent with the probable diagnosis of major neurocognitive disorder. The plaintiff's cognitive impairments include deficits related to his memory functioning, executive functioning and social cognition, but he does not have a major mood or anxiety disorder.

[306] Dr. Jacqueline Purtzki is a specialist in adult and paediatric physical medicine and rehabilitation. In her second report, she notes that the plaintiff's mood and anxiety improved after he started taking Effexor.

[307] Dr. Purtzki opined that the plaintiff's brain injury resulted in physical symptoms. These are truncal weakness, lower limp spasticity and abnormal gait,

2020 BCSC 881 (CanLII)

mild thoracic scoliosis, abnormal shoulder girdle movements, and impaired dynamic balance.

[308] She described that the plaintiff also had physical injuries arising from the accident, which include right forearm fracture and compartment syndrome. This results in a “phantom pain” and reduced functioning of the right arm and hand. The plaintiff gave evidence that his right arm pain manifests as a tingling or numbness in his wrist and elbow. His right hand will form a fist unintentionally, but he can pick things up and do what he needs to do with his right hand.

[309] In 2017, the plaintiff fell and badly fractured his left elbow while attending a marijuana consumption establishment. He had consumed Sativa marijuana, and, when he stood up, he was unable to walk.

[310] The plaintiff’s use of his right arm mobility is extremely limited. He was learning to use his left arm more following the accident, but after his fall and the injury to that arm, he is back to using his right arm.

[311] Dr. Purtzki described the plaintiff’s 2017 injury to his left elbow as a complicated left elbow fracture that resulted in a permanent impairment which prevents him from fully extending his left arm. She said that this injury affects the plaintiff’s ability to lift heavy objects. She expressed her view that the left elbow injury was the result of excessive marijuana intoxication, not the accident.

[312] The plaintiff can no longer run. He can walk uphill if he does so slowly. He can use stairs if there is a railing for his use. His knees get sore when walking and he requires special running shoes, which he goes through at a rate of one pair a month, due to his abnormal gait, whilst walking on pavement.

[313] In the history section of her January 25, 2013 report in the Children’s Hospital records, Dr. Andrea Chapman, a psychiatrist, recorded:

> According to the father, they said before the accident, [the plaintiff] had at times been somewhat ‘moody.’ He said that there possibly could have been some depressive symptoms before the accident, however it was not something they formally looked into and in the past he has never seen a

2020 BCSC 881 (CanLII)

> psychologist, counselor or psychiatrist in the past. He said in the summer, he had been hanging around with a 'not so good crowd'. He had been drinking and smoking marijuana.

Damages

(a) Non-Pecuniary Damages

[314] The parties agreed that at the present time, the upper limit for non-pecuniary damages is approximately $388,177.

[315] The purpose of non-pecuniary damages was succinctly stated by Madam Justice Ker in *Trites v. Penner*, 2010 BCSC 882:

> [188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [*Andrews*]; *Jackson v. Lai*, 2007 BCSC 1023 at para. 134 [*Jackson*]; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 135 [*Kuskis*].
>
> [189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews; Jackson; Jenkins v. Bourcier*, 2003 BCSC 388 at para. 87; *Radford v. Drobot et al.*, 2005 BCSC 293 at para. 62; *Kuskis* at para 136.

[316] In *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*], Madam Justice Kirkpatrick set out the following non-exhaustive list of the factors which influence awards for non-pecuniary damages at para. 46:

a. the age of the plaintiff;
b. the nature of the injury;
c. the severity and duration of pain;
d. the disability;
e. the emotional suffering;
f. the loss or impairment of life;
g. the impairment of family, marital, and social relationships;
h. the impairment of physical and mental abilities; and
i. the loss of lifestyle.

2020 BCSC 881 (CanLII)

[317] As a result of the accident the plaintiff has a shortened life expectancy, with a predicted age of death at 69.8 years. This is a difference of 11 years from an average BC adult's life expectancy. His shortened life expectancy will affect his claim for non-pecuniary damages, his claim for the cost of future care and, to a lesser extent, his future income claim.

[318] The plaintiff submits that an award of non-pecuniary damages near or at the upper limit is appropriate in this case. He submits this case is substantially similar to *Spehar v. Beazley*, 2002 BCSC 1104, aff'd 2004 BCCA 290 [*Spehar*], where the upper limit, then $280,000, was awarded. He contends that, like the plaintiff in *Spehar*, his brain injury is "devastating". He relies on *Spehar* for the proposition that a devastating brain injury should attract an award of non-pecuniary damages in the upper range without making "fine distinctions" regarding degree of comparable brain injuries.

[319] The defendants referred me to *Robinson (Litigation guardian of) v. Bud's Bar Inc. (cob Bud's Bar and Lounge)*, 2015 BCSC 1767 [*Robinson*], and *Mackey (Litigation guardian of) v. British Columbia (Provincial Capital Commission)*, 2016 BCSC 1333 [*Mackey*].

[320] In *Robinson,* Mr. Justice Sigurdson dealt with a 19-year old plaintiff who suffered a traumatic brain injury causing cognitive impairment when he was pushed backwards during an altercation and hit his head on the pavement. The plaintiff's brain injury caused permanent cognitive difficulties such as impaired ability to sequence information, poor insight, a lack of focus, impaired memory, and difficulty with sustained concentration and multi-tasking. He also developed a mental disorder requiring antipsychotic and anti-anxiety medication for the rest of his life. The plaintiff was awarded $250,000 in non-pecuniary damages.

[321] The plaintiff contends that the brain injury and resulting symptoms in *Robinson* are similar to his, but that his physical injuries are more significant than those of the plaintiff in *Robinson*.

2020 BCSC 881 (CanLII)

[322] In *Mackey*, the plaintiff, age 17, fell two stories on the concrete walkway when he tried to swing around a lamp post that came loose. The plaintiff suffered a traumatic brain injury with permanent cognitive defects. He also suffered a broken arm, lacerations to his scalp, chin and tongue, and contusions to his chest, arms and legs. He spent five weeks in hospital and another 15 months in an intensive rehabilitation program. Mr. Justice Macintosh found that that plaintiff would have gone to medical school if it were not for his injuries. He was awarded $250,000.

[323] The defendants contend that the plaintiff in *Mackey* appears to have regained more physical functioning than the plaintiff has, and that taking into account the *Stapley* factors in his condition, $275,000 is a fair award for non-pecuniary damages.

[324] While I accept that the plaintiff has lost a great deal due to the injuries that he sustained in the accident, he has not been left without some ability to enjoy the life he now faces. Bearing in mind the present upper limit for an award for non-pecuniary damages, had I found liability for the plaintiff I would have awarded him $300,000 under this head of damages.

(b) Loss of Past Earning Capacity

[325] The legal principles which apply to a loss of income earning capacity award, both past (pre-trial) and future (post-trial), were summarized in detail by Mr. Justice Verhoeven in *Firman v. Asadi*, 2019 BCSC 270 at para. 155, where he adopted his previous comments in *Sendher v. Wong*, 2014 BCSC 140. With respect to past loss of income earning capacity, Verhoeven J. summarized the legal principles as follows:

> [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.
>
> [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.

2020 BCSC 881 (CanLII)

> [160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:
>
> > What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, aff'd 2011 BCCA 45 (CanLII).
>
> [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.
>
> [163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.

[326] The plaintiff introduced the report of an economist, Robert Carson of Associated Economic Consultants, in support of his claim for loss of earning capacity. According to Table 1 in Mr. Carson's report of November 4, 2019, which assumes that the plaintiff pursued carpentry after high school, his past income loss net of all labor market contingencies is $165,433, assuming a four-year path to becoming a carpenter.

[327] The plaintiff did finish high school equivalency, but it took distance education courses, tutoring and more time for him to do so, and I am not satisfied that he did so on any traditional basis.

[328] The plaintiff submits that the evidence establishes that, had he not been injured in this accident, he would have easily earned his ticket in carpentry and used it as a stepping stone to other educational, business and vocational accomplishments, including becoming an engineer, architect or starting his own

2020 BCSC 881 (CanLII)

business. He argues that his practical capabilities and the example set by his twin brother make it far more likely the latter or something similar would have been his course.

[329] He contends that a reasonable assessment of his past loss of income is $182,000 inclusive of 10% non-wage benefits.

[330] I am unable to accept that there is any likelihood that, but for the accident, the plaintiff would have achieved an occupation other than that of a carpenter, but I do find that there was a real and substantial possibility that he would have pursued work in the field of carpentry.

[331] The plaintiff's figures, however, ignore the limited income he has enjoyed since the accident. In 2015, he worked as a landscape laborer working two to three days per week for four to five hours per day during the working season. He earned around $1,000 per month. The work ended when he fractured his left elbow.

[332] In 2018, he worked at a marijuana consumption store called Terp City Lounge. He worked six to seven hour shifts and was paid $13.70 per hour. His duties included collecting cover charges for customers, general clean-up, and selling snacks. More recently, he got a job through an organization called Solid Outreach, where he and a friend are paid $25 per hour to pick up needles for two hours.

[333] I find that the income that the plaintiff has managed to earn since the accident is so minimal that it is less than the amount of income that he would have earned, whilst in training to be a carpenter, and need not be taken into account to reduce his claim for lost earning capacity up to the date of trial.

[334] The question arises as to how long it would have taken the plaintiff to complete his carpentry training, but for the accident.

[335] Dylan McLeod is 24 years old. He is the son of Dave McLeod. He lives in Vancouver and works as an apprentice carpenter. He has yet to receive his full certification, having completed his first three years of education at Camosun College

2020 BCSC 881 (CanLII)

in Victoria, he plans to complete his fourth in Vancouver. He believes he will be a fully qualified carpenter in September 2020. He stated that he has worked off and on and could have become a carpenter in four years had he worked full time.

[336] The plaintiff's twin brother, Tom, went to Camosun College to become an electrician. He will become a journeyman electrician once he completes his work hours this summer.

[337] I was impressed with the industry and accomplishments of the plaintiff's brother Tom. I find that his drive to pursue training and a career was superior to that of the plaintiff. I find that he was considerably more motivated to pursue training than the plaintiff. I conclude that his delay in completing his training as an electrician was due to the other training he interspersed with his training as an electrician.

[338] I find that, but for the injuries he sustained in the accident, the plaintiff would have taken the same length of time to complete his apprenticeship as did his friend Dylan McLeod, and had he pursued carpentry, I find that the plaintiff would likely have earned his certification in the summer of 2020.

[339] Had the plaintiff pursued his training as a carpenter, his capacity for part-time employment would have been reduced, but not entirely eliminated. Bearing in mind the length of time that I have found that the plaintiff would have taken to complete training as a carpenter I find that the modest income earned by the plaintiff since the accident is less than he would have earned over the period of time since the accident, had he pursued a career as a carpenter.

[340] An award of $150,000 would reflect the delayed eight-year path I find that the plaintiff would have taken, but for the accident, similar to Dylan McLeod. Had I found liability for the plaintiff I would have awarded him that amount under this head of damages.

2020 BCSC 881 (CanLII)

(c) Loss of Future Income Earning Capacity

[341] The plaintiff contends that an assessment of $2,500,000, inclusive of benefits, under this head of damages is reasonable.

[342] In Mr. Carson's income loss report of November 4, 2019, the plaintiff's without-accident future income is said to be $1,864,545. However, this figure does not take into account the plaintiff's reduced life expectancy. Mr. Carson said the reduced life expectancy would result in a reduction of up to 5%, or roughly $95,000.

[343] Mr. Carson's calculations assume that the plaintiff would have completed his carpentry certification in four years. He admitted that if it took the plaintiff eight years, as I have found would have been the case, but for the accident, this would reduce his total income loss, but that the reduction would be modest because earnings data already reflect the fact that some people take longer to complete their certifications.

[344] The defendants contend that taking into account the plaintiff's reduced life expectancy and the likelihood that he would have earned his carpentry certification in the summer of 2020, an overall 5% reduction of Mr. Carson's without-incident future income total is justified, bringing the number to $1,771,317.75.

[345] The defendants say that the plaintiff's figure should be further reduced to take into account the plaintiff's residual earing capacity.

[346] The defendants present the plaintiff's future income loss, net of any residual earning capacity at a final total of $1,528,728.11.

[347] They emphasize that according to Dr. Lazar, Dr. Purtzki, and the vocational rehabilitation consultant, Mr. Alex Jackson, the plaintiff should have some residual earning capacity. He had just started grade 12 when the accident occurred. His prior work history included working at a golf course, a pub, a restaurant, and various landscaping and construction-related jobs. Although there were some references to architecture, firefighting, and photography, the most likely course is that the plaintiff

2020 BCSC 881 (CanLII)

would have pursued a career in carpentry. He probably would have gone to Camosun College.

[348] Dr. Lazar expressed the view that the plaintiff might be successful in securing employment in the future. She stated in cross-examination that he can work part-time in the right environment.

[349] Mr. Jackson stated that part-time volunteer or paid work would be a good outcome for the plaintiff.

[350] Dr. Purtzki expressed her opinion that although the plaintiff will never be able to support himself financially, he could “take on part-time, low skilled and low paying jobs”.

[351] While these experts expressed these views, I find that they did so more in the hope of finding activities that would occupy the plaintiff, as opposed to earning him any real income.

[352] Having observed the plaintiff, and hearing the limitations that he will face in the future from his family members, his friends, and the experts, I find that he has no appreciable residual earning capacity.

[353] Had I found liability for the plaintiff I would have assessed his future loss of income earning capacity at $1.8 million.

(d) Cost of Care to Date

[354] This aspect of the plaintiff’s claim includes a claim for his parents “in-trust” for the considerable support that they have provided to him.

[355] In *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 180, Madam Justice Smith reviewed the factors to be considered in the making of “in-trust” awards. She then offered the following summary of those factors:

> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

2020 BCSC 881 (CanLII)

(b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);

(c) the maximum value of such services is the cost of obtaining the services outside the family;

(d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

(e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,

(f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[356] The law relating to in-trust awards was more recently summarized by Mr. Justice Davies in *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155:

> [529] Spouses or other family members who provide care or other services to an injured plaintiff are entitled to compensation for those services rendered over and above those what would be expected from the family relationship.
>
> [530] In *Dykeman v. Porohowski*, 2010 BCCA 36, Newbury J.A. wrote at para. 28:
>
> > [28] Since *Kroeker*, it has been settled law in this province that "housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family." In *Kroeker*, such recovery was allowed under the heading of 'loss of future ability to perform household tasks', but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., *McTavish v. MacGillivray*, 2000 BCCA 164 (CanLII) at paras, 43, 51-7, *per* Huddart J.A.; *West v. Cotton* (1995) 1995 CanLII 1424 (BC CA), 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and *Campbell v. Banman* 2009 BCCA 484 (CanLII). The reasoning in *Kroeker* has been extended beyond "spousal" services to services rendered by other members of a family: see *Boren v. Vancouver Resource Society, Dufault, McTavish v. MacGillivray*; *Bystedt v. Hay*, all *supra*. Such awards are colloquially referred to as "in trust" even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see *Feng v. Graham* (1988) 1988 CanLII 3044 (BC CA), 25 B.C.L.R. (2d) 116 (C.A.) at 9-10*; McTavish, supra.*

2020 BCSC 881 (CanLII)

[357] The plaintiff's parents spent all or part of 263 days with the plaintiff at the various hospitals where he received treatment.

[358] The plaintiff was in a coma in the ICU for 12 days. There was temporary housing at Victoria General Hospital where the family was able to stay.

[359] In June 2013, the plaintiff returned to Salt Spring Island, where he continued to receive therapy. In January 2018 he moved to MCM in Victoria.

[360] Mr. McCormick and Ms. Jones have provided care, support, and guidance well above that expected of a parent. They have been involved in every aspect of the plaintiff's rehabilitation, care, and re-introduction to avocational life. The additional work included interacting with caregivers, managing his daily life decisions, and accompanying the plaintiff for treatment. The plaintiff needs constant accompaniment when he travels because if anything went wrong, anything out of the ordinary, he would become confused and is vulnerable to potentially making bad decisions.

[361] Ms. Jones reduced her work to a four-day week to continue to assist her son, for example with appointments, although she received some income replacement. She felt that the nursing care on the neurological ward was subpar and that she was required to help with care aide tasks due to short staffing. While at Sunny Hill, she essentially spent her days caring for her son and interacting with the various rehabilitation providers.

[362] As in the case of *Woo v. Crème De La Crumb Bakeshop & Catering Ltd.*, 2019 BCSC 1752, the plaintiff presents an in-trust claim on behalf of his parents in the amount of $100,000 for his father and $50,000 for his mother, which includes the assistance they will continue to provide in the future.

[363] The defendants concede that the plaintiff's parents have been heavily involved in his care since the accident and it is clear that they are entitled to compensation. They were less involved during his stay at the Victoria General Hospital, but were particularly involved in his care while he was at Sunny Hill from

2020 BCSC 881 (CanLII)

November 2012 to June 2013 and when the plaintiff lived on Salt Spring Island from June 2013 to January 2018. The defendants also concede that an in-trust award should be made for care and services provided during the four and a half years that the plaintiff lived on Salt Spring Island. The defendants submit the plaintiff's parents' involvement in his care has reduced significantly since he moved to MCM in January 2018.

[364] In *Sangra (Guardian ad litem of) v. Lima*, 2015 BCSC 2350, the plaintiff's wife took over six months off of work and spent 12-15 hours per day or more in the hospital with the plaintiff. The care she provided during the plaintiff's initial five and a half weeks in hospital was similar to the care that the plaintiff's family provided at Victoria General Hospital. Mr. Sangra was then transferred to two different facilities. At these facilities, the plaintiff's wife provided a similar or greater level of care to what the plaintiff's parents provided at Sunny Hill. Mr. Justice Walker concluded at para. 243 that:

> I find that Ms. Sangra's significant efforts to help her husband with his recovery while he was hospitalized, particularly at Mt. St. Joseph's and Holy Family hospitals, augmented the rehabilitation care provided by the medical staff to Mr. Sangra's recovery. With the encouragement of hospital and rehabilitation staff, and in addition to helping her husband with his communication, Ms. Sangra was continuously at his side assisting him to become flexible and mobile. She also fed and cleaned him, changed his soiled bedding and clothing and helped him with his toileting. The evidence establishes that hospital staff encouraged Ms. Sangra to do as much as she could to assist because of their heavy workloads. Her relentless efforts to promote her husband's recovery have continued since his release from Holy Family Hospital. I am satisfied that her efforts are directly linked to the qualitative nature and speed of Mr. Sangra's recovery.

[365] Walker J. awarded the plaintiff's wife an in-trust award of $28,000 for care provided while the plaintiff was in hospital. The defendants concede that the plaintiff was hospitalized for longer than Mr. Sangra, which should be reflected in the in-trust award in this case.

[366] The defendants contend that the in-trust award should also reflect the fact that the plaintiff's care needs declined as his condition improved, and thus, an in-

2020 BCSC 881 (CanLII)

trust award of $50,000 would be fair compensation for the care provided by his family while at Victoria General Hospital and Sunny Hill.

[367] The defendants raised the decision in *Hermanson v. Durkee,* 2014 BCSC 877, where an 18-year-old plaintiff suffered a severe traumatic brain injury in a motor vehicle accident. Like the plaintiff, Mr. Hermanson did not live independently either before or after the accident due to his young age. At the time of trial, Mr. Hermanson had been living at home for three years. During that time, his mother and girlfriend provided assistance with transportation, meal preparation, and general homemaking and provided reminders for various tasks. His mother also provided some rehabilitation assistance. These are similar to the services that the plaintiff's family provided while he lived on Salt Spring Island from June 2013 until January 2018.

[368] Had I found liability for the plaintiff I would have assessed the in-trust claim for the plaintiff's parents as proposed by the plaintiff at $100,000 for his father and $50,000 for his mother.

(e) Future Cost of Care

[369] The legal principles underpinning a cost of future care award were summarized by Mr. Justice Savage in *Gao v. Dietrich*, 2018 BCCA 372:

> [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:
>
> > In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "*restitutio in integrum*" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.
>
> [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health

2020 BCSC 881 (CanLII)

> of the claimant: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 (CanLII) at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
>
> [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).
>
> [71] In *Ali v. Glover*, 2016 BCCA 446, and *Reimer v. Bischoff*, 2017 BCCA 4, this Court overturned awards for future care because there was no evidence from a health care professional recommending a treatment item.

2020 BCSC 881 (CanLII)

[370] The plaintiff claims $5,810,683 as reasonable and supportable on the evidence for cost of future care. The plaintiff submits his emphasis on full compensation for these future care costs is partially a response to the arbitrary limit on non-pecuniary damages.

[371] The plaintiff's cost of future care claim is detailed in the report of Sholeh Salehi, an occupational therapist with Optimum Therapy Rehabilitation Services.

[372] Ms. Salehi made the following recommendation with respect to medications for the plaintiff in the future:

> Mr. McCormick is currently taking Venlafaxine XR 75 mg for his depression and other than daily vitamins. Dr. Purtzki recommended amitriptyline 2%, ketamine 1% cream for neuropathic pain management of right forearm; occasional Advil for muscle pain; Effexor or its derivatives, for reducing frustration and improving energy; Modafinil for chronic fatigue of neurological origin.

[373] She also recommended "future Botox injections for hamstrings and gastrocsoleus muscles. Therefore, an allowance of $1,300 – 1,500 per year is recommended to cover the cost of future medications (Venlafaxine is approximately $17.95/month and other anti-depressants $30-$50/month)."

[374] For rehabilitation and other therapies, Ms. Salehi proposed:

Mr. McCormick will continue to require the following rehabilitation services for the management of his limitations, as a result of the accident:

- Occupational therapy/case management:

  … The writer concurs with Dr. Kosaka in that Mr. McCormick is permanently disabled and he would require rehabilitation support to assist in organization, home and money management, decision making, planning, and goal setting, and to be able to live independently.

  …

  Mr. McCormick will require support to build functional strength and work towards some type of part-time employment/volunteer work. The occupational therapist can help him with pain management, coping strategies, problem-solving, goal setting, and planning through different stages of life.

  …

  To minimize the burden of care on his parents, during the first year, as he transitions to a new home environment, he would benefit from 3 sessions per month, 2 hours per session of occupational therapy/case management. After the first year he would benefit from biweekly intervention, 2 hours per session. This level of support is critical to assist him with weekly goal setting, money management, scheduling/organizing his week as well as to help him to develop healthy habits and routines and also serve as a check-in for safety monitoring and problem solving. Hence until age 50 as he goes through different transitions in life and milestones. He will require this level of support to manage these transitions and try to establish a routine. Hence, for the first year based on 3 sessions per month, 36 sessions/year is recommended for a total of 72 hours of intervention, plus 36 hours of travel time. After the first year, until age 50, based on biweekly sessions, 24 sessions/year is recommended for a total of 48 hours of intervention, plus 24 hours of travel. Thereafter, a lifelong allowance of 12 sessions per year is recommended for occupational therapy/case management services, facilitate any goals, and assist Mr. McCormick with any transitions through adulthood. Session duration is estimated at 2 hours/sessions. Occupational therapy services are billed at an average rate of $112/hour.

- Rehabilitation Assistant/Kinesiologist:

  ... He would benefit from a kinesiologist to develop an exercise routine appropriate for his injuries. Mr. McCormick has demonstrated a decrease in his overall functional tolerance, increase in fatigue and pain. He has been going to the gym one-two times per week with a support worker from MCM. He has demonstrated difficulty in initiating and following through with activities.

  …

  His current exercise program has been set by the Physiotherapist and Kinesiologist in the Brain Injury Team. It is more likely than not that

2020 BCSC 881 (CanLII)

once he is done with the MCM program, and he does not have the Brain Injury Team and the support workers, he will have difficulty following through with his exercise program, due to his cognitive limitations. There are also safety issues with him attending the gym on his own due to his decreased balance as well as him overdoing it and injuring himself.

…

Mr. McCormick may benefit more with an RA with a kinesiology background so that they can provide both exercise and life skills support.

…

In order to assist Mr. McCormick with the follow through of daily living goals and monitor his participation with the tasks, a Rehabilitation Assistant is recommended to follow through on the therapy plan outlined by the occupational therapist, and to complement any goals outlined by the psychologist, speech pathologist and vocational rehabilitation consultant. The writer concurs with Dr. Lazar, Dr. Purtzki and Dr. Kosaka in that Mr. McCormick is unlikely to be capable of independent living. Therefore to maximize independence and minimize burden of care on his family, as well as the fact that family support may not be available at all times, it is anticipated that Mr. McCormick would require a higher level of support throughout his life as he goes through different transitions and working towards different goals. Mr. McCormick has been deemed to be incapable of living independently by his physicians. The Rehabilitation Assistant could also assist Mr. McCormick with re-establishing leisure activities as a healthy outlet to manage his emotional symptoms and feelings self-confidence in this regard.

…

In order for Mr. McCormick to be able to live semi-independently without the burden of care on his family, it is anticipated that he will require Rehabilitation Assistant support every day, for 2 hours per day, five days per week, as well as additional 6 weeks per year for activities that may require full or half-day attendance such as job coaching, a total of 290 sessions per year for, 2 hours per session, plus 290 hours/year of travel time until age 65. Thereafter, it is recommended that he receive 3 session per week for 2-hour sessions, for a total of 312 hours per year. While there may be other cheaper alternatives such as a life skills worker, these individuals may not have adequate training or experience to deal with the neurobehavioral sequelae (such as anger management, judgment and decision making, problems solving, compensation strategies, etc.)

…

Mr. McCormick may use more than this number of sessions in some years and fewer in other years. Kinesiology services are billed at $50 per hour. Cost of the annual membership fee for Community Fitness

2020 BCSC 881 (CanLII)

Centre in Victoria is $492.00 for adults and seniors, as per Crystal Pool and Fitness Centre.

- Physiotherapy:

  … the writer concurs with Dr. Purtzki and Dr. Kosaka in that Mr. McCormick will benefit from an allowance of physiotherapy to help with treatment of aggravations and flare-ups, as well as providing recommendations for the exercise program as fit for him.

  … the writer recommends an allowance of 8 to 12 physiotherapy sessions per year to address the above issues which would be outside the scope of practice of the Rehabilitation Assistant, Kinesiologist, or occupational therapist. Physiotherapy services are billed at $95 per 30 minutes visit. (As per Physiotherapy Association of British Columbia).

- Psychology/Counselling support: Dr. Kosaka and Dr. Lazar noted that Ms. McCormick would benefit from psychological counselling, over his lifetime to learn strategies and techniques to cope with anxiety and depression. Dr. Lazar recommended that Mr. McCormick would benefit from one to one PhD-level psychological counselling with experience in brain injury, to target symptoms of anxiety, affective regulation, anger management techniques, and relational concerns. As well as behavioural component and instruction regarding specific relaxation and mood-enhancing techniques. She recommended he receive weekly sessions during the first year, biweekly to monthly sessions during the 2nd year, and ongoing yearly session in groups of 8 to support him in times of transition and crises.

  …

  The writer concurs with Dr. Kosaka and Dr. Lazar in that Mr. McCormick would require ongoing counselling throughout his life. Therefore, an allowance of 24 sessions/year is recommended for the first year, 12 to 15 sessions/year is recommended for the 2nd year and 8 sessions/year is recommended over his lifetime. Also 12 sessions/year of family counselling for a period 3 years is recommended to assist in adjustment issues and provide support for the family to learn, manage, and cope with Mr. McCormick's brain injury. He may use more than this number of sessions in some years and fewer in other years. Psychological services are billed at $200/hour, as per BC Association of Psychologists.

- Speech and Language Pathologist:

  Dr. Lazar recommended ongoing Speech and Language Pathology treatments to support functional communication skills and social cognition. It is recommended that Mr. McCormick be assessed by a Speech and Language Pathologist to determine needs, and treatment sessions required. An allowance of $800 is recommended for Speech and Language assessment as per West Coast Speech and Language Pathology. Further allowance needs to be considered depending on the result and recommendations of the assessment.

2020 BCSC 881 (CanLII)

[375] Insofar as the plaintiff's vocational needs were concerned, Ms. Salehi proposed:

> Dr. Kosaka, Dr. Purtzki, and Dr. Lazar all opined that Mr. McCormick would require support in gaining and maintaining meaningful employment and recommended that he be provided with vocational counselling. Mr. Jackson opined that Mr. McCormick's injuries will prevent him from being able to obtain and/or maintain employment in the competitive labour market.
>
> …
>
> Mr. Jackson recommended that given Mr. McCormick age he would benefit from 6-7 rounds of job placement throughout his lifetime. The writer concurs with Mr. Jackson's recommendation of 6-7 rounds of job placements over Mr. McCormick's lifetime. The cost of these services is estimated at $3,500 to $4,000 per placement.

[376] For care arrangements, Ms. Salehi proposed:

> ... Mr. McCormick currently has access to 8 hours a day of support during the day, and 6 hours of week of one to one support worker. Reportedly there has been no change in his behaviour and cognitive skills in the past two years.
>
> ...
>
> He has one more year at MCM before he has to move out and has applied for substitute housing in Victoria. Dr. Lazar, Dr. Kosaka and Dr. Purtzki all concur that Mr. McCormick would not be able to live independently. Dr. Purtzki noted that Mr. McCormick will be at increased risk of falls as he ages, especially in his 50s and 60s. He would require safety features in his bathroom such as grab bars, raised toilet seat and a shower chair. Considering his level of cognitive functioning, his progress to date and level of assistant he continues to receive both from the MCM staff and his parents, I concur that Mr. McCormick is not able to live independently and needs access to at least 8 hours of support per day.
>
> …
>
> If Mr. McCormick is provided with 8 hours of care-aid, they can assist with homemaking, childcare and other chore that he may not have the energy to perform. Hence it is recommended that Mr. McCormick rent a suite and be provided with 8-hours of daily care in order to have a supported living model of care, and without having the burden of care on his extended family, until age 55. The writer concurs with Dr. Purtzki in that it is possible that Mr. McCormick experience further deterioration in his physical, psychological, and cognitive symptoms. He may encounter mobility difficulties. Therefore it is recommended that he be provided with 12 hour care after age 55 onward. Mr. McCormick would be best served by workers hired through a health care agency, which has nursing services and supervision programs in place for their care aides. The cost of this service is estimated at $35-$45/hour as per Keepers Comfort and Bay Shore Home Health. It is also recommended that he be set up with Lifeline Services after age 55, to improve safety during the

2020 BCSC 881 (CanLII)

night-time, and at times that he is by himself. The cost is estimated at $75/month with one time installation fee of $90, as per Philips Lifeline.

[377] Ms. Salehi proposed the following equipment needs for the plaintiff:

- It was recommended that Mr. McCormick be provided with a Stove Guard for safety reasons once he has moved out of the group home. This will automatically turn off the stove if the person has not been in front of it for a period of time, the price of a stove guard is $669.95 plus $20 shipping, as per Stove Guard International Ltd.
- Mobility Aids:

  Mr. McCormick may require mobility aids after age 55, as it is possible that his physical condition may deteriorate. It is recommended that Mr. McCormick he may require a cane or walker initially, and he may eventually require a wheelchair or scooter. Cost of a cane is approximately $30-$50 plus tax. Cost of a 4-wheel-walker is estimated at approximately $569. Cost of basic manual wheelchair is estimated at approximately $3,000 to $5,000, as per TIME Mobility and Accessibility, depending on his needs at the time. Cost of a light to medium scooter is approximately $3,000 to $6,000 as per McDonald's Home Health Care. Replacement maybe needed every 7-10 years.
- Safety Equipment:

  To ensure safety and minimize risk of falls in the bathroom and home, Mr. McCormick may require equipment through-out his life span. At present due to his reduced balance he requires raised toilet seat ($60-$85), grab bars in the bathtub (32 inch bar @ $40 per bar plus $80 installation fee), and shower chair ($89.00). Therefore, an allowance of $500-$800 is recommended for equipment every 3-5 years.

[378] Ms. Salehi also proposed a functional driving evaluation for the plaintiff:

The cost of Driver Rehab Assessment for the plaintiff at $1,000-$1,060, as per Community Therapists and GF Strong, and if the plaintiff were successful in obtaining a license some further training classes to address limitation that may arise as the result of the assessment. An allowance of 10-15 sessions is recommended. Costed at $175 to $250 per session as per GF Strong and Community Therapists.

[379] Ms. Salehi's costs are therefore summarized as follows:

	Cost	Frequency
1. MEDICATIONS Allowance for additional pharmacological management	$1,300 - $1,500	Yearly
2. REHABILITAION/THERAPIES		
Occupational Therapy/Case Management First		

2020 BCSC 881 (CanLII)

Year:		
36 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hours at $112/hr	$12,096	One time cost
Second year to age 50:		
24 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hrs at $112/hr	$8,064	Second Year until age 50
Thereafter:		
12 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hrs x 12 sessions	$4,032	Yearly
Kinesiology/Rehabilitation Assistant		
Up to age 65:		
5 sessions per week/2 hours per session for 58 weeks = 290 sessions at $50/hr plus 290/hr of travel	$43,500	Yearly up to age 65
Thereafter:		
3 sessions/week plus 3 hrs travel/week = 156 sessions at $50/hr plus 156/hr of travel	$23,400	Yearly
Gym pass	$492.00	Yearly
Physiotherapy		
8-12 sessions/year $95/session	$760 to $1,140	Yearly
Psychology		
First year:		
24 sessions/year at $200/hr	$4,800	One time Cost
Second year:		
12 to 15 sessions/year at $200/hour	$2,400 to $3,000	One time Cost
Thereafter:		
8 sessions/year at $200	$1,600	Yearly
Family Counselling:		
12 sessions/year at $200	$2,400	For 3 years
Speech and Language Pathologist Assessment	$800	One time cost
3. VOCATIONAL NEEDS		
6-7 placement cycles at $3,500 - $4,000 per placement	$21,000 - $28,000	One time cost
4. CARE REQUIREMENTS		

2020 BCSC 881 (CanLII)

Care aids, up to age 55: 8 hours/day 7 days per week at $35 to $45/hour	$101,920 - $131,040 + GST	Yearly to age 55
Thereafter: 12 hours/day 7 days per week at $35 to 45/hour	$152,800 - $196,560 + GST	Yearly after age 55
Lifeline $75/month	$900.00	Yearly after 55
$90 installation fee	$90.00	One time cost
5. MEDICAL/REHABILITATION EQUIPMENT NEEDS:		
Stove Guard	$669.95 + taxes	Every 10 years
Mobility aid:		
Cane	$30-$50 + taxes	Every 3 – 5 years
Walker	$569	Every 3 – 5 years
Wheelchair or Scooter	$3,000 - $6,000	Every 7 – 10 years after age 55
Safety equipment		
Allowance of $500 - $800	$500 - $800	Every 3 – 5 years
6. DRIVING ASSESSMENT/REHABILITATION		
Driver Rehabilitation Assessment	$1,061	One time cost
Driver Rehab classes 10 – 15 classes @ $175 - $250	$1,750 – $3,750	One time cost

[380] The defendants contend that there is no medical justification for an award of $1,300 - $1,500 per year for medication. The plaintiff's only present prescription medication is Venlafaxine (Effexor), which costs $17.95 per month. There are no plans to change the plaintiff's medication in the future. He may need Advil on occasion for muscle pain. Ms. Salehi cites Dr. Purtzki's "recommendation" for Botox injections. However, Dr. Purtzki does not make this recommendation. Rather, she says that Botox injections are something that "should be considered in the future". This does not establish the required probability of a future need. At the very least,

2020 BCSC 881 (CanLII)

the defendants contend that there should be a strong negative contingency for the possibility that he never needs this treatment.

[381] Given that Venlafaxine, the only of the above medications that the plaintiff uses, costs about $200 per year, I accept that the claim of $1,300-$1,500 is unwarranted. I accept the submission of the defendants that an award of $300 per year will be sufficient to cover the cost of Venlafaxine and Advil, as well as provide enough of a buffer in the event of a change in the plaintiff's medication.

[382] In terms of the plaintiff's claim for occupational therapy, the defendants argue that none of the medical experts that Ms. Salehi relies on quantify the plaintiff's needs for occupational therapy. Ms. Salehi recommends 36 sessions per year for the first year "as he transitions to a new home environment." She recommends 24 sessions per year until age 50 "as he goes through different transitions in life and milestones." She also recommends 12 sessions per year after age 50 to assist the plaintiff with "any transitions through adulthood." The defendants point out that she offers no explanation as to why the initial transition to a new home requires three times more occupational therapy than transitions after age 50, and that she offers no explanation as to why transitions after the first year until age 50 require double the amount of occupational therapy than transitions after age 50.

[383] I accept the defendants' contention that 12 sessions of occupational therapy per year would be sufficient, and I assess the annual cost for occupational therapy at $112 per hour for 12, two-hour sessions at $2,688.

[384] Since moving to the MCM, the plaintiff has been provided with a weekly and monthly schedule in his current management program. He stated that he does his own shopping, though his parents sometimes help him.

[385] Mr. McCormick testified that when he and Ms. Jones visit the plaintiff at MCM they clean his room and remove rotten food from the fridge. Based on what he has witnessed, it does not seem like the plaintiff has ever cleaned his bathroom, fridge or oven. He estimated he and Ms. Jones visit the plaintiff in Victoria six times a month.

2020 BCSC 881 (CanLII)

The plaintiff returns to Salt Spring Island at least once a month to see his doctor. He also returns for holidays, and, on those occasions, will stay for an extended period.

[386] I find that without schedules prepared by someone else, the plaintiff would quickly flounder in terms of his shopping and meal preparation.

[387] Mr. McCormick gave evidence that the plaintiff needs to have his energy level constantly monitored as he tires easy, especially in new situations. He said that any unusual addition to his daily routine is trouble.

[388] Mr. McCormick gave evidence that the plaintiff forgets to eat and is prone to not remembering that he will be hungry. When he becomes hungry, he cannot handle the situation and has, on numerous occasions, phoned home because he is hungry and upset and does not know what to do. On his own, he has very low functioning in his ability to make meals.

[389] The plaintiff's memory function is impaired. He is sensitive to noise and has difficulty tolerating busy or noisy environments.

[390] Ms. Jones agreed that busy/noisy environments are difficult for him as he becomes overstimulated and cannot focus.

[391] She said that the plaintiff is vulnerable and people take advantage of him. She once received a call from her son telling her that a man wanted him to cash a cheque for him in the plaintiff's account and then give him the money. This is not the only time someone has asked him to cash a cheque for them. He is also overcharged for things. She gave evidence that, on one occasion a homeless man, named "Paul", moved into his apartment and stayed for two months.

[392] Although he stated that he manages his own bank account, his mother does have viewing privileges. He takes money out, and occasionally deposits money. His rent automatically comes out of his account. He also budgets for food and has a few hundred dollars for "presents and stuff". He is supposed to live on a budget and

2020 BCSC 881 (CanLII)

receives about $1,000 per month from the government, but his parents find that they need to add to his bank account on a regular basis.

[393] I am not persuaded that the plaintiff can actually manage an account, unless it has only limited funds and is supervised by someone else.

[394] I find that the plaintiff will require management assistance, but as I am of the view that he will require the assistance of a care attendant, I have concluded that it would be a duplication of his needs to also provide him with an award for a case manager.

[395] Insofar as the kinesiology/rehabilitation assistant is concerned, the defendants say that the plaintiff's evidence was that he currently goes to the gym with a personal trainer twice per week, and that there is no evidence that more training is required or would be undertaken. I accept the defendants' submission that two sessions per week of kinesiology/rehabilitation assistance would be sufficient to address the plaintiff's claim for such services and assess that at a cost of $100 for each two hour session ($50 per hour), plus $25 per hour for travel, for a total annual cost of $13,000, but would disallow the claim for a gym pass, as I conclude that such an expense would likely have been incurred by the plaintiff whether he had been in the accident or not.

[396] I accept that the plaintiff has mobility challenges and lurches forward off kilter when he moves, continually stabbing his foot into the ground, and that because of how he walks, he goes through one good quality pair of shoes per month.

[397] When he arrived home, the plaintiff's outlook was good for a period but he then began to understand his limitations. On two occasions prior to his move to MCM his parents had to take the plaintiff to the ER because he has threatened to kill himself. It is unclear to me whether these were genuine threats or attention getting gestures, but his parents reacted sensibly by taking him to the hospital.

2020 BCSC 881 (CanLII)

[398] I heard evidence from the plaintiff's family members that he has issues with anger management and can lash out when he gets tired and frustrated. He has thrown things at his mother and threatened her.

[399] However, the evidence is that the plaintiff's mood and mental health have greatly improved since the increase to his dosage of Venlafaxine. Accordingly, the defendants contend, and I agree, that his need for counselling has diminished and propose that a 50% reduction in Ms. Salehi's figure for the plaintiff's psychological counselling is appropriate. In the event that I had found liability in the plaintiff's favor, I would have awarded him the sum of $2,400 for psychological counselling.

[400] The defendants contend, and I agree, that Ms. Salehi's recommendation for family counselling to "assist in adjustment issues and provide support for the family to learn, manage, and cope with [the plaintiff's] brain injury" is unrelated to the plaintiff. His family members are not parties to this action, so I decline to make any award for this item as a future care cost.

[401] As I have found that the plaintiff does not enjoy any residual employability prospects, I am not prepared to make any award for the cost of vocational counselling. I appreciate that a vocational assessment might go beyond paid employment, but as I have accepted that the plaintiff will need occupational therapy, I consider that a vocational assessment is an unwarranted duplication in this case.

[402] The defendants say that there is no medical justification for the plaintiff to have a care aide for eight hours per day, seven days per week. He currently lives at MCM and while MCM has staff available eight hours per day, the defendants contend that there is no evidence that he actually uses or needs anywhere near this level of support.

[403] The defendants concede that the presently available staff members assist the plaintiff with meal preparation twice per week for two hours, and that he gets some assistance with shopping, but otherwise he does everything by himself. He sets his own schedule and he spends most of his days outside of his apartment.

2020 BCSC 881 (CanLII)

[404] The plaintiff stated in cross-examination that he does not want somebody to be there watching him for eight hours per day. The defendants contend that an allowance for five visits per week for two hours per day is reasonable, as it provides the same amount of in-home care he currently receives plus an additional six hours per week and could be increased to three hours per day after age 55.

[405] I find that the evidence establishes that the plaintiff's brain injury has caused significant multiple and overlapping cognitive, emotional and behavioral problems for him. These problems are permanent and are not subject to improvement in the future. As a result of his vulnerability, he requires someone to be with him or to check in on him on a regular basis. Without this help, he will be vulnerable to exploitation. His "friend" Paul has made this abundantly clear.

[406] I find that on average, the plaintiff will need the assistance of a care worker for eight hours per day, five days per week, and for a total of two hours per day on Saturdays and Sundays.

[407] I do not, however, accept the costs for such a worker presented by Ms. Salehi. She priced care aides at $35-$45 per hour. Her draft summary of costs priced them at $29-$32 per hour. The defendants say there is no explanation for this discrepancy, and indeed none was offered.

[408] Ms. Salehi said the range set out in her report is justified because the care aide needs to have a certain skill set to deal with the plaintiff's brain injury and anxiety. I find that there is no indication he is receiving or needs specialized care.

[409] The defendants submit that a rate of $25 per hour is sufficient to allow the plaintiff to hire a care aide. This is the inflation-adjusted cost of a care aide assessed by Mr. Justice Kelleher in *Mitchell v. We Care Health Services Inc. et al.*, 2004 BCSC 902. While Kelleher J. assessed the cost of a care aide at $19 per hour in *Mitchell*, he did so on the evidence before him. The evidence to justify such a rate is not before me, so I find the case to be of no assistance.

2020 BCSC 881 (CanLII)

[410] If I had found liability for the plaintiff, I would order that the cost of a care attendant be awarded at $29 per hour; the lower of Ms. Salehi's initial figure.

[411] Using Mr. Carson's multiplier, that would result in an award for the cost of a care attendant for 44 hours a week or 2,288 hours per year of $66,352.

[412] I am not persuaded that had I found liability in the plaintiff's favor his claims for the Lifeline or its installation fees are appropriate claims.

[413] The defendants contend that there should be some deduction to the claim for medical/rehabilitation equipment needs to account for the fact that the plaintiff will not simultaneously need a cane, a walker, and a scooter or a wheelchair, because an allowance for all three simultaneously would lead to double or triple recovery. They argue that each of these items should be reduced by one-third. They also argue there should be a 50% reduction to reflect that much of his bathroom safety equipment will be replaced less frequently than the three to five years suggested by Ms. Salehi, if needed at all.

[414] There is some merit to the defendants' submission with respect to medical/rehabilitation equipment needs, and in an effort to be fair to both sides, and if I had found liability for the plaintiff, I would limit the plaintiff's recovery for these items to $5,000.

[415] Ms. Salehi included a driving assessment and rehabilitation efforts to allow the plaintiff to drive. The defendants oppose any amount for a driving assessment and rehabilitation cost. The plaintiff's evidence was that he had no interest in driving. Dr. Purtzki stated that she is "quite doubtful" that the plaintiff will be able to obtain a restricted driver's licence, and Mr. Jackson stated that it is unlikely that he could pass a driving test. Had I found liability for the plaintiff, this care item would not be allowed because it is not likely to be incurred.

[416] In his report of March 3, 2020, Mr. Carson, with a further update reflecting a reduced life expectancy of 70 years for the plaintiff, revised multipliers for future care cost items.

2020 BCSC 881 (CanLII)

[417] I have recalculated the items that I would accept for the plaintiff's future care costs, using the present value multiplier of $27,841 per $1,000 for costs of future care items from the date of trial until the plaintiff's presumed death from Mr. Carson's report of March 3, 2020. That would result in the following figures:

a. Medications: $8,352.30;
b. Occupational therapy: $74,837;
c. Rehab assistant/kinesiologist: $361,933;
d. Psychologist: $2,400;
e. Care Requirements: $1,847,306;
f. Medical/rehabilitation equipment needs: $5,000.

Total without taxes: $2,299,828.30.

Total with taxes at 15%: $2,644,802.55.

[418] I will not refer to the costs of financial management proposed by Ms. Salehi, and the parties have agreed that submissions with respect to the need for and cost of such management will be deferred for the present.

[419] Ms. Salehi concluded that the follow-up with physiatry, psychiatry, and a family physician, as well as an orthopedic specialist recommended by Dr. Purtzki would be covered by the Provincial Medical Plan, and thus present no cost to the plaintiff himself.

(f) Special Damages

[420] The amount is agreed at $42,278.31.

(g) The Health Care Costs Recovery Claim

[421] The Minister's Certificate with respect to the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 totals $771,326.68. In the event that the plaintiff had established liability against the Pearsons, I would have ordered that the Minister was entitled to recover this amount.

2020 BCSC 881 (CanLII)

(h) Tax Gross-up and Management Fees

[422] The parties have agreed that issues of tax gross-up and management fees will be deferred, so I will not address that head of damages.

Conclusion

[423] The plaintiff's claim is dismissed.

[424] Had I not dismissed the plaintiff's claim I would have awarded him the following damages:

a) Non-pecuniary damages: $300,000;

b) Loss of Past Earning Capacity: $150,000;

c) Loss of Future Income Earning Capacity: $1,800,000;

d) Cost of Care to Date: $150,000;

e) Future Care Costs: $2,644,802.55;

f) Special Damages: $42,278.31;

g) Claim pursuant to the *Health Care Costs Recovery Act*: $771,326.68

Total: $5,858,407.54.

The Honourable Chief Justice Hinkson

2020 BCSC 881 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Merko v. Plummer,*
2016 BCSC 1403

Date: 20160727
Docket: M127174
Registry: Vancouver

Between:

Angela Mary Merko

Plaintiff

And

Shawn Thomas Plummer, Lindsay J. Plummer and Shirley Y. Malcolm

Defendants

- and -

Docket: M140790
Registry: Vancouver

Between:

Angela Mary Merko

Plaintiff

And

Brian James Gunn

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff in both actions:	Kevin J. Miles Chelsea C. Caldwell
Counsel for the Defendants in both actions:	Oliver L. Wilson
Place and Dates of Trial:	Vancouver, B.C. April 4-8 and 11-13, 2016
Place and Date of Judgment:	Vancouver, B.C. July 27, 2016

2016 BCSC 1403 (CanLII)

2016 BCSC 1403 (CanLII)

Introduction

[1] The plaintiff Angela Merko was involved in two car accidents that left her with lasting injuries. The first accident, on December 11, 2010, caused the most harm. The second accident, on April 13, 2012, exacerbated her injuries for a time. The defendants have admitted liability and do not seek to distinguish the injuries as between the two accidents. The issues in this case have to do with the proper assessment of her total damages.

[2] The symptoms have largely to do with pain, which is extremely hard to prove through independent evidence. The plaintiff was put to the challenge and met it well.

[3] Mrs. Merko was a highly credible witness. Her evidence was internally consistent; it was consistent with the evidence of people who knew her before and after the accidents; and it was consistent with the medical evidence. Any inconsistencies were innocent and minor. There was no medical evidence that raised serious doubts about whether she suffered from the symptoms of which she complains or about whether they were caused by the accidents.

[4] I am satisfied that Mrs. Merko did not exaggerate her symptoms. If anything, her stoic and strong character has made it difficult for her to accept her limitations.

[5] The evidence was overwhelming that Mrs. Merko now experiences chronic pain as a result of the accidents, which has a serious and severe impact on her quality of life.

[6] Prior to the accidents she was a highly productive person who was happiest when she was busy with multiple tasks to complete, whether it was at her employment, or in her numerous crafts and hobbies, or making elaborate meals. She took pride in all of her work and many activities.

[7] Despite diligent efforts to get better, Mrs. Merko remains plagued by chronic pain that is exacerbated by too much activity. She now cannot be productive in the

2016 BCSC 1403 (CanLII)

same way she used to be, and although her personality drives her to keep trying to push herself, her pain takes away her enjoyment of the activities she can manage.

[8] Mrs. Merko's enjoyment of life, self-image and social and marital relationships have taken a battering due to her severe and ongoing pain. Simply put, her life has changed significantly.

[9] The legal principles governing the measurement of damages, including causation, are not in issue in this case.

Pre-Accident History

[10] The plaintiff was born in 1964. She was 46 at the time of the first accident and 52 at the time of trial. She is married with two adult daughters.

Employment

[11] Mrs. Merko has a high school education. She took some courses at Douglas College related to administrative or office-type work.

[12] Mrs. Merko has worked for 16 years for the Surrey School District, for the last 11 years as a district office clerk.

Activities

[13] Mrs. Merko has always been someone who likes to keep her hands busy and productive. She sewed, knitted and quilted; created jewellery; and enjoyed drawing and decorating and refinishing furniture. She made elaborate meals and kept track of her recipes in an organized system of multiple binders. She canned and baked, sometimes spending an entire day on a single project. She socialized with friends, doing crafting projects together. She participated in a lunch club, sharing cooking and baking with colleagues.

[14] Mrs. Merko also enjoyed long walks and hikes as well as bike-riding.

[15] Mrs. Merko met her husband in 2005 and they married in 2008. They have been best friends, spending lots of time doing activities together. Because they both

2016 BCSC 1403 (CanLII)

enjoy woodworking and refinishing furniture, they thought that when they retired someday they would open a small business repurposing furniture. Mr. Merko described Mrs. Merko as someone who was always on the go.

[16] Many of Mrs. Merko's favourite activities involved a lot of handiwork. Mrs. Merko had no problems using her hands and arms and neck.

Pre-Accident Health

[17] The plaintiff's prior medical history was unremarkable with one exception: she did report having headaches from time to time, beginning in her teens. These were not reported or diagnosed as so severe as to lead her physician to prescribe medication, although in the spring of 2010 she was given a sample of a triptan medication to try.

[18] From time to time before the first accident Mrs. Merko left work early because of a bad headache. It would not require her to take a full day off. Usually if she had a headache she could still carry on.

[19] When questioned by various medical experts after the car accidents about her pre-accident headache history, Mrs. Merko's recollection of that history was not always consistent. This in my view was an innocent discrepancy, related to the longevity of her headache history and the fact that the severity of the pre-accident headaches was so unremarkable. While sometimes bothered by headaches, she was not plagued by them and they did not diminish her busy and productive life.

The Accidents and Subsequent Injuries

[20] The first accident happened on December 11, 2010 (the 2010 Accident). Mrs. Merko was a passenger in a vehicle, seated behind the driver. The vehicle was hit in a rear-end collision. The impact was sufficient to cause the back door of the vehicle to buckle and stick.

[21] Subsequent to the accident, Mrs. Merko noticed pain in her neck as well as in her upper back and shoulder area. This pain has been severe and at times radiates

2016 BCSC 1403 (CanLII)

into her right arm. The pain in her neck, upper back and shoulders continues to be her biggest problem.

[22] Mrs. Merko has been diagnosed with chronic myofascial pain or pain syndrome in her neck, upper back and shoulders. The evidence is overwhelming that this condition did not exist before the first accident; and the medical evidence clearly establishes that it was caused by the first accident. Given the length of time that has passed, it is unlikely to resolve even with further treatment.

[23] The second accident happened on April 13, 2012. Mrs. Merko was a driver of a vehicle when it was struck from the rear. This accident caused a flare-up of her injuries temporarily but then the injuries returned to the baseline of what they were following the first accident.

[24] Mrs. Merko has tried nearly every therapy available for her neck, back and shoulder symptoms, including exercise programs. These have required considerable time and effort, and some treatments were exhausting and very painful (such as injections), but none have completely resolved her symptoms.

[25] Mrs. Merko has also been prescribed many medications and has taken over-the-counter medications as well. Eventually the medication that seemed most effective proved to be a transdermal Butrans patch. This is a narcotic medication. Her physicians have no concerns about her use of this prescribed medication. The dosage of the Butrans patch has been decreased over time from 10 mg to 5 mg.

[26] The main problem affecting Mrs. Merko since the accidents is pain in her neck and shoulders. However, she also has suffered from ongoing headaches.

[27] The medical opinions are not unanimous as to the cause of her headaches given that she also had a long history of headaches before the accidents. The difference between the opinions to a large extent turns on comparing the plaintiff's pre-accident and post-accident history of headaches. Simply put, she was a bad historian and had to guess about her history and told different physicians different things.

2016 BCSC 1403 (CanLII)

[28] Mrs. Merko was cross-examined about her varying reports to physicians about her headache history. In my view, there was an over-emphasis on her record-keeping as though she ought to have been able to be precise about how many headaches a week she had and how long they would last. I had no sense that Mrs. Merko was trying to mislead anyone. My sense was that her pre-accident headaches did get bad enough to take time off work on occasion, but they had not been so severe as to require her to be referred to a specialist for headaches, or so severe as to require prescription medications (other than the one small trial), and there is no sense that they diminished her overall enjoyment of life.

[29] Mrs. Merko testified that she had an increase in the number and intensity of headaches after the first accident. She felt that they got much worse after the accident, and she was not as able to cope with them as she had pre-accident. She has observed that her neck pain is a trigger for the post-accident headaches.

[30] One defence medical expert, Dr. Rehan Dost, saw the increase in headache frequency and severity as a natural trajectory of a pre-existing migrainous disorder. Part of the reason for this was his view that the worsening of Mrs. Merko's headaches began three to four months after the 2010 Accident, based on his review of records including her own journal. However, Mrs. Merko's journal indicated she had headaches in December 2010, shortly after the accident on December 11. Further, one has to be cautious about giving too much weight to her own records or lack of records of headaches because she had lived with headaches all her adult life and was experiencing new and significant pains in her neck and shoulders post-accident.

[31] Mrs. Merko was prescribed medications that treat migraine as early as February 2011, only a couple of months after the first accident. This is consistent with her physician being told she was having problems with headaches that she did not previously experience, even if he did not make a note of it in a clinical record.

2016 BCSC 1403 (CanLII)

[32] Dr. Dost agreed that the soft tissue injuries to the neck could aggravate a pre-existing migrainous condition, and an increase in pain medication could indicate a change in pattern.

[33] Dr. Heather Finlayson, a physical medicine and rehabilitation specialist, saw a causal link between the first accident and a worsening headache symptomology. Her evidence was clear, logical, and objectively presented.

[34] Dr. Finlayson explained that headaches caused by neck pain or dysfunction are described as cervicogenic. Although the plaintiff had a prior history of some headaches, she reported an increased frequency of them since the accidents. Dr. Finlayson explained that people with migraines who have neck injuries can get worsening headaches and frequently people with cervicogenic headaches can develop migraines.

[35] The idea that neck pain can increase a person's headaches seems logical. I accept Dr. Finlayson's evidence in this regard as consistent with common sense and with the plaintiff's experience.

[36] Mrs. Merko's family doctor, Dr. Jasper Burger, was of the view that the plaintiff's headaches got worse after the first accident. He diagnosed her as having myofascial pain syndrome of the neck and upper back with secondary headaches. He described the headaches as cervicogenic.

[37] Dr. Burger did note that the plaintiff had a past history of headaches. However, the only time he gave her a prescription for headaches prior to the accidents was when he gave her a free sample pack of a triptan drug in April 2010, approximately seven months before the first accident. He thought there were two doses in the sample pack.

[38] Dr. Winston Gittens, a noted neurosurgeon, testified that neck pain can contribute to headaches, and that cervicogenic, migraine, and tension headaches can co-exist.

2016 BCSC 1403 (CanLII)

[39] I am satisfied on the medical evidence and a balance of probabilities that the first accident caused an increase in the severity and frequency of Mrs. Merko's headaches so that they were of a significantly different order and magnitude than they had been pre-accident. On a balance of probabilities, I find that but for the accident, the headaches would not have progressed to a severity that required prescription medication and eventually Botox treatment (which I will come to).

[40] At the same time, there is no reason to think that but for the accident Mrs. Merko's pre-existing pattern of headaches would have gone away. Even if the accident had not occurred, she is likely to have needed to occasionally sit out activities or take time off work due to a headache, and to use over-the-counter medications.

[41] Mrs. Merko has had some success with treating her headaches with Botox injections under the care of Dr. Gordon Mackie, a neurologist. She received her first injections in October 2015 and the last one prior to trial was in February 2016. She says that her headaches have reduced significantly, both in terms of frequency and intensity.

[42] The Botox treatments are quite invasive, involving over 30 injections in the plaintiff's face and head. She finds the treatment painful.

Assessment of Damages

[43] I turn now to the assessment of damages.

Loss of Past Earnings and Future Earning Capacity

[44] As mentioned, Mrs. Merko works for the Surrey School District. She works full-time through the calendar year in a district office, not at a school. Essentially she is responsible for the dispatch of janitorial staff at schools, including filling absences. The number of schools (over 100) and personnel (over 400) to juggle each day makes this a very intense job. Her job responsibilities also include creating and publishing monthly postings for job opportunities and coordinating the awarding of positions to custodial staff with human resources.

2016 BCSC 1403 (CanLII)

[45] The job done by Mrs. Merko used to be staffed by two people: one to do the dispatch, and the other to do the posting and human resources tasks. About five years ago the other person was promoted and Mrs. Merko now does both tasks. This was close in time to the first accident.

[46] In addition, within the last year the District has gone to a paperless pay system. Mrs. Merko now has the additional responsibilities of making sure that janitorial staff are paid correctly.

[47] Mrs. Merko's position is hands-on and requires a lot of time speaking to personnel on the phone and considerable time logging in information on a computer. She is the only employee doing this work.

[48] Mrs. Merko's work hours are 8:00 a.m. to 4:00 p.m., Monday to Friday.

[49] Since the accidents, Mrs. Merko has noticed that around 11:00 a.m. or noon the pain in her neck starts to burn. She tries to go for a walk during her lunch break so that she moves around. Sometimes she has to cut the walks short because of her pain.

[50] In the afternoons at work, Mrs. Merko is in more discomfort. She tries to take microbreaks to allow her to walk around and change position. She will often go into a bathroom stall at work and use a trigger ball that one of the pain clinics recommended. She will press the ball against the sore area to try to work out the pain. She will often hang from her arms on the stall to relieve the pain. When back at her desk and on the phone, she constantly shifts positon to try to get comfortable. She frequently administers self-massage with a hand on her neck and shoulders, trying to break up the burning feeling caused by what she describes as tight knotted balls.

[51] By the afternoon of some days Mrs. Merko finds the pain too much to bear and she takes medications to get through the rest of the day. She testified that she hates to do this.

2016 BCSC 1403 (CanLII)

[52] Mrs. Merko does not want to come across as negative or weak so does not share how she is feeling with her co-workers.

[53] An ergonomic assessment was done of Mrs. Merko's workspace by her employer and some modest changes were made. However, Mrs. Merko is still experiencing pain.

[54] By the end of the average work day, Mrs. Merko finds herself in such pain that she is irritable and frustrated. She watches the clock and gives herself pep talks for hours, trying to get through the afternoon.

[55] Mrs. Merko does not live far from her office. Occasionally she will go home during the day but she tries as best as she can not to do this. She describes herself as being extremely conscientious, and this description matched all the other evidence.

[56] When testifying about her efforts to get through the day at work, Mrs. Merko's voice became shaky and her demeanour showed her to be quite upset.

Past Sick Leave

[57] Mrs. Merko did not suffer any decrease in pay due to her injuries. However, she has occasionally used up partial or full days of her bank of sick leave due to her pain or because she was attending treatment.

[58] The parties agree that to the extent the Court finds that sick leave taken by Mrs. Merko was due to her injuries, she should be compensated at the rate of $23 per hour. Mrs. Merko's employer has a subrogated interest in this claim.

[59] On this issue, the defence suggested that Mrs. Merko's claim in relation to sick leave needed to be supported by a medical note to prove that when she took sick leave it was due to her injuries. I do not accept that impractical proposition. It would be a waste of time for medical doctors and a waste of taxpayers' money if every time a person took a day or a few hours off work because of a health reason a physician needed to provide a note. If Mrs. Merko was in such severe pain that she

2016 BCSC 1403 (CanLII)

needed to go home from work and lie down, the notion that she should have first gone and lined up at a medical office to obtain a note, extending the time until she might get some relief, makes no sense.

[60] I am satisfied that due to her conscientious nature and decision to often work through the pain, and to schedule appointments in a way that did not cut into her work day, the amount of time that Mrs. Merko took off work due to her injuries is less than it might have otherwise been.

[61] At the same time, I accept the defence argument that not all of Mrs. Merko's sick leave is related to her injuries.

[62] The defendants have helpfully summarized and compared pre- and post-accident sick leave taken by the plaintiff, as follows:

> In the period of almost 3 years prior to the first accident, from January 1, 2008 to December 11, 2010, the plaintiff used 240 hours of sick time. That is a rate of approximately 6.8 hours per month (240 hours divided by 35.3 months).
>
> In the period of almost 5 years following the first accident, from December 11, 2010 to September 26, 2015, the plaintiff used 371.75 hours of sick time. That is a rate of approximately 6.2 hours per month (371.75 hours divided by 60.2 months).

[63] Some of her past sick leave prior to the accidents was related to bronchitis.

[64] The plaintiff claims 350 hours of sick leave due to the accidents for a total claim of $8,050.

[65] I conclude that even if the accidents had not occurred, Mrs. Merko would have taken some sick leave days for headaches and other illnesses.

[66] For a time after the accidents Mrs. Merko noted the cause of her taking sick leave. The cause of 110.5 hours of leave was not noted. I am of the view it is fair to estimate that 50% of these hours were due to the pain she suffered from the accidents and having to leave early or take a day off. That means 55.25 hours do not relate to the accidents.

2016 BCSC 1403 (CanLII)

[67] Ten hours of the entries related to headaches alone. I will estimate that even without the accidents, Mrs. Merko would have taken half of this sick leave due to headaches and so I will deduct from her claim 5 hours as not related to the accidents.

[68] Some of the entries relate to headache pain combined with neck or upper back pain. I conclude that the combined effect of the injuries from her accidents caused her to take this sick leave and she would not have taken it but for the accidents. It is all claimable.

[69] Mrs. Merko mistakenly included in her tally 7.5 hours taken to attend her examination for discovery and 26.25 hours taken to attend medical/legal appointments and mediation. The total, 33.75 hours, should not be considered sick leave taken due to her injuries from the accidents.

[70] I find that all other sick leave taken by Mrs. Merko, for treatments and otherwise, was due to the injuries caused by the accidents.

[71] Thus, of the plaintiff's claim for 350 hours of past sick leave, I find that 94 hours should be deducted (55.25 plus 5 plus 33.75 hours). Added to the plaintiff's claim should be 7.5 hours for the day she took off work to obtain Botox treatment. The balance of the claim for sick leave taken since the 2010 Accident to the time of trial, due to her injuries, is 263.5 hours multiplied by $23 per hour. Rounded to the nearest dollar, this totals $6,060.

[72] The above analysis should not be taken to mean that the assessment of these past damages is a precise mathematical calculation. It is still an assessment, considered in light of the whole of the sick leave taken since the 2010 Accident.

2016 BCSC 1403 (CanLII)

Loss of Future Earning Capacity

Mrs. Merko's Likely Working Career Absent the Accidents

[73] Mrs. Merko has always liked to be productive and have a purpose in life. She always planned a long work career. Prior to the accidents, she obtained a lot of enjoyment from her current employment position.

[74] Mr. Merko is four years younger than Mrs. Merko and she did not expect to retire before him. He expects to work at least to the age of 65 and possibly even longer.

[75] Her father is 72 years old and still working full-time and Mrs. Merko thinks she has the same mindset. She also always planned to stay active and expected that the financial rewards of work would enable her to continue to pursue her interests. She calculates that she would not qualify for a full pension until she is 68 years old because the formula applicable to her factors in years of service plus age.

[76] I find that if the accidents had not occurred, Mrs. Merko would have likely continued working in her current position until at least age 69. There is also a real and substantial possibility that she would have worked until age 72 or even longer.

Mrs. Merko's Capacity Post-Accidents

[77] Two physicians recommend that Mrs. Merko reduce her hours of work.

[78] Dr. Finlayson, a physical medicine and rehabilitation specialist, assessed the plaintiff on July 9, 2015 and provided a report of that date. Dr. Finlayson confirmed the diagnosis of myofascial pain syndrome affecting Mrs. Merko's neck and shoulder areas. In her opinion, the worsening of this pain through the day while working at a sedentary desk job is typical of this condition because "muscles typically become stiffer and more painful during prolonged static postures".

[79] Dr. Finlayson confirmed that the plaintiff is physically able to perform her job duties but that it worsens her pain. Dr. Finlayson stated that in her opinion the

2016 BCSC 1403 (CanLII)

plaintiff's full-time job is "likely impeding her full recovery". She recommended in her first report at p. 6 that:

> Ideally, she should also have a reduction in her total work hours to minimize the exacerbation of her pain throughout the day. Part-time work, e.g., 66-75% of full-time would reduce the strain on her neck and shoulders and decrease the escalation of pain and her resultant irritability and decreased energy.

[80] In cross-examination Dr. Finlayson confirmed that the figure of 66-75% was not an exact number but rather an estimate and that one has to take a "holistic" approach and look at both the plaintiff's vocational and recreational situation. Dr. Finlayson suggested that because the plaintiff's job worsens her pain, it affects her functioning at home, her ability to enjoy recreational pursuits, and her ability to have a normal relationship with her partner. This is why she recommended that work hours be decreased so that Mrs. Merko would have more time to recover at the end of the work day.

[81] At the same time Dr. Finlayson also noted that it would probably not be good for the plaintiff to stop working as she gets a lot of satisfaction from her work.

[82] Dr. Finlayson gave evidence on cross-examination that the plaintiff's condition has improved with some medications. However, the medications have risks of side effects with long-term use. Further, the pain could get worse.

[83] Dr. Finlayson explained that when someone is living with chronic pain they can go down a negative road, have their sleep affected, become depressed, and the pain can get worse. She testified that there is a risk of that happening to the plaintiff, although she could not say it was more than a risk as opposed to a probability. She agreed that the plaintiff's future ability to do her job was at risk of being shortened because of her symptoms.

[84] Dr. Finlayson also explained that it is likely that the pain will flare up over the years.

[85] The plaintiff's family doctor, Dr. Burger, gave a written opinion dated October 23, 2015, to the effect that the plaintiff is likely to continue to suffer from

2016 BCSC 1403 (CanLII)

pain in her neck and shoulder, as well as from headaches, in the future. He noted that her position using a computer at work leaves her in significant discomfort by the end of the day. In his opinion "it is foreseeable that she might have to reduce her workload to about 80% of her previous workloads". He only saw her pain improving if she changed her workload.

[86] In cross-examination, Dr. Burger agreed that he had not made any prior recommendation that the plaintiff reduce her workload, and he may have been influenced in his recommendation by Dr. Finlayson's recommendation. However, he agreed with Dr. Finlayson's recommendation.

[87] Dr. Finlayson recommended that Mrs. Merko have a functional capacity evaluation to provide further information regarding her work capabilities. This was carried out by Mr. Paul Pakulak, an occupational therapist and certified work/functional capacity evaluator.

[88] Mr. Pakulak functionally assessed Mrs. Merko on October 1, 2015. He also assessed Mrs. Merko's cost of future care needs over the course of approximately one hour at her home.

[89] In summary, Mr. Pakulak observed that in performing tasks similar to those she would perform at her employment, the pain in Mrs. Merko's neck and upper back increased over the time of testing. Her headache pain, which started at a lower grade, did not increase over the time of testing. Her productivity would also decrease over time. As he put it in cross-examination, Mrs. Merko is capable of doing the work but at a cost, and that cost is reduced productivity, increased pain, and reduced activity levels outside of work.

[90] In his report dated December 3, 2015, Mr. Pakulak stated:

> …She demonstrated functional limitations specific to prolonged and repetitive overhead work, prolonged and repetitive positioning of the neck and shoulders for work in front of the body and prolonged sitting.
>
> …

2016 BCSC 1403 (CanLII)

> In my opinion, Ms. Merko demonstrated the physical capacity to be employable on a part time and full time basis with restrictions and limitations as noted above. …
>
> Prolonged positioning of the neck and upper extremities for work in front of the body will result in increases in symptoms and reduced capacity and productivity over time and she will require the flexibility to take breaks to stretch and change positions if this is required on more than an occasional basis. …
>
> It is also my opinion that her overall ability to compete for work in an open job market is significantly reduced due to her ongoing injuries and resultant physical limitations. That is, the overall number of jobs that she would be able to compete for given her physical limitations are significantly limited.
>
> [p. 29]

2016 BCSC 1403 (CanLII)

[91] While it was Mr. Pakulak's opinion that the plaintiff's ability to compete in an open job market in any occupation was reduced by her injuries, he felt she was able to do the type of work she is doing now, which is considered sedentary or limited strength work. But her ability to do the work she is doing now has limitations and she is not capable of doing the work at a competitive level. In this regard, he stated in his report:

> …Based on the testing results, it is my opinion that she did demonstrate the capacity to complete this work [sedentary or limited strength] on a full time basis at a gainful level but testing results suggest that the demand for prolonged positioning of the neck and shoulders will result in increases in symptoms and reduced capacity and productivity over time. As such, she did not demonstrate the capacity to complete the work at a competitive level as she is likely to work more slowly over time and to have reduced activity tolerances for activity outside of work.
>
> [p. 30]

[92] The defence retained Dr. Robin Rickards, an orthopaedic surgeon, who assessed the plaintiff on October 15, 2015 and provided a report dated January 10, 2016. His opinion was that "[g]enerally symptoms of soft tissue difficulties in neck or shoulder areas respond to a well focused and well participated in muscle strengthening regime" and "[i]n the vast majority of cases symptoms resolve with appropriate treatment, muscle strengthening and time" (at p. 12). Since Mrs. Merko's soft tissue injuries did not resolve despite abundant treatment

and muscle strengthening and time, his opinion in this regard did not add anything of value with respect to the issues before the Court.

[93] Interestingly, Dr. Rickards did not take issue with Mrs. Merko's report to him that she had increased intensity and frequency of headaches after the first accident, which is further support for the conclusion that there is nothing medically unusual about this.

[94] The defence takes the view that given Mrs. Merko's strong attachment to her job, there is no real possibility that she will suffer a future loss of earning capacity due to her injuries. Rather, she will work through whatever pain she might have.

[95] The plaintiff submits that despite Mrs. Merko's strong attachment to work, there remains a very real and substantial possibility that she will not be able to continue in her current, demanding position. One cannot predict with certainty if and when she will burn out, but there remains a strong possibility that she will, given the pain she struggles with and how the very effort to sustain her full-time work diminishes every other aspect of her life.

[96] Mrs. Merko has not tried to obtain permission to reduce her hours at work. She knows it is a full-time position. She obtains a lot of satisfaction from the people she works with. She feels she would be emotionally unable to adapt if she had to change to a different part-time job with her employer. It would require her to be retrained, to take a lower salary, and to work out of a school, all negatives for her. As she put it, she could not bear the thought of giving up her job; it is the only thing giving her satisfaction in life right now.

[97] Despite her emotional attachment to her work, Mrs. Merko admits it is a struggle every day, both physically and emotionally, because of the pain she bears.

[98] In cross-examination she was asked if it was her intention to continue working full-time for the foreseeable future. Mrs. Merko's evidence was to the effect that that was her hope, but based on how she feels she was not sure how long that will continue. This was an insightful answer, in my view, because it captures

2016 BCSC 1403 (CanLII)

Mrs. Merko's clear desire to work, tempered by her knowledge and concern that it is very difficult to cope with the pain that full-time work causes her.

[99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.

[100] I find that a number of real and substantial possibilities exist on the evidence and as a matter of common sense considering ordinary human experience:

a) that Mrs. Merko will not be able to sustain her full-time job, will realize that it takes too big a toll on the rest of her life and relationships given the pain she feels at the end of the full work day, and so she will look for part-time work, either with her current employer or elsewhere. Finding a replacement position would likely be difficult given her age and any necessary disclosure about her pain issues and limitations, and it would likely be in a position that pays less on an hourly basis than her current position;

b) that Mrs. Merko will not be able to sustain her full-time job as long as she otherwise would have done but for the accidents. It was likely but for the accidents that Mrs. Merko would not have retired until age 69 and there was a real possibility she would have continued working until 72. There is a real and very substantial possibility that she will need to cease work and retire earlier, at a decreased pension and with a loss of salary for the years she does not work.

2016 BCSC 1403 (CanLII)

[101] At the same time, these are only possibilities, and it remains possible that she will continue working full-time until age 68 when she reaches her full pensionable age, but sacrificing most other activities and relationships.

[102] These real and substantial possibilities lead to a conclusion that Mrs. Merko is entitled to damages for future loss of earning capacity: see *Perren v. Lalari*, 2010 BCCA 140. Assessing those damages is difficult, whether on the approach that she has lost a capital asset or on the approach that she has lost earnings.

[103] The defence submits that the plaintiff has suffered no future loss of earning capacity because she has continued to work full-time and wants to do so in the future, but I disagree for the reasons above. Counting on Mrs. Merko's stoicism, the defence has submitted no alternative theories as to how to best assess loss of earning capacity.

[104] The plaintiff's counsel submits that the plaintiff's loss of future earning capacity should be measured as though her injuries will mean she is only going to be able to work an average of between 66% and 75% of her present full-time capacity in the future. The plaintiff currently earns $45,945 per year. The plaintiff calculates her loss as equivalent to $13,400 per year.

[105] Using an economic multiplier supplied by the plaintiff's expert economist, Darren Benning, this works out to a loss of approximately $123,000 if one was to assume that but for the accidents the plaintiff would have worked only to age 65.

[106] The plaintiff's approach is in some ways conservative, because if the plaintiff does reduce her employment to part-time to better cope with her injuries, there is a good chance her salary would be a lower starting salary than assumed in the above calculation. Further, these figures overlook the plaintiff's evidence to the effect that her past intentions and expectation was always that she would have worked well past age 65.

[107] One way of testing the reasonableness of the plaintiff's estimate of damages is to compare it to an alternative scenario. I consider one strong possibility on the

2016 BCSC 1403 (CanLII)

evidence to be that the plaintiff will keep on working full-time, but because of her injuries, will retire at least four years earlier than she otherwise would have, losing out on four years of salary. The present value of such a loss would be larger than the $123,000 estimated by the plaintiff. This reinforces the conservative nature of the plaintiff's assessment.

[108] At the same time, these are not probabilities but only possibilities. Factored in has to be the plaintiff's very strong attachment to her job and her understanding of her own psychological need to have a purpose and keep working, plus the possibility other contingencies would have negatively affected her future employment regardless of the accidents.

[109] I also note that Mr. Benning's report identified the economic multiplier applicable to Mrs. Merko from the time of trial to age 65 as 7.023, which means that if her present salary of $45,945 continued to age 65, the total present value of her future earnings would be $322,671. Of course, Mr. Benning's figures did not take into account my finding that but for the accident, there was a real possibility she would have worked to age 69 or even 72 or longer. Now, because of her injuries, there is a real possibility she will retire earlier.

[110] Considering the dueling contingencies and the loss of capital asset perspective and the earnings approach, I consider an assessment of the loss at $100,000 to be reasonable.

[111] In my view this assessment fairly takes into account the real possibility that because of her injuries the plaintiff will need to reduce her hours of work, or will retire earlier than she otherwise would have done, both with a resultant loss in salary and pension benefits. This assessment also takes into account the counter-possibility that the plaintiff will continue to soldier on working full-time for a period despite her pain, even as she ages, and despite the sacrifice to other aspects of her life.

2016 BCSC 1403 (CanLII)

Cost of Future Care

[112] Several medical witnesses recommended that Mrs. Merko undergo or continue the following treatments:

a) an exercise program;

b) Botox injections; and

c) medications including the Butrans patch.

Exercise Program

[113] The defence agrees that an exercise program with a kinesiologist is an appropriate future care item, with a cost range of $412.50 to $495. The plaintiff submits that $471 is an appropriate estimate of the cost, and I agree.

Botox

[114] One of the more expensive care items in dispute has to do with past and future Botox treatments.

[115] Dr. Mackie is a neurologist and the plaintiff's treating physician solely for her headaches. He was not called as an expert to give opinions but was called as a factual witness by the defence to testify as to his treatment of Mrs. Merko.

[116] Dr. Mackie made recommendations at one point in Mrs. Merko's treatment that she stop all pain medications to see how it affected her headaches, as he had a concern that some of her headaches might be related to medication overuse. These medications were given to her under supervision of other physicians for management of pain.

[117] The plaintiff was compliant but had quite a difficult time managing her pain when she came off the medications and so had to take time off work. The defence argues this time off work was not related to her injuries suffered in the accidents, but I disagree. I have found it likely that were it not for the accidents, she would not have been on pain medications to manage the soft tissue injuries, and would not have

2016 BCSC 1403 (CanLII)

suffered an increase in the severity of her headaches. I have taken this into account in assessing damages in relation to past sick leave taken.

[118] As Dr. Mackie put it, a patient suffering from headaches and soft tissue injuries is between a rock and a hard place, trying to balance the pain and treatment.

[119] The plaintiff has found the Botox treatments given by Dr. Mackie help with her headaches.

[120] Dr. Mackie has recommended that the plaintiff continue with Botox treatments for her headaches every three months. He explained that he injects her in her head and down into her neck at 33 or 34 injection sites.

[121] The defence argues that the need for Botox treatments for the headaches is not due to the accidents because Mrs. Merko had headaches before the accidents.

[122] Dr. Finlayson attributed the increased headache symptoms to the injuries caused by the accidents. Mrs. Merko had never needed Botox for those symptoms prior to the 2010 Accident.

[123] Dr. Finlayson opined that continuation of the Botox injections recommended by Mrs. Merko's neurologist was a reasonable treatment. She added that she believed these injections might also help the plaintiff's neck and shoulder pain to a degree, as Botox can be an effective relaxant of the cervicoparaspinal muscles. As noted, some of the injections are to Mrs. Merko's neck.

[124] It was Dr. Rickard's written opinion that there was no strong evidence that Botox treatments are effective in treating myofascial pain difficulties. However, in cross-examination he agreed that some clinicians find them helpful in treating headaches and myofascial pain.

[125] I have concluded that but for the accidents, Mrs. Merko's headaches would not have progressed in frequency and severity to the point where she needed the Botox treatments. This is a reasonable cost of care caused by the injuries sustained in the accidents.

2016 BCSC 1403 (CanLII)

[126] The problem is that no expert provided an opinion as to how frequent, and for how long a period, Mrs. Merko will need these treatments.

[127] Plaintiff's counsel submits that the cost of these treatments can be expected to continue until age 80. The present value of such treatments would be $21,606. I do not find sufficient evidentiary support for this.

[128] I do find it likely that treatments will continue for at least one year. I therefore find that the evidence supports an additional one year of treatment with Botox injections, at a cost of approximately $1,080.

Butrans Patch

[129] Mrs. Merko has been prescribed a number of pain relief medications over time since the accidents, including a Butrans patch.

[130] The plaintiff testified that the Butrans patch helps her manage her pain, especially in the afternoons, in order to get through her work day.

[131] Dr. Rickards was cautious in his written opinion about continued use of the Butrans patch due to the possibility of opioid dependency. He agreed in cross-examination that there was nothing in the plaintiff's medical or Pharmanet records to suggest that there had been inordinate prescriptions for her. He agreed that the person best situated to determine a patient's chronic pain treatment is the person who has treated and observed the patient's response to medications over time. This of course would be Mrs. Merko's treating physicians and not Dr. Rickards.

[132] Dr. Burger has overseen Mrs. Merko's treatment on the Butrans patch but did not provide an opinion regarding its long-term use.

[133] Dr. Rickards agreed in cross-examination that he would defer to a physiatrist acting on the advice of a functional capacity evaluator in matters of rehabilitation and increasing a patient's function.

2016 BCSC 1403 (CanLII)

[134] I too consider Dr. Finlayson's opinions and that of the functional capacity evaluator of more utility and weight in assessing Mrs. Merko's future care needs.

[135] Dr. Finlayson recommended continued use of medications including the Butrans patch.

[136] Mr. Pakulak identified that the cost of the patch is $794 per year.

[137] The plaintiff submits that the present value of the cost of using the patch until age 85 is $17,352.

[138] The defence submits that a more reasonable estimate of the cost would be to predict a continued expense in this regard for five years, which works out to a present value of $3,757.21.

[139] I accept the defence figure as reasonable based on a lack of any expert opinion estimating the expected time frame for continued use of the Butrans patch.

Other Medications

[140] The plaintiff takes other over-the-counter medications. She also took some over-the-counter medicines before the accidents to treat headaches. There are some long-term problems associated with some of these medications.

[141] The plaintiff claims the cost of a prescription medication named "Axert". The annual cost of this medication is $362. The defence submits that this is solely to treat headaches. I find that the injuries caused by the accidents caused the increase in severity of the plaintiff's headaches; whereas previously she did not need prescription medications, since the 2010 Accident she has needed these.

[142] Dr. Finlayson's opinion is that it is appropriate for Mrs. Merko to continue to use these medications for management of pain arising from the injuries sustained in the accidents into the foreseeable future, but she cannot predict for how long.

[143] I find there is not sufficient evidence to support the plaintiff's claim for continued use of these medications until age 85. I also find that some allowance

2016 BCSC 1403 (CanLII)

has to be made for the fact that Mrs. Merko did use some over-the-counter pain medications before the accidents for her headaches, and this likely would have continued in any event.

[144] A one year's supply of Axert apparently costs $362 according to Mr. Pakulak; the other over-the-counter medications cost perhaps $28 per year. I accept that over her lifetime Mrs. Merko will need to use more pain relievers or muscle relaxants due to her injuries than she would have if the accidents had not occurred. I estimate the future cost of these medications related to her injuries to be $2,000.

Total Cost of Future Care

[145] I have concluded that the total cost of future care that is likely to be incurred by Mrs. Merko in dealing with her injuries is $471 (exercise program) plus $1,080 (Botox) plus $3,757.21 (Butrans patch) plus $2,000 (other medications). The total damages awarded under this head rounded to the nearest dollar is therefore $7,308.

[146] I will leave it to the plaintiff to sort out the extent to which the prescription medication cost is subject to a subrogated claim by any insurer.

Loss of Housekeeping Capacity

[147] Mr. Pakulak's functional assessment concluded that Mrs. Merko's ability to do household chores is impaired:

> With respect to avocational activities she did demonstrate the capacity to complete most aspects of light household cleaning chores required in her present residence. She demonstrated limited capacity for the more physically demanding household chores and yardwork tasks consistent with her reported ongoing difficulties. As such, it is my opinion that she will require ongoing assistance with these tasks as outlined on the following pages.
>
> [p. 30]

[148] Both Mr. and Mrs. Merko's evidence confirms that Mrs. Merko continued to do light household work after the accidents. However, it takes her longer than it used to, and she also does less around the house and yard than she used to do because of her pain. Mr. Merko's ability to pick up the slack is diminishing due to his own health issues.

2016 BCSC 1403 (CanLII)

[149] The plaintiff has not yet hired someone to do household chores but I find it is likely she will need to do so in the future as she tries to cope with the limitations caused by her pain due to her injuries, especially as she ages. I therefore conclude she has suffered a loss of her capacity to do household chores.

[150] Mr. Pakulak estimated the annual cost of assistance in household chores to be $2,326.50 plus GST, comprised of three hours every second week plus eight hours' seasonal chores twice per year. Mr. Benning estimates the present value of this from time of trial until Mrs. Merko is age 80, based on the assumption that she would not have done this work after 80 even if the accidents had not occurred, as being $48,682.

[151] The fact that the plaintiff has not yet engaged someone to do this work does not mean she does not need the assistance. The fact that she is functionally able to do the work does not mean she should do it at a cost of increased pain. The plaintiff's husband cannot reasonably be expected to pick up all the slack in the future given his own health condition, but so far he has continued to do some.

[152] Keeping in mind the need to be cautious (*Westbroek v. Brizuela*, 2014 BCCA 48), I find that a reasonable assessment of Mrs. Merko's future loss of housekeeping capacity is approximately half of what Mr. Benning estimated, namely $24,000.

[153] Given that Mrs. Merko insisted on continuing to work around the house despite her injuries post-accident, her past loss of housekeeping capacity was minimized. Nevertheless her husband and other family members volunteered their time and did things she was not able to do. I assess her past loss of housekeeping capacity at $4,000.

Non-Pecuniary Damages

[154] The plaintiff submits that an appropriate award of non-pecuniary damages would be $95,000; the defendants submit that a more appropriate award would be $50,000.

2016 BCSC 1403 (CanLII)

[155] The biggest impact of Mrs. Merko's injuries has been on her everyday enjoyment of life.

[156] She loves her job but now experiences such pain that she struggles with it every day, physically and emotionally. Mrs. Merko's decision to carry on working full-time means her claim for loss of earnings and loss of earnings capacity is less than it might otherwise have been for a similarly situated person; on the other hand, her loss of enjoyment of life may be greater because of this.

[157] Prior to her injuries, she was able to work a full day, come home, and work on any one of her several personal projects well into the evening, often until 10:00 or 11:00 p.m. She was a fast worker, and liked to complete her projects. She can no longer do this. Her job now takes everything out of her.

[158] A lot of her activities involved looking down, whether it be cooking, sewing, or working on furniture. Her neck and shoulder pain now puts extreme limitations on what she can manage. She has given up trying to refinish furniture. Most of Mrs. Merko's activities have diminished as she is too uncomfortable doing them and they take so much longer to do that she has lost her passion for them. She clearly cannot bear being unproductive and is not someone who enjoys watching television. Her mood is down. The more of her former activities that she does not do, the worse her mood, in what she describes as a vicious cycle.

[159] With her pain being elevated by the time she comes home most evenings from work, Mrs. Merko is irritable and drained and so tends to avoid her husband. This is putting a strain on what used to be an affectionate, happy relationship.

[160] Mr. and Mrs. Merko used to like to travel. They still do some travel but long periods of sitting exacerbate her discomfort.

[161] Both Mr. and Mrs. Merko testified about what her pain has done to their relationship. They both clearly love each other but are having a very difficult time coping with her pain. Mrs. Merko choked up describing how they used to hold hands everywhere but now do not.

2016 BCSC 1403 (CanLII)

[162] Mr. Merko wants to help her and his inability to do so greatly frustrates him. He broke down and got quite upset in the witness stand. He was clearly grieving for what has happened to her and was worried about the future.

[163] In the meantime Mr. Merko has been diagnosed with his own health condition, fibromyalgia involving chronic back pain. They both feel conflict about doing chores around the house. Mr. Merko tries to help out and do more chores so that Mrs. Merko does not do them, but he is getting overloaded. There are a lot of home chores that they cannot do comfortably.

[164] Mrs. Merko is now terrified about how she will handle retirement.

[165] Mrs. Merko also spends less time with her friends and has become more withdrawn socially. Friends and colleagues who testified at trial have noticed that she carries her body stiffly, an observation I made as well. One friend choked up describing how she misses her good friend, who is now visibly uncomfortable and no longer the happy person she once knew.

[166] Mrs. Merko has been taking medication in the form of a Butrans patch since approximately 2013 as pain relief for her neck, shoulders and upper back. She is very embarrassed about using the medication. However, she finds it necessary to help her get through her work day.

[167] Over the years since the accidents she has tried many different medications. Several have had difficult side effects, including weight gain, mental fogginess, puffy hands and feet, weight loss, metallic taste, and tingling in her hands and feet.

[168] Mrs. Merko also has tried several therapies since the accidents, some of which have wracked her with pain.

[169] Both sides point to other cases as providing a range of comparables for non-pecuniary damages, but as always, each case turns on the specific facts. I found helpful the cases of *Nijjar v. Hill*, 2016 BCSC 546 ($90,000 non-pecuniary damages less 15% for failure to mitigate, involving a much younger plaintiff who therefore had

2016 BCSC 1403 (CanLII)

a longer future with symptoms, but her symptoms were less severe than in the present case) and *Dabu v. Schwab*, 2016 BCSC 613 (non-pecuniary damages of $95,000 for a plaintiff of similar age).

[170] A formerly dynamic, highly productive, social and happy woman, the plaintiff's life has been drastically altered by her injuries. Every enjoyable aspect of the plaintiff's life has been negatively affected by her chronic pain.

[171] I find that an appropriate award of non-pecuniary damages is $95,000.

Special Damages

[172] The defence agrees that the plaintiff has incurred $3,834.92 in expenses that qualify as special damages.

[173] The plaintiff claims an additional $1,122.21 in special damages. These all relate to either prescription medications since the accidents or Botox treatment.

[174] I am satisfied these additional costs relate to injuries sustained in the accidents. I award the plaintiff a total of $4,957 as special damages, being $3,834.92 plus $1,122.21 rounded to the nearest dollar.

Conclusion

[175] The plaintiff is entitled to damages of $241,325 as against the defendants as follows:

a) Past use of sick leave: $6,060

b) Loss of future earning capacity: $100,000

c) Cost of future care: $7,308

d) Loss of future housekeeping capacity: $24,000

e) Loss of past housekeeping capacity: $4,000

f) Non-pecuniary damages: $95,000

2016 BCSC 1403 (CanLII)

g) Special Damages: $4,957

[176] Ordinarily the plaintiff would be entitled to her costs at an ordinary scale. If the parties wish to make submissions regarding costs due to information not known to me, they have liberty to seek a further hearing before me but I request that they give notice of the same within 45 days of this judgment.

"The Honourable Madam Justice S. Griffin"

2016 BCSC 1403 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Montgomery v. Williamson*,
2015 BCSC 792

Date: 20150513
Docket: M147514
Registry: New Westminster

Between:

William Bryan Montgomery

Plaintiff

And

Brent Williamson

Defendant

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

Counsel for Plaintiff:	J.C. Moulton
Counsel for Defendant:	L. Hibbert
Place and Dates of Trial:	New Westminster, B.C. December 2-5, 2014
Place and Date of Judgment:	New Westminster, B.C. May 13, 2015

2015 BCSC 792 (CanLII)

I. INTRODUCTION

[1] Mr. Montgomery was driving his 2009 Toyota Highlander over the Alex Fraser Bridge on January 24, 2011 when he had to come to a stop for traffic in front of him.

[2] Unfortunately for him, Mr. Williamson was driving his truck behind Mr. Montgomery and did not see the traffic stopping. He drove at high speed into the back of Mr. Montgomery's vehicle, driving it forward some distance, causing some $14,000 damage to Mr. Montgomery's vehicle, and smashing in the front of Mr. Williamson's vehicle causing it to be a write-off.

[3] Mr. Montgomery described a period of time where he has no recollection, i.e. before Mr. Williamson came up and tapped on his driver's side door.

[4] After the various formalities were completed, rather amazingly Mr. Montgomery was able to drive his vehicle back to his house, He took a nap but ongoing pain caused him to go to a walk-in clinic.

[5] The pain in his neck and back continued and not long after Mr. Montgomery went to see Dr. Prentice who had been his family doctor since 2002.

[6] I am satisfied Mr. Montgomery sustained severe injuries to the soft-tissue in his upper back and neck and aggravated a pre-existing condition in his right shoulder.

[7] Unfortunately for him these matters have become chronic. The headaches are now being treated by trigger-point injections, while his right shoulder was operated on to deal with pain from arthritis which, in the view of some of the doctors, has been accelerated by the car accident.

[8] The defendant does not dispute that Mr. Montgomery was injured in the car accident but says that the right shoulder injury is not related, that Mr. Montgomery's neck injuries are not as severe as the plaintiff argues, and that his business losses are not as great as the plaintiff argues.

2015 BCSC 792 (CanLII)

A. Mr. Montgomery - pre-accident

[9] Several friends of Mr. Montgomery, his wife and his mother-in-law gave evidence as did Mr. Montgomery. I do not propose to go over that at length. I am satisfied Mr. Montgomery, who is a large and powerfully-built man, had an active, athletic career as a young man and was a convivial and outgoing personality which carried over into marketing and sales and eventually the start-up of his own business.

[10] By the time of the accident, he was married with young children with whom he was very much involved.

[11] He did the landscaping around his house and a substantial portion of the housework.

[12] He enjoyed his outdoor sports, in particular snow skiing and water skiing, and recreational hockey where one of his friends described him as a player in the Cam Neely mold (i.e. an aggressive forward).

[13] He enjoyed other games and coaching his and other children.

[14] His company had made steady ground since starting up in 2009. His wife who is also an accountant did the books for his company and the figures put forward as income and expenses were not disputed.

[15] It is evident that the earnings have fallen off but not for some two years post-accident.

B. Mr. Montgomery's injuries

[16] The effect on Mr. Montgomery was immediate in terms of neck and back pain and headaches. He initially attended a walk-in clinic on two occasions and then rather curiously while at a social event and laughing, suddenly felt a severe pain in his neck and consequent nausea. The walk-in clinic doctor referred Mr. Montgomery to the Peace Arch Hospital for CT imaging to rule out any possible injury that had been overlooked, but the CT scans came back with no findings of concern.

2015 BCSC 792 (CanLII)

[17] However, the pain and headaches led to fatigue. Mr. Montgomery soon reduced his daily workload, taking daily naps for one to three hours for 18 months post-accident and those have continued, though less frequent.

[18] His family doctor, Dr. Prentice referred him to physiotherapy and then massage therapy and the treatments have continued though on a lesser basis for almost four years.

[19] Dr. Prentice noted there were no health issues pre-accident.

[20] While the neck and lumbar injuries seemed to be resolving throughout 2011, late in the year, Mr. Montgomery felt something happened with his right shoulder at physiotherapy. This eventually led to the attendance on Dr. Smit who initially was of the opinion that the motor-vehicle accident had caused arthritis to develop in Mr. Montgomery's right shoulder.

[21] However, after further consideration of the fact that Mr. Montgomery had played rugby in high school with some damage to his shoulder, and the report of a water-skiing accident in 2008 which had led to Mr. Montgomery seeking medical attention a year later, though without any further complaint from Mr. Montgomery pre-accident, Dr. Smit changed his opinion to the extent that he felt the arthritis pre-existed the car accident and the car accident had accelerated the arthritic process.

[22] He noted from the surgery he performed April 15, 2014, disruption of the biceps anchor, extensive synovitis, osteoarthritis of the glenohumeral joint, partial thickness rotator cuff tear, and extensive subacromial bursitis of the right shoulder.

[23] This was treated by removal of the frayed labrum, extensive removal of the bursal tissue and the undersurface of the acromion was smoothed.

[24] In his later opinion, Dr. Smit felt the accident brought on the surgery 5-10 years earlier than would have been expected i.e. a slowed, progressive right shoulder pain and loss of function happened far more quickly due to the accident and trauma to Mr. Montgomery.

2015 BCSC 792 (CanLII)

[25] Dr. Regan also provided an opinion. He agreed Mr. Montgomery had sustained injury to his neck and back and that had resulted in bilateral trapezial myofascial pain and aggravated his cervical arthritis, in turn causing his headaches. In his written opinion Dr. Regan stated the right shoulder osteoarthritis pre-existed the car accident and surgery would have been required sometime in the future.

[26] In cross-examination Dr. Regan quite fairly conceded that given Mr. Montgomery had no shoulder difficulties for two years prior to the accident, save some difficulty throwing a football, and made no complaint about his right shoulder until late 2011, it was possible the soft tissue injuries to Mr. Montgomery's upper back resulting in reduced activity by Mr. Montgomery could have caused muscle dysfunction in the shoulder musculature, triggering Mr. Montgomery's shoulder pain, and would have sped up the arthritic process and brought forward the consequent surgery.

[27] Dr. Prentice in his report dated March 28, 2012 did not find a causal relationship between the shoulder issue and the car accident but in the circumstances, I accept the opinion of the two other specialists that there is a relationship between the car accident and acceleration of shoulder pain and the remedial shoulder surgery, while keeping in mind that the osteoarthritis and surgery would have occurred in the not so distant future. .

[28] Dr. Prentice did agree in 2012 that Mr. Montgomery's upper back and neck pain was chronic but he was still hopeful that there would be a further improvement and perhaps cessation of pain.

[29] That did not happen. Dr. Bohorquez, a specialist in physical medicine and rehabilitation diagnosed Mr. Montgomery with myofascial pain affecting the cervical paraspinal muscles that in turn led to cervicogenic headaches from tight and painful cervical paraspinal muscles.

2015 BCSC 792 (CanLII)

[30] By definition he noted the condition was chronic and that had not been cured in spite of Mr. Montgomery having multiple treatment modalities. He doubted that Mr. Montgomery would ever be fully pain free or headache free.

[31] However, trigger point injections were being started and he hoped there might be further improvement.

[32] He stated Mr. Montgomery understood and should continue his exercises for stretching and strengthening his cervical paraspinal muscles.

[33] He proposed Mr. Montgomery's exercise techniques be reviewed from time to time by a kinesiologist to ensure proper exercise techniques were being used. As well Mr. Montgomery would benefit from massage therapy once per month for neck pain and headache control.

[34] He indicated the ongoing use of nortriptyline at night-time. With respect to the trigger-point injections that had been started, he indicated more benefit might be obtained from Botox injections but each time would cost approximately $750.

[35] As well, he believed Mr. Montgomery would benefit from a referral to a multi-discipline pain clinic to help focus on activities despite the pain.

[36] He noted the effect to Mr. Montgomery as a self-employed salesman, noting that while neck pain and headaches were not totally disabling Mr. Montgomery, the onset of fatigue meant loss of work and also reduced computer time.

[37] Mr. Montgomery has a start-up interest in another company involving computers and he stated his time working on a computer was two to four hours a week.

[38] Dr. Bohorquez noted Mr. Montgomery's driving and travelling time would continue to be affected if there was not going to be further improvement.

[39] It was noted that Dr. Robinson had been consulted with respect to the cervicogenic headaches but they were quite difficult to treat.

2015 BCSC 792 (CanLII)

II. PLAINTIFF'S ARGUMENT

[40] The plaintiff referred to *Debou v. Besemer*, [2014] B.C.J. No. 2358, *and Caroll v. Hunter,* 2014 BCSC 2193 and submitted an award of $90,000 was reasonable.

[41] As well, if the Court accepted a causal relationship between the car accident as causing the onset of significant pain in the right shoulder resulting remedial surgery in 2014, the award should be increased to $120,000.

III. DEFENDANT'S ARGUMENT

[42] While conceding the plaintiff's neck, upper back and headache injuries were caused by the accident, the defendant noted Mr. Montgomery referred to his level of pain since 2013 as being a three to four out of 10, thus more of a discomfort than excruciating pain and only a sharp pain when he was overly strenuous.

[43] The defendant also argued that the lack of sleep and consequent fatigue was now caused by a recently diagnosed sleep apnea. However, there was no medical testimony to suggest any such relationship. Arguably, the apnea issues, being post-accident, might well be related to the upper back and neck issues. I do find soft tissue pain caused lack of sleep and fatigue, but at trial this was at a reduced level.

[44] The defendant focused on the consultation report from Dr. Oliver dated September 1, 2009 to Dr. Prentice that Mr. Montgomery had said his right shoulder was dislocated while playing rugby in his youth and further injured water-skiing. That report was made by Dr. Oliver who saw Mr. Montgomery September 2009, approximately one year after the water-skiing incident.

[45] However, Mr. Montgomery denied he had dislocated his shoulder in his youth and stated he did not have any real problems with his shoulder, he was playing all his sports including his hockey, and the only restriction he had was that he was not throwing a football 100% i.e. he had a nagging discomfort. I note throwing the football would be an overarm action.

2015 BCSC 792 (CanLII)

[46] As well, the defendant points to the fact that it took from 7-9 months post-accident before Mr. Montgomery started experiencing significant pain in his right shoulder. It was not reported by any of the treating medical personnel until January 30, 2012 (Dr. Prentice).Thus the defendant says the plaintiff's complaints of injury to the right shoulder are all based on previous injuries unrelated to the car accident.

[47] As well, with respect to Mr. Montgomery's depression and anxiety which was treated by Dr. Prentice providing Celexa for some six months, the defendant said it was not a significant issue.

[48] In terms of enjoying his life, the defendant noted the plaintiff had resumed playing golf (once) and had been able to play volleyball (once with his children when evidently he injured his finger).

[49] The defendant also noted the plaintiff had resumed some of his household chores (none related to the heavier duties and none at all related to the outside chores such as landscaping that he previously did).

IV. DISCUSSION

[50] I am satisfied that the car accident has caused a chronic, ongoing myofascial pain to Mr. Montgomery's upper back and neck area resulting in ongoing headaches.

[51] I also accept the opinions of the specialists that there is a causal relationship between the car accident and the right shoulder surgery. i.e. that the pain and subsequent surgery was brought on some 5-10 years earlier than it might have been.

[52] I accept Mr. Montgomery's evidence and the evidence of his wife and friends that the previously outgoing salesman had become far less so to the extent that he has withdrawn from his social circle, is irritable within his family circle and recently his wife has been suggesting counselling is needed.

2015 BCSC 792 (CanLII)

[53] It is a reasonable conclusion in the circumstances that the depressive effect of ongoing pain and headaches and resultant loss of sleep and fatigue has sapped the energy of the salesman who was an effective force for his company (and for his family in 2009 and 2010 but in a lessened and diminished fashion since that time).

[54] In the circumstances and given the conservative forecasts of the several doctors involved, an appropriate award is $95,000.

A. Lost Income

[55] In 2008 the plaintiff made $109,451 gross and $99,491 net as a regional sales manager for a video cam manufacturing company. He decided to go to self-employment in the same field, essential security installation work which involved telephone calls, website sales, site visits, customer trainer, and installation and attendance at trade shows all over western Canada but primarily Alberta and British Columbia.

[56] He said he worked 40 to 60 hours per week with a lot of travelling. By the time of the accident he had approximately four large clients but was seeking 12.

[57] Post-accident he said the pain, fatigue, and afternoon napping meant he was at best, working some 30 to 40 hours per week.

[58] After the 2014 surgery, he said he was slowly accumulating more sales.

[59] His evidence was that he had three principal customers, GPM, Sony, and Tatung and that GPM was 45 - 50% of his 2010 sales, but eventually GPM left him in April 2013 as his sales gradually fell from $4,500 -$5,000 to $2,000 per month.

[60] He lost Tatung, a $500 per month customer in the fall of 2012, and Sony, a $6,000 per month customer, in early 2013.

[61] He attributes the loss of clients to missing trade shows and not getting his name out in those forums as well as not being able to get around to see customers and clients as he should. This was confirmed by the president of GPM who gave

2015 BCSC 792 (CanLII)

evidence and said they tried to keep Mr. Montgomery as a sales person until eventually the sales and customer complaints got to a situation where they had to let him go in early 2013.

[62] Mr. Montgomery said his sales were also helped by a larger federal prison contract and that that kept sales somewhat buoyant through 2011 and 2012.

[63] He agreed he had taken an interest in a start-up company in early 2013 but that was only two to four hours per week. He acknowledged that his modest advertising budget was far less in 2013, but said he primarily used a website and direct contacts. He agreed that his expenses for meals went up in 2012 and 2013.

[64] He agreed that he can still function in sales and wants to continue but his ability had been lessened.

[65] As well, Ms. Montgomery noted the changes that had occurred, namely, he had never been an afternoon napper and after the problems set in post-accident, she was having to wake him and get him out on the road.

[66] His lack of energy and fatigue showed in their various holidays and trips where he would not waterski or play volleyball, where before he had been the leader. Rather he became a spectator. As well she was concerned about the change in his personality and that he became “short fused, irritable, agitated, and did not play with the children” and he was no longer the “happy go lucky person he previously was”.

[67] In her mind, there was no question the result of the injuries was also resulting in his inability to carry on his business at his previous level.

[68] The defendant’s principal arguments arise from three neatly presented schedules showing the company income using the year end June 30 in Schedule 1, using a calendar year approach in Schedule 2, and last a summary of personal income tax returns using the year end, Schedule 1 the 2010 gross profit is $30,164; 2011, $75,354; 2012, $103,204; 2013, $72,396; and 2014, $60,555.

2015 BCSC 792 (CanLII)

[69] In the years 2011, 2012, and 2013 the management fees taken were $75,200, $85,500 and $69,000.

[70] Some of the difficulty in attempting to see what the effect of the injuries is the rather flat line revenues and expenses. Plainly the year 2012 is the best year, but none of it adds up to the year of earnings as postulated with the three principal customers providing monthly income of potentially $10,500 or $126,000 a year. There was evidence when some of the large contracts were ended but not the starting times, thus the defendant says when one looks at the overall figures they do not show such an extreme loss of cliental and such an award should be modest.

[71] The defendant also argued the sales documents had not been produced but did not raise the issue in cross-examination of either the plaintiff or his wife (the company accountant) and I do not accept that argument at this stage. What I do accept is there is some lack of clarity in connecting the evident injuries to Mr. Montgomery and the financial loss that has been arguably suffered.

[72] Counsel argued for Mr. Montgomery that I should consider the lost sales from the three principal customers.

[73] As well it was argued there had been a steady growth in the first two years by some 40% per annum and there was another way of projecting income that would have increased for 2011, 2012, 2013, and 2014.

[74] I do accept the general thesis that Mr. Montgomery's hours meant that he was unable to serve customers properly, was unable to attend trade shows, and generally keep driving with the previous force he brought to his occupation. I accept there is evidence that his company's income do not increase as well as it might and I do accept principal customers were lost.

[75] The plaintiff submits that can be quantified between $139,000 - $262,000. The defendant says those claims are not evidenced by the company's financial records. While both arguments have some weight, the plaintiff submits an award of $75,000 is appropriate in the circumstances.

2015 BCSC 792 (CanLII)

[76] I accept that submission as fair in light of the somewhat general evidence. I award $75,000 for lost earnings before trial.

B. Loss of Future Earning Capacity

[77] The parties agree on the law that is applicable, as stated by the British Columbia Court of Appeal in *Perren v. Lalari,* 2010 BCCA 140 at para. 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 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.

[78] I accept the medical evidence is such that Mr. Montgomery's present abilities in his sales efforts are still some 20 - 25% less than he was pre-accident. There is still evidence of chronic neck pain and chronic cervicogenic headaches but some of that may be treatable and there is still some prospect for future improvement.

[79] On the other hand the defendant says that given the plaintiff says he can continue to work and he has chosen to continue to work in sales, Mr. Montgomery has failed to prove there is no real and substantial possibility that he will incur income loss in the future.

[80] I do not find that to be the case here. Plainly Mr. Montgomery has ongoing neck, back, and headache problems that are chronic, and the medical consultants are not optimistic there will be a full recovery.

[81] I do accept that with the shoulder surgery and improved right shoulder function and the possibility of more control of the neck and upper back injuries, the

2015 BCSC 792 (CanLII)

possibility of Botox injections lessening the debilitating effects of the headaches, that Mr. Montgomery may well regain much of his former strength and energy.

[82] However, there remains a real and substantial possibility that these matters may not resolve as one may hope. Given that, the defendant says such an award should be nominal. In light of the medical forecast, I am not so optimistic.

[83] I find that Mr. Montgomery is less capable overall from earning from all types of employment. He would be less attractive or marketable to other employers. Physically he would be less capable of other employment. Overall he is less capable of earing income in a competitive labour market. He has suffered a loss of his future earning capacity. Given his new venture was in a start-up mode, a capital asset approach is appropriate.

[84] Again, counsel for the plaintiff has put forward a submission I accept as fair and appropriate estimate of $75,000, and I so award.

C. Special Damages

[85] At trial $10,292 were agreed upon. As well I accept a recent bill for the Botox of $760.35 is appropriate.

[86] What was in issue between the parties was the cost of an MRI that the plaintiff obtained for $1,049. However, that did isolate issues regarding the shoulder pain that Mr. Montgomery was complaining of, and led to earlier surgery, and given my finding the process was accelerated by the car accident, the expenditure was appropriate. I therefore allow the special damages in the amount claimed of $11,052.35.

D. Future Cost of Care

[87] The principal costs are based on the medical evidence as to a pain clinic, ongoing advice from a kinesiologist, psychological counselling, and massage. To some degree these matters are interrelated; for instance, I would not think the psychologist would be necessary if the pain clinic was attended which would include

2015 BCSC 792 (CanLII)

all of the aspects of massage, psychological counselling and kinesiology, although the kinesiologist and massage may be long term matters.

[88] The plaintiff submitted the costs over 10 years would be $63,000 and about half of that for five years. As well, the Botox injections may well be an ongoing requirement. Again, I accept plaintiff's counsel submission that $40,000 is appropriate in the circumstances.

E. Housekeeping

[89] The evidence was that Ms. Montgomery and her mother pitched in to do much of the work that Mr. Montgomery in his energetic pre-accident days had performed around the house, which was estimated to be approximately 40% of the housekeeping. As well, he had done all the outside landscaping and outside work, in the house they had before the accident. The evidence was that housekeeping costs are $25-30 per hour and the time Ms. Montgomery's mother-in-law assisted was approximately four to eight hours per month.

[90] In *Deglow v. Uffelman,* 2001 BCCA 652, the Court of Appeal reiterated that a plaintiff may recover for loss of homemaking capacity though no expense has been incurred for those services, referring to *McTavish v. MacGillivray,* 2000 BCCA 164, para. 73.

[91] In rough mathematical terms for some three and a half years at $25 - $35 per hour, gives a total of approximately $7,500.

[92] In terms of assessing the future loss of home making capacity, the principal question would be how long Mr. Montgomery's injuries will cause him to be less effective around the house. Given the potential recovery of his right shoulder injury, I am of the view this will be on a diminishing basis, and taking into account the potential for Mr. Montgomery to largely recover his abilities around the house over the next five to ten years I assess the future loss of homemaking capacity at $5,000.

2015 BCSC 792 (CanLII)

V. COSTS

[93] The plaintiff is entitled to his costs unless there is some issue as to same, in which case, counsel may arrange to speak to the matter before me through trial scheduling.

"The Honourable Mr. Justice Crawford"

2015 BCSC 792 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Moskaleva v. Laurie***,
2009 BCCA 260

Date: 20090610
Docket: CA034897

2009 BCCA 260 (CanLII)

Between:

Natalia Moskaleva

Respondent
(Plaintiff)

And

Mildred Laurie

Appellant
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, February 28, 2007,
Moskaleva v. Laurie, M034207

Counsel for the Appellant:	J.D. Baker, Q.C. W.M. Finch
Counsel for the Respondent:	D.G. Cowper, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia September 5, 2008
Place and Date of Judgment:	Vancouver, British Columbia June 10, 2009

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[1] In an action for damages for personal injuries caused by the appellant's negligence, the jury awarded the respondent $245,000 for non-pecuniary damages, $300,000 for past loss of income, $1,350,000 for future economic loss, and $32,500 for future care costs. Special damages were agreed at $2,734.43.

[2] The appellant seeks to set aside the verdict on five grounds. In the first three grounds the appellant argues that she was deprived of a fair trial because: (a) the opening submissions of respondent's counsel were improper and prejudicial; (b) the cross-examination of a psychiatrist called by the appellant exceeded the bounds of proper cross-examination and thereby prejudiced the jury; and (c) the trial judge's interventions and questions during the testimony of three expert witnesses called by the defence impugned the credibility of those witnesses. In the fourth ground of appeal, the appellant alleges that the trial judge erred in his instructions to the jury by failing to explain properly the law relevant to past and future economic loss and by inaccurately stating the appellant's position on that issue. The relief the appellant seeks on the first four grounds of appeal is an order for a new trial.

[3] In the fifth ground of appeal, put forward in the alternative, the appellant argues that the awards for non-pecuniary damages, past wage loss, and future economic loss are inordinately high, not supported by the evidence, and inconsistent with the jury's award for cost of future care.

[4] For the reasons which follow, I would not accede to any of the grounds of appeal the appellant advanced.

II. Background

[5] On 2 July 2002, the respondent was struck by the appellant's car while she was crossing with the light in a marked cross-walk in Maple Ridge. Liability was not admitted but there was ample evidence to establish that the appellant's negligence

2009 BCCA 260 (CanLII)

caused the accident. There was no suggestion of any contributory negligence on the part of the respondent.

[6] At the instance of the appellant, the trial was scheduled to be heard by a judge and jury. The respondent's preliminary motion to discharge the jury was unsuccessful.

[7] The trial commenced in January 2007 and, following an eighteen-day trial, the jury gave its verdict, finding that the respondent's injury and loss had been caused by the appellant's negligence and awarding damages totalling $1,930,234.43.

[8] The main area of contention in relation to the respondent's injuries was whether she had suffered a mild traumatic brain injury as a result of the accident. Other issues seriously in contention were the respondent's pre-accident earning capacity and the extent to which the respondent's injuries had affected her income earning potential.

[9] The respondent was born in Russia in 1953. She had a post-secondary education in science and mathematics and had training and a work history as a computer software engineer both in Russia and in Canada. The respondent and her husband moved to Canada in 1997. Her employment in Canada was with WestNet Media, a business in which she and her husband were partners. At the time of trial, the respondent was 53 years old.

[10] The respondent's treating physician, Dr. P.D. Golin, and the specialists to which she was referred, Dr. Raymond Ancill, a psychiatrist, Dr. Donald A. Cameron, a neurologist, and Dr. F. Spellacy, a neuropsychologist, were all of the opinion that she has sustained a brain injury. The doctors called by the appellant, Dr. Alexander Levin, a psychiatrist, and Dr. Peter Rees, a neurologist, were of a contrary view.

[11] Dr. Golin was the respondent's family doctor. He speaks Russian and was readily able to communicate with the respondent. His final diagnosis was one of traumatic brain injury, post-traumatic headaches related to a head and neck injury, cognitive disorder due to traumatic brain injury, post-concussion syndrome,

2009 BCCA 260 (CanLII)

depression with associated anxiety, chronic pain disorder, multiple bruises, abrasions of the left elbow, neck strain, back strain, right knee strain and tinnitus.

[12] The opinion of Dr. Ancill, the psychiatrist, was that the respondent had sustained a mild traumatic brain injury, and had developed a post-concussion syndrome. He was also of the view that the respondent continued to suffer from a number of cognitive, neuropsychiatric, functional and emotional deficits, a major depressive episode, as well as a pain disorder.

[13] The opinion of the neurologist, Dr. Cameron, given in his report dated 3 August 2005, was that the respondent probably sustained a mild traumatic brain injury and that she probably suffered from predominant symptoms of post-traumatic brain injury syndrome or post-concussion syndrome for a period of several months following the accident. He also thought it probable that the respondent developed predominant psychological dysfunction in the form of anxiety and depression.

[14] The neuropsychologist, Dr. Spellacy, said in his report dated 18 January 2005, that the respondent showed signs of cognitive impairment and thought it likely that her symptoms were, at least in part, the result of a mild traumatic brain injury. He also stated that the psychological symptoms of anxiety and altered mood, of which the respondent complained, were sufficient to account for many of the impairments she reported.

[15] Dr. Rees, the neurologist who examined the respondent at the request of the appellant, expressed his opinion in a report dated 19 March 2004 that the respondent had suffered a possible head injury but not a brain injury. He opined that the respondent had sustained an adjustment reaction anxiety state but was of the view that it was unlikely the respondent had sustained a brain injury.

[16] Dr. Levin, the psychiatrist who had examined the respondent for medical-legal purposes, expressed the opinion in his report dated 22 February 2005, that it was unlikely that the respondent had any clinically significant cognitive deficits to diagnose her with post-concussional syndrome or disorder. Dr. Levin, who also

2009 BCCA 260 (CanLII)

spoke Russian, was not convinced that the respondent had sustained any clinically significant head or brain injury. He thought the respondent's description of her symptoms, as well as evidence from the medical documentation, suggested that she had developed a brief adjustment reaction, or at most, adjustment disorder.

[17] Dr. McPherson, an orthopaedic surgeon called by the appellant, stated in a report dated 16 June 2006, that he could find no objective evidence of the respondent having any physical disability related to the motor vehicle accident.

[18] There was a good deal of evidence called about the respondent's past ability and experience in the design of computer software and about her diminished cognitive ability and change in personality after the accident. The respondent's actual pre-accident earnings and her earning capacity in the field of computer software design after coming to Canada but before the accident were contentious. The evidence of the respondent and her husband was to the effect that, as a result of her injuries, the respondent was incapable of pursuing her vocation in software design. The medical evidence called by the respondent supported a conclusion that the effects of the brain injury on her cognitive abilities were permanent.

III. Grounds of Appeal

Ground One: Is a new trial required as a result of the opening statement given by respondent's counsel to the jury?

[19] Under the first ground of appeal, the appellant argues that the opening submissions of respondent's counsel were improper and prejudicial and resulted in an unfair trial. To support her submissions that the opening statement failed to conform to the proper function or purpose of an opening, the appellant refers to *Halsbury's Laws of England*, 3rd ed. (London: Butterworths, 1953), vol. 3, at 69, and to what was said by Finch C.J.B.C. in *Brophy v. Hutchinson*, 2003 BCCA 21 at paras. 24-25, 9 B.C.L.R. (4th) 46. As to the effect of an improper opening statement, the appellant refers to *Brophy* at para. 48.

[20] The appellant complains that the opening statement contained no explanation as to its purpose and, rather than outlining the facts the respondent expected to

2009 BCCA 260 (CanLII)

prove, gave a description of the accident, the mechanism of a brain injury, and the respondent's training and employment background, all as if they were established fact, thereby giving the impression that all that was important for the jury to consider was the evidence of the respondent's symptoms in the aftermath of the collision. The appellant further submits that in the opening, the respondent's symptoms and the consequences of the accident were couched in pathos through an emotional appeal to the challenges faced by the respondent as an immigrant to Canada from Russia. The appellant argues that while the complete effect of the opening remarks of respondent's counsel cannot be known to a certainty, the character of those remarks was clearly prejudicial. The appellant contends that the fullness of their effect was to cement for the jury as fact the assertion that the respondent had suffered a brain injury, was incapable of performing work, and had suffered a significant economic loss.

[21] The appellant also complains that a phrase used by the respondent's lawyer at the conclusion of his opening improperly suggested that the accident, instead of being the result of negligence, was volitional. In that regard, the appellant refers to the statement in the opening that the appellant "chose to launch her car forward from that stop sign and not pay attention to who was in the cross-walk". In the appellant's submission, the effect was to present the appellant's case in the context of the respondent as victim and the appellant as culprit. The appellant argues that the effect was to demonize the appellant at the inception of the trial, thus implicitly characterizing her as a person who intentionally disregarded the interests of others, rather than being merely negligent.

[22] Another complaint the appellant makes is that it was improper for respondent's counsel to use evidence in the form of photographs in the opening.

[23] In my view, none of the arguments put forward under the first ground of appeal can succeed.

[24] The appellant's characterization of what was said in the respondent's opening is overstated and, in some instances, inaccurate. Prior to counsel for the

2009 BCCA 260 (CanLII)

respondent beginning his opening statement, appellant's counsel informed the trial judge that he did not dispute that the appellant was negligent but said he was not in a position to admit liability. As a result of the position taken, liability was obviously in issue. In the circumstances, for respondent's counsel to refer to the respondent's recollection of the accident in his opening statement is unremarkable. At trial, appellant's counsel did not object to the description given by respondent's counsel as to how the accident had occurred and did not complain that respondent's counsel had "demonized" the appellant.

2009 BCCA 260 (CanLII)

[25] The suggestion that a miscarriage of justice occurred as a result of what was said by respondent's counsel in his opening about the circumstances of the accident is further undermined when considered along with the submissions on liability made later in the trial. Before making his final submission to the jury, respondent's counsel advised the trial judge and appellant's counsel that he intended to submit that "one of the reasons why we're here is because Ms. Laurie [the appellant] says she's not at fault". Appellant's counsel stated he did not have a problem with that submission and later agreed it was appropriate for the trial judge to instruct the jury to find the appellant negligent. I further note that during the course of his closing submissions, appellant's counsel told the jury:

> Now, you've heard that Ms. Laurie ran her vehicle into the plaintiff. There's no doubt. There's no doubt that Ms. Moskaleva was in the intersection. There's no doubt that Ms. Moskaleva had the right-of-way. There is nothing that I could say to suggest that Ms. Moskaleva did anything wrong, or that my client demonstrated all the care that she should have. She didn't. She didn't. As a result you may find that my client was negligent. I don't have anything to say on that. Nothing I can say. I think it's fairly obvious.

[26] In view of the foregoing, there is no substance to the submission that the remarks in the respondent's opening about the appellant's manner of driving at the time of the accident resulted in the kind of prejudice that would require a new trial.

[27] In his opening, respondent's counsel showed the jury some photographs of the respondent and her husband. Appellant's counsel had been informed in advance by respondent's counsel that he intended to use the photographs in his

opening and appellant's counsel told the trial judge he did not have "a problem" with the photographs. After the opening had been given, appellant's counsel repeated that he did not object to the use of the photographs.

[28] The appellant's contention that the respondent's counsel stated evidence as fact, thereby resulting in prejudice requiring a new trial, ignores the trial judge's opening instructions to the jury. Near the commencement of the trial, the judge gave the jury various instructions, including an instruction on the purpose of counsel's openings. After referring to the burden and standard of proof, the trial judge said, in part:

> I will turn next to the opening remarks of counsel. One of the Mr. Faheys will begin the trial once I have concluded my remarks. He will take the opportunity to explain to you what he expects the evidence will disclose and give you an overview of his case. Counsel for the defendant will do so at a later time after the plaintiff's evidence has been called. These opening remarks are made so that you will have a better understanding of the nature of the evidence that the parties intend to call; however, the opening remarks are not evidence and you cannot rely on what the lawyer says in his opening to prove the facts that you have to prove to decide the case. You must only accept that the case is proven based on evidence that is called at court.

[29] Counsel for the respondent referred throughout his opening to the types of evidence he intended to adduce and what that evidence would show. He specifically told the jury there would be controversy in the evidence concerning brain injury, concussion, and post-concussion syndrome and asked the jury to pay close attention to the evidence that would be led. There were some phrases or statements in the respondent's opening that might have been more carefully couched, but considered in the context in which they were uttered, they were not such as to exclude consideration of the case for the appellant.

[30] After the respondent's counsel had concluded his opening statement, appellant's counsel asked the trial judge to remind the jury that the opening was not evidence. The trial judge decided his earlier instruction was sufficient, and in his charge, the judge reminded the jury that they were to rely on their own recollection of the evidence, not anything said by counsel.

2009 BCCA 260 (CanLII)

[31] Of considerable significance in regard to this ground of appeal is the fact that appellant's counsel told the trial judge he was not seeking a mistrial as a result of anything said during the opening. This is a case in which appellant's counsel specifically put his mind to the effect of the opening and elected not to seek an order discharging the jury. A deliberate election, such as occurred in this case, is a powerful circumstance militating against the appellant's submission that a new trial is required to rectify an unfair trial. While the facts of the case differ from the case at bar, the observation of Hall J.A. in *R. v. Doyle,* 2007 BCCA 587 at para. 28, 248 B.C.A.C. 307, is apposite:

> In my opinion, having made a reasoned decision not to seek a mistrial, I do not consider it is open now to counsel for the appellant to advance an argument that the discovery and use by the judge of the evidence resulted in an unfair trial proceeding. A rational choice was made at trial by experienced and competent counsel and it would not be appropriate to now allow this point to be the foundation of a contrary position in this Court.

[32] Further support for the view expressed by Hall J.A. may be found in *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513, 38 B.C.L.R. (2d) 1 at 10 (C.A.), and in *Morton v. McCracken* (1995), 7 B.C.L.R. (3d) 220 at para. 13, 57 B.C.A.C. 47.

[33] I would not accede to the first ground.

Ground Two: Did the cross-examination of Dr. Levin on his qualifications deprive the appellant of a fair trial?

[34] The appellant tendered Dr. Levin, a psychiatrist, to give opinion evidence concerning the occurrence of a brain injury, and the respondent's self-reported mental condition. Dr. Levin spoke Russian and was able to conduct his examination of the respondent in Russian. Dr. Levin's opinion, which was central to the defence case, was that the respondent could have had an adjustment disorder but had likely not suffered a brain injury as a result of the accident.

[35] At the outset of his testimony, Dr. Levin was examined and cross-examined on his qualifications. Following cross-examination, the respondent's counsel did not take issue with Dr. Levin being qualified to give opinion evidence, but he later urged

2009 BCCA 260 (CanLII)

the jury not to accept Dr. Levin's evidence, based in part on his training and qualifications.

[36] The question of whether a witness is permitted to give opinion evidence is a question of law to be decided by the trial judge. The question of the weight to be given to opinion evidence is solely within the province of the trier of fact, in this case, the jury. Determination of the question of law may be made in an inquiry in the absence of the jury, but that was not the course followed here and no objection was taken at trial to the process or procedure being followed.

[37] Dr. Levin testified that he was first trained and qualified as a psychiatrist in Russia. Counsel for the respondent questioned Dr. Levin on his educational training and experience and, in particular, whether he had been trained at the Serbsky Institute. During his cross-examination, respondent's counsel made suggestions to the witness regarding scrutiny of the Serbsky Institute by international psychiatric organizations. Counsel also suggested that psychiatry was used in the Soviet Union to imprison people who disagreed with the State and that the Serbsky Institute received much negative publicity because many Soviet dissidents were incarcerated and tortured there.

[38] The appellant contends that the cross-examination was improper because respondent's counsel, without any evidence, suggested that Dr. Levin was associated with forms of State-enforced terror of psychiatric patients. The appellant further argues that the respondent's line of questioning was irrelevant and unrelated to the actual qualifications of Dr. Levin. In the appellant's submission, questions asked of Dr. Levin were deceptive and inaccurate and served to poison the minds of the jury so they would view his evidence with suspicion. The appellant further submits that the questions asked also served to unsettle the witness, for after the cross-examination by respondent's counsel, Dr. Levin said: "But I feel that I'm on trial here for what happened in Russia".

[39] To support her argument on this ground, the appellant refers to the decision of the Supreme Court of Canada in *R. v. Fanjoy*, [1985] 2 S.C.R. 233 at para. 9,

2009 BCCA 260 (CanLII)

21 D.L.R (4th) 321, in which it was held that the failure of a trial judge to restrain abrasive or abusive cross-examination can constitute an error of law. The appellant also refers to the decision of the Ontario Court of Appeal in *R.v. Fair* (1993), 16 O.R. (3d) 1 at 23-24, 26 C.R. (4th) 220 (C.A.), in which Finlayson J.A. referred to the damaging effect of unsubstantiated suggestions made in cross-examination. In that case, Crown counsel, while cross-examining a character witness, posed a question suggesting anti-Semitism as a character trait of the accused. Of the cross-examination, Finlayson J.A. said:

> There was no follow-up of this remark. No attempt was made by the Crown to establish through the complainant or the appellant that such an instruction had ever been given. Nor could there have been on this collateral issue. This statement by Crown counsel was, in the vernacular, a "cheap shot". It is not even a question. It is a statement by the Crown that is completely unsupported by the record. Crown counsel then asked the witness if this news would surprise him knowing full well that it was highly unlikely that Dr. Spinner would have volunteered to be a character witness for the appellant if the statement was true and he had known of it. I am becoming increasingly concerned about the tendency of some trial counsel to throw out allegations in cross-examination which they make no attempt to substantiate. In this case, the statement in question raised a poisonous side issue which in no way was relevant to the charges against the appellant.
>
> Unfortunately, the trial judge did not help matters. In his charge to the jury, he properly instructed them that there was not a shred of evidence to support this statement. However, he then gave some measure of respectability to what was done by the Crown by stating "in my view discrimination is *violence"*.

[40] The appellant also makes reference to John Sopinka*,* Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. *(*Toronto: Butterworths, 1999) at 935, concerning the abusive power of cross-examination in which suggestions are made that are not subsequently proved:

> . . . it accords a power to cross-examining counsel that does not appear warranted in the interest of justice in some instances as it may be the subject of considerable abuse. … Juries, in particular, could be influenced by suggestions made in cross-examination, but not subsequently proved.

[41] The respondent's position on this ground is that the questions asked were neither improper nor irrelevant, and refers to the transcript to support her submissions about the reasons for the cross-examination taking the course it did.

2009 BCCA 260 (CanLII)

[42] Witnesses who are permitted to give opinion evidence are nevertheless subject to cross-examination about their education, professional training and experience. Such questions are relevant, especially in cases in which there are conflicting opinions, to provide the trier of fact with some foundation for assessing what weight, if any, ought to be given to the expert's testimony. Where an expert obtained his or her qualifications may be of some significance in making such an assessment. For example, training obtained at an institution that is accredited is generally preferred to an unaccredited institution because it is reasonable to assume that an accredited institution adheres to certain recognized standards within the particular discipline or profession whereas that cannot be assumed with an unaccredited institution.

[43] According to his testimony, Dr. Levin received most of his psychiatric training in what was then the Soviet Union. He acknowledged he had received training in forensic psychiatry and medical-legal aspects of psychiatry in Moscow at the Central Institute of Forensic Psychiatry, which is also known as the Serbsky Institute. According to Dr. Levin's *curriculum vitae,* this part of his training took place in 1986-1987.

[44] Respondent's trial counsel cross-examined Dr. Levin at some length about his training, about apparent omissions and contradictions in his *curriculum vitae*, and about the Serbsky Institute in particular. Counsel also put propositions to Dr. Levin about Soviet psychiatry and the Serbsky Institute. Dr. Levin accepted, rejected or qualified the propositions put to him.

[45] The transcript shows that during cross-examination, Dr. Levin acknowledged that on his *curriculum vitae* he had not identified the institution at which he trained as the Serbsky Institute. He agreed that he had received ten years of education and training in the "Russian tradition of psychiatry" and that the Serbsky Institute is "the largest and most prominent psychiatric hospital in … the former Soviet Union". He agreed that he knew about complaints made to the World Psychiatric Association about techniques used at the Serbsky Institute and Russian psychiatry in general

2009 BCCA 260 (CanLII)

and that, in response to the concerns raised, the Soviet All Union Society of Psychiatrists resigned from the World Psychiatric Association in 1983 and was not readmitted until 1989. Dr. Levin's training at the Serbsky Institute took place during this period.

[46] Before us, the respondent also submitted that Dr. Levin's responses to questions about the Serbsky Institute were evasive and uninformative. By way of example, when it was suggested psychiatry had been used in the Soviet Union to imprison those of whom the state did not approve, Dr. Levin did not deny psychiatric abuses in the 1980s; instead, he responded with a digression about a much earlier time when, according to Dr. Levin, Stalin had a paranoia about the conduct of certain doctors. Dr. Levin added "it doesn't mean that every psychiatrist in Russia, or every doctor, did anything wrong for Russian people." When Dr. Levin was asked whether Russian psychiatry had been "used by the state as a tool of suppression", Dr. Levin replied "[n]ot at the time when I was in the training and studying psychiatry in Russia".

[47] That juries may be influenced by suggestions improperly made in cross-examination is not contentious. In this case, an examination of the transcript shows that this was not a case of trial counsel throwing out abusive allegations in cross-examination without expectation of having to substantiate them. The questions asked in cross-examination about where and when Dr. Levin had taken his training in psychiatry, and questions about the withdrawal of the Soviet All Union Society of Psychiatrists from the World Psychiatric Association at the time Dr. Levin was learning his profession, were neither abusive nor unsubstantiated. Instead, the respondent's questions had a basis in fact acknowledged by the witness. The questions were relevant to the quality and standards of training of a student of psychiatry in Russia in the period when the profession in that country had none of the advantages afforded by membership in the World Psychiatric Association, including consideration of current theory and practice standards.

2009 BCCA 260 (CanLII)

[48] Dr. Levin's subsequent qualification to practice psychiatry in Canada was, of course, also a matter to be weighed by the jury but the fact that he was qualified to practice would not make the questions about his initial training irrelevant.

[49] I would not give effect to the appellant's arguments on the second ground of appeal.

Ground Three: Were the trial judge's questions of Doctors Levin and Rees and Mr. Hildebrand unfairly prejudicial and such as to deprive the defendant of a fair trial?

[50] Under the third ground of appeal, the appellant takes issue with certain questions the trial judge asked during the testimony of Drs. Levin and Rees and Mr. Hildebrand. To support the argument on this ground, the appellant refers to what was said by O'Halloran J.A. in *R. v. Pavlukoff* (1953), 106 C.C.C. 249 at 267, 17 C.R. 215 (B.C.C.A.), about the stature of a trial judge trying a case with a jury and its potential for influence on the minds of the jury:

> The Judge in Court officially and physically occupies a position of great power and prestige. His power and his control of the trial plain to see in Court, are matched by his knowledge of the law and his experience in weighing and analysing evidence. His lightest word or mannerism touching the reliability of a witness and the guilt of the accused, cannot fail to bear heavily upon the members of the jury who naturally look up to him (and in more ways than one) as the embodiment of the great traditions of the law. To the jury the presiding Judge appears as the great neutral. Anything that emanates from him, carries for them at least all the ear-marks of balanced justice.

[51] The appellant complains that the questions asked of Dr. Levin unfairly impugned his credibility and suggested a basic scepticism of his testimony. In my opinion, this complaint is without substance.

[52] During Dr. Levin's very lengthy testimony, the trial judge asked some questions of the witness. A contentious issue at trial was whether the respondent has sustained a brain injury or whether, as the respondent's experts opined, there were other medical explanations for her condition, such as depression. In the direct examination of Dr. Levin, the judge asked some questions about Dr. Levin's opinion of the symptoms relative to depression, and during cross-examination, he asked

2009 BCCA 260 (CanLII)

Dr. Levin why he would attach significance to the fact that the respondent took a painkiller without his permission during his examination of her.

[53] It is well established that judges may ask questions of witnesses for the purpose of clarification of evidence. In *Jones v. National Coal Board,* [1957] 2 All E.R. 155, Lord Denning said at 160:

> Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination.

[54] In this case, it was well within the province of the trial judge to clarify evidence given by Dr. Levin about the symptoms of depression and that is particularly so when the evidence was relevant to the pivotal issue at trial.

[55] It was unclear from his evidence what basis Dr. Levin had for attributing any psychiatric significance to the respondent's action of taking a painkiller without his permission during his examination of her, yet a paragraph in his medical report was devoted to making note of it. When asked by counsel in cross-examination why he included such a note in his report, he responded by saying that "it's very unusual that in the middle of an interview a patient would take a pill from her purse without any mentioning of that."

[56] The questions the judge asked with which the appellant now takes issue were directed at clarifying Dr. Levin's answer that suggested there was some psychiatric significance to the respondent's action. The answers the witness had given in cross-examination about why he had made a note of it in his report had been unresponsive to the question. The three questions the judge then asked the witness sought a responsive answer. One of the judge's questions, in which he expressed astonishment about the inclusion of the note in Dr. Levin's report, might have been more circumspectly stated, but when the three questions are viewed in the context of the doctor's responses in cross-examination, they appear to me to be unremarkable.

2009 BCCA 260 (CanLII)

[57] The appellant's second argument under this ground is that the manner of the trial judge's interjections during the examination in chief of Dr. Rees expressed scepticism of the doctor's opinions. The appellant also argues that during the course of the cross-examination of Dr. Rees on the question of amnesia, the judge intervened and offered his own opinion, which had the effect of supplementing the thrust of the cross-examination.

[58] At trial, no objection was taken to the questions the trial judge asked and a review of the appellant's transcript references does not support the argument that the questions, taken in the context in which they were asked, demonstrated a reasonable apprehension of bias.

[59] As he had done with other expert witnesses, the trial judge asked questions of Dr. Rees in order to clarify his evidence on such matters as the source of the doctor's knowledge about the respondent's loss of consciousness or amnesia following the accident. At that time, counsel for the appellant did not raise any objection to the trial judge's questioning.

[60] Before Dr. Rees testified, expert witnesses called by the respondent had opined that loss of consciousness is not required for a diagnosis of mild traumatic brain injury. Prior to Dr. Rees being called as a witness, there was limited evidence concerning the events immediately following the accident. No eyewitness had testified about the mechanics of the accident or the respondent's condition or responsiveness immediately following the accident. The trial judge's questions to Dr. Rees were consistent with the evidence that had been led to that point.

[61] In my opinion, the appellant's arguments with respect to the questions the trial judge asked of Dr. Rees are unpersuasive and I would not give effect to them.

[62] Under this ground of appeal, the appellant also complains about the effect of questions the trial judge asked of the appellant's economist, Mr. Hildebrand, during his examination in chief, and with what the judge said at the conclusion of Mr. Hildebrand's testimony. In the appellant's submission, the following remark had

2009 BCCA 260 (CanLII)

the effect of neutralizing the credibility of the witness by imparting to the jury the trial judge's view that Mr. Hildebrand's economic testimony was not comprehensible.

> Thank you, Mr. Hildebrand. I'm not sure I understand everything you say, but thank you. Thank you for attending.

[63] As the respondent pointed out in argument before us, the trial judge asked questions of the economists called by both parties. The judge made it clear that he was unfamiliar with the type of evidence they were giving and asked questions to clarify the experts' methodologies and conclusions. For example, during the examination in chief of the appellant's expert, Mr. Benning, the trial judge told the jury, "I'm not terribly familiar with it, economists' evidence" and "I have to really concentrate on it myself." The judge put a series of questions to Mr. Benning, seeking to summarize Mr. Benning's opinion "in my own simple language" and to clarify points he did not follow. The trial judge explained that "I really have trouble balancing my cheque book, never mind anything else" and apologized for his confusion and "lack of knowledge". During Mr. Hildebrand's testimony, the judge asked similar questions in order to clarify his understanding of the evidence.

[64] The appellant also argues that the effect of the judge's questions was to restrict direct examination, thereby excluding consideration of the subject of income splitting. Before Mr. Hildebrand testified, the respondent had led evidence that the income from WestNet, the company through which the respondent and her husband worked, had been allocated in accordance with the amount of work each had performed. In the appellant's submission, the trial judge's questions invited Mr. Hildebrand to comment on the evidence that had previously been led on the allocation issue. Mr. Hildebrand's report questioned whether the tax returns were an accurate reflection of their respective contributions but appellant's counsel had previously advised the trial judge he was not suggesting the respondent had participated in some form of tax evasion. Other questions asked by the trial judge during Mr. Hildebrand's testimony on both direct examination and cross-examination sought to confirm his understanding of Mr. Hildebrand's evidence.

2009 BCCA 260 (CanLII)

[65] An examination of the transcript shows that the trial judge's questions and interjections during the testimony of the two economists were directed at understanding their evidence. The questions of Mr. Hildebrand reflect as well some concern over the meaning of some of his testimony which, from reading the transcript, was understandable.

[66] In my opinion, the judge's questions and interjections do not carry the negative connotations the appellant suggests and do not give rise to a reasonable apprehension of bias.

Ground Four: Did the trial judge err in his charge to the jury by failing properly to explain the law relevant to past and future pecuniary loss and by inaccurately stating the position of the appellant with regard to those claims?

[67] Under this heading, it is convenient to address the arguments the appellant advances under both the fourth and fifth grounds of appeal concerning the awards for past and future pecuniary loss. Under the fifth ground, the appellant challenges those awards on the basis that they were "inordinately high" but, in my view, the arguments the appellant makes, if accepted, would properly be characterized as misdirection.

[68] At trial, the respondent advanced future loss claims on two bases: general loss of earning capacity and loss of opportunity to profit from computer software programs the respondent was developing. Each party called an economist to give expert evidence pertaining to the future loss claim.

[69] The respondent's position was that she was no longer able to work in the specialized field in which she had training and experience, and that she was permanently disabled as a result of the brain injury she sustained in the accident. The appellant's position was that the evidence did not support a finding that the respondent suffered a total or permanent disability as a result of the accident.

[70] On the appeal, the appellant argues that the trial judge "erred in failing to properly instruct the jury on the use of the 'models' prepared by the two economists", and takes issue with the judge's description of the evidence and his summary of the

2009 BCCA 260 (CanLII)

legal principles applicable to the assessment of loss of income or earning capacity. The appellant contends that the trial judge ought to have instructed the jury to calculate any loss to the respondent on the basis of diminution of earning capacity rather than instructing them in a manner of calculating loss on an arithmetic basis. To support that submission the appellant refers to *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, in which Dickson J. said, 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?
>
> [Internal citation omitted]

[71] Appellant's counsel also refers to *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314; *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24; and *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) said at para. 43:

> The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[72] The appellant also refers to the reasons of Macfarlane J.A. in *Friesen v. Pretorius Estate* (1997), 37 B.C.L.R. (3d) 255 at paras. 30-31, 33-34, 92 B.C.A.C. 232, to explain the importance of a trier of fact stepping back from mathematical calculations and considering the global reasonableness of the figure awarded as loss of earning capacity.

[73] The appellant's submissions focus in part on evidence the respondent presented about her and her husband's partnership earnings. The respondent's income tax returns for the years 2001 and 2002 were based on an allocation of partnership income between the respondent and her husband, as follows: 2001:

2009 BCCA 260 (CanLII)

88.5% to the respondent and 11.5% to her husband; and 2002: 80% to the respondent and 20% to the husband. The appellant argues that the respondent advanced past and future loss claims by reference to the earning history of the respondent's husband and that the allocation of partnership income as between the respondent and her husband was deeply flawed. At trial, the appellant contended that the respondent's income for the two years before the accident was the product of income splitting and was not a true reflection of the respondent's earning capacity. The appellant complains that the trial judge improperly restricted the examination in chief of Mr. Hildebrand regarding the income splitting that was a part of Mr. Hildebrand's report. The appellant submits that Mr. Benning, the economist called on behalf of the respondent, relied upon the income allocation in the preparation of his report and that the jury was obviously misled by a faulty assumption, based on the income allocation, that the respondent would have earned wages in the range of $100,000.00 per annum had it not been for the accident.

[74] In reply, the respondent submits that the appellant is simply inviting this Court to come to different conclusions based on evidence the jury must have rejected, given the awards they made.

[75] As to the appellant's assertions of misdirection, the respondent argues that the judge's charge, when considered in its entirety and in the context of all of the evidence and the addresses of counsel, would not have left the jury in any doubt as to the issues and the appellant's position in respect to those issues. To support that argument, the respondent refers to *Alden v. Spooner*, 2002 BCCA 592 at para. 20, 6 B.C.L.R. (4th) 308, leave to appeal ref'd [2002] S.C.C.A. No. 535:

> [20] …[T]he charge in its entirety is to be considered in light of the whole of the evidence and in light of the positions of counsel as taken from their addresses to the jury. One statement in a judge's charge might constitute a misdirection, but it is the charge as a whole that must be considered to determine whether the misdirection may have misled the jury or whether the issues were placed before it fairly.
>
> [Internal citation omitted]

[76] Generally, I agree with the respondent's submissions.

2009 BCCA 260 (CanLII)

[77] During his closing address to the jury, appellant's counsel made it abundantly clear that the appellant was inviting the jury to find that the respondent did not suffer a brain injury and was not totally or permanently disabled as a result of the accident. He submitted, for example, that the respondent's claims were "entirely disproportionate to the harm that occurred in the case", that there was "a real dearth of convincing evidence" with respect to the claims for past and future economic losses, and that "there is not enough evidence reliable [sic] for you to conclude that she's suffered a brain injury or has a significant ongoing condition which supports the suggestion that she cannot work ever again, at all." In view of the examination and cross-examination of the various doctors, the appellant's closing address to the jury, and the judge's charge, it is implausible to suggest that the jury could have misapprehended the defence position or misunderstood the issues they had to determine.

[78] There was ample evidence from which the jury could reasonably conclude that the respondent had suffered a brain injury as a result of the accident and that her ability to engage in her former vocation was permanently foreclosed. From the jury's awards, it is reasonable to infer that they accepted that evidence.

[79] Another aspect of the appellant's submissions on appeal questions the evidence concerning the respondent's earnings and earning capacity. I agree with the respondent that those submissions amount to little more than a challenge to the credibility of Mr. Serebrennikov, the respondent's husband, who testified in great detail about the respondent's role in, and the earnings from, WestNet. Mr. Serebrennikov gave evidence that the allocation of income from WestNet in 2001 and 2002 was an accurate reflection of the value of the respondent's services and that she worked full-time developing programs necessary for WestNet to complete projects. Mr. Serebrennikov testified that the respondent's work was essential to these projects and it would have been impossible for him to deliver the services required without her work in the background. WestNet was not paid for these projects on the basis of an hourly rate. Defence counsel did not suggest the respondent had engaged in some form of income tax evasion and accepted the trial

2009 BCCA 260 (CanLII)

judge's guidance that he should avoid creating that impression. The issue was whether the income allocation was accurate and Mr. Serebrennikov testified it was. It was open to the jury to accept the evidence that the allocation of income from WestNet accurately reflected the respondent's contribution.

2009 BCCA 260 (CanLII)

[80] I am also not persuaded by the appellant's submissions of error in the judge's instructions with respect to the two pecuniary loss claims. In his closing address appellant's counsel told the jury that there were a number of different methods or approaches they could take in arriving at their pecuniary awards, depending on the evidence they accepted as to the respondent's injuries. The address of appellant's counsel to the jury included the following:

> …you may find that she's only partially disabled, or that she's disabled now, but she may get better in a while, and then she can go to work. You're going to have to throw all that into your calculation, your mix of what you think is actually going on here, and you can do it in a variety of ways. You could just simply pick a number. Alternatively, you can use a method of calculation. If you choose to use the evidence of PEDA Consulting (phonetic), you would come up with, on their assumptions, a number for the future of $2,532,254, if you are going to find that she is totally disabled from now to age 70, and assuming that she would earn $250,000 a year from right now, forward. So that's one tool you could use. That's a total assumption. You're just assuming that out of the blue. Her husband hasn't ever earned that, but make that assumption and that's what you'll arrive with.
>
> There are similar assumptions made for $190,000 a year and age 65. You could adopt those as numbers, too. If you find that this is what would likely happen, it's your decision, then that's what you may have to calculate. Or you can use a multiplier, we've heard the multipliers, and then you're going to have to decide is she totally disabled, ten percent disabled, 20, 18, whatever the number is you want to choose, and how much you think she would have earned in a year, and then figure out what the disability is and then multiply it out. There are examples, and there isn't a great big difference between the multipliers for the two experts. They're economists. They're obviously going to come up with very similar numbers. You could use that approach.
>
> [Emphasis added]

[81] When summarizing the appellant's approach to the assessment of the respondent's loss of earning capacity, the trial judge told the jury:

> The Defendants have taken the approach that the best way to calculate the loss of income to date of trial, as well as into the future, is to

> look at people with similar education, in their view, to that of Ms. Moskaleva, and using essentially Statistics Canada summaries for people that they feel fall into Ms. Moskaleva's level of education and employment.

[82] Before he summarized the evidence, the trial judge expressly cautioned the jury not to rely on his recollection of the evidence if it conflicted with their recollection but to rely on their own memory or notes. When describing the models presented by the two economists, the trial judge said "[y]ou may accept one of these models or neither. It is up to you." The trial judge also specifically instructed the jury that they should not accept his interpretation of the parties' positions if they conflicted with what counsel had submitted.

[83] After the trial judge delivered his charge, defence counsel expressed concerns about the trial judge's summary of the defence position on income loss, with specific reference to the opinion of the defence economist. The trial judge recalled the jury and again instructed them to rely on their own memory of counsel's submissions. In my view, the trial judge's instructions in response to the appellant's complaint cannot be construed as misdirection. Regardless of whether the trial judge was entirely accurate in conveying the position of the defence in relation to the evidence of the economists, I am of the view that his charge, when considered as a whole and in light of the evidence and defence counsel's address to the jury, reveals no direction that could have had the effect of misleading the jury as to the issues they had to decide.

[84] The appellant has not demonstrated any reviewable error on the part of the trial judge in his charge to the jury on the two pecuniary loss claims under consideration and, therefore, I would not accede to the appellant's arguments in either ground four or five in relation to those awards.

Ground Five: Are there grounds to interfere with the jury's damage awards?

[85] The appellant's alternative argument on the appeal is that the jury awards for non-pecuniary damages of $245,000, past wage loss of $300,000, and loss of earning capacity or opportunity of $1,350,000 were inordinately high and cannot be

2009 BCCA 260 (CanLII)

supported by the evidence. The appellant also argues that these awards are inconsistent with and contradictory to the jury's award of $32,500 for future care costs.

[86] Under this ground of appeal, I will address only the arguments concerning the non-pecuniary award. The appellant's arguments concerning the past income loss and the loss of earning capacity or loss of opportunity have already been considered under ground four and I need say no more about the challenge to those awards.

(i) The appellant's argument on the non-pecuniary award

[87] The appellant argues that the award for non-pecuniary loss is erroneous in that it is inordinately high, not supported by the evidence, and out of all proportion to the nature of injuries alleged. The appellant refers to *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248, 22 B.C.A.C. 118, leave to appeal ref'd [1993] 2 S.C.R. vii, as supporting appellate interference with jury awards that are "inordinately high, low, or disproportionate" when the award "falls substantially beyond the upper or lower range for damage awards in the same class of case".

[88] The appellant's submission on the proper range of non-pecuniary damages for injuries of the type suffered by the respondent is between $75,000 and $110,000. In support of that submission the appellant refers to the following cases as analogous examples: *Siemens v. Damien*, 2002 BCSC 1065, non-pecuniary damages of $75,000.00; *Clark v. Royal Oak Holdings Ltd*., 2003 BCSC 275, non-pecuniary damages of $85,000.00; *Tan v. Chui*, 2001 BCSC 663, non-pecuniary damages of $100,000.00, and *Joel v. Paivarinta*, 2005 BCSC 73, non-pecuniary damages of $110,000.00.

[89] The other argument advanced by the appellant is that the non-pecuniary award is inconsistent with and contradictory to the award for future care costs of $32,500 and must be set aside.

2009 BCCA 260 (CanLII)

(ii) The respondent's argument

[90] The respondent submits that given the jury's substantial awards, supportable on the evidence before them, this Court must assume that the jury resolved all evidentiary conflicts in favour of the respondent. The jury must have accepted evidence that the respondent has suffered severe and permanent disabilities as a result of the accident, and that the accident has had a devastating, if not catastrophic, effect on her. The respondent's profession, which was central to her life, is now foreclosed because of the cognitive deficits from which she suffers as a result of the accident.

[91] The respondent argues that in light of the foregoing, the jury's award in this case is not so far above the range of damages for comparable injuries that this Court may interfere with the jury's verdict. Juries, as members of the community, are uniquely qualified to assess the damages suffered by a plaintiff, and a jury award cannot be set aside merely because it is above the upper limit of the range of damages awarded by trial judges for comparable injuries. On this point, the respondent relies on Lambert J.A.'s reasons in *Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184; and on *Boyd v. Harris*, 2004 BCCA 146, 237 D.L.R. (4th) 193.

[92] In the respondent's submission, the range of damages for permanently disabled plaintiffs, even where their physical injuries may have resolved, is wide. To support that submission, the respondent relies on, among others, *Boyd v. Harris* and *Alden v. Spooner*, where this Court upheld jury awards of $225,000 and $200,000 respectively. The respondent contends that taking into account inflation, an award of $245,000 five years after *Alden* is not excessive. The respondent also relies upon the judge alone decisions of *Sirna v. Smolinski*, 2007 BCSC 967 ($200,000 non-pecuniary damages), and *Lines v. Gordon*, 2006 BCSC 1929 ($225,000 non-pecuniary damages).

[93] Finally, the respondent submits that the award for non-pecuniary damages is not inconsistent with the award for future costs of care, because that award was based on the relatively modest claim put forth by the respondent herself on the basis

2009 BCCA 260 (CanLII)

that her physicians felt there were limited treatment regimes that would be of benefit. Given those circumstances, the respondent submits, the jury's award of $32,500 is, in fact, substantial.

(iii) Discussion: Non-pecuniary damages and the standard of review applied to jury awards in actions for damages for personal injuries

[94] In a trilogy of cases issued in 1978, the Supreme Court of Canada established a "rough upper limit" of $100,000 for non-pecuniary damages in personal injury cases for catastrophic or near-catastrophic injuries: *Andrews v. Grand & Toy Alberta Ltd.*; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (the "Trilogy"). The rough upper limit is now over $300,000. A jury should be instructed on the rough upper limit only if the non-pecuniary award is anticipated to exceed that limit. In all other cases the jury assesses non-pecuniary damages in this Province without reference to the rough upper limit: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577; *Brisson v. Brisson*, 2002 BCCA 279, 213 D.L.R. (4th) 428.

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 129 D.L.R. (3d) 263; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19, leave to appeal ref'd [2006] S.C.C.A. No. 100; *Lee v. Dawson*, 2006 BCCA 159 at paras. 76-79, 267 D.L.R. (4th) 138, leave to appeal ref'd [2006] S.C.C.A. No. 192. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this

2009 BCCA 260 (CanLII)

> nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".
>
> [Internal citations omitted]

[96] There is no issue that this Court has the jurisdiction to vary a jury award of damages upward or downward: *Vaillancourt v. Molnar Estate*, 2002 BCCA 685, 8 B.C.L.R. (4th) 260, leave to appeal ref'd [2003] S.C.C.A. No. 77. It is well-settled law that an appellate court cannot alter a damage award made at trial, either by judge alone or by jury, merely because on its view of the evidence it would have come to a different conclusion: see *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385. However, the test applied on appellate review of a jury award in a personal injury case in this Province cannot be regarded as well settled, as a review of the case authorities demonstrates. As Finch C.J.B.C. observed in *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 22 and 30, 250 D.L.R. (4th) 83, reviews of jury awards have become increasingly difficult.

[97] The articulation of the test for appellate review of damage awards found in two early authorities continues to be pertinent. In *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601 (H.L.), Lord Wright said, at 616:

> There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case.

[98] Lord Wright's statement was adopted by Viscount Simon in *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 at 613-614, [1951] 3 D.L.R. 705 at 713-714 (P.C.)[cited to A.C.], in which the Privy Council had for review a jury award in a negligence action. The following oft-quoted passage in the speech of Viscount Simon in *Nance* is generally regarded as the seminal statement on the question of appellate review of damage awards:

> The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then,

2009 BCCA 260 (CanLII)

> before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (*Flint v. Lovell*, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries*). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (*per* Lord Wright, *Davies v. Powell Duffryn Associated Collieries*).
>
> [Emphasis added]

2009 BCCA 260 (CanLII)

[99] The reasons of McEachern C.J.B.C., for the majority, in *Cory v. Marsh*, posited a comparative approach between the jury award under review and "analogous" awards made by trial judges sitting alone. Under *Cory*, appellate interference is justified if the jury's award falls substantially beyond the upper or lower range for comparable damage awards (at paras. 6-8):

> 6 The opinion of Lord Wright in Davies introduces the concept of proportionality between the award and the circumstances of the case. This must include reference to other cases because a priori reasoning is hardly a basis for reviewing damage awards.
>
> 7 In *Nance v. B.C. Electric* (1951), 2 W.W.R. (N.S.) 665 (J.C.P.C.), Viscount Simon delivered what is often regarded as the *loccus classicus* on this question. He said, at p. 675, that an assessment of damages by a trial judge should not be interfered with unless the appellate court is:
>
> > ... satisfied either that the judge ... applied a wrong principle of law ... or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
>
> 8 Because of its reference to inordinately low or high awards and to wholly erroneous estimates of the damage, Nance continues the proportionality approach taken in Davies. This calls for consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases. In my view, an award is inordinately high, low, or disproportionate, if it falls substantially beyond the upper or lower range for damage awards in the same class of case.
>
> [Emphasis added]

[100] The reasons of McEachern C.J.B.C. in *Cory* emphasized the first portion of the passage from *Nance* rather than the part in which Viscount Simon adopted the statement of Lord Wright in *Davies*. As a result, the majority judgment in *Cory* can be interpreted as conflating the two standards of review in *Nance*, one applicable to a judge alone award of damages and the other, a jury award.

[101] The language of "so inordinately low or so inordinately high" as to amount to a "wholly erroneous estimate of the damage" was the standard referred to in *Nance* that was applicable upon review of a judge alone damage award. The test for interference with jury damage awards, according to *Nance* and *Davies*, is that they be wholly "out of all proportion" to the circumstances of the case.

[102] The two standards set out in *Nance* applying, on the one hand, to a judge-alone award, and on the other, to a jury award, are not merely two ways of saying the same thing. That is evident from the statement in *Nance* that "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone."

[103] In his dissenting reasons in *Cory*, Gibbs J.A. made clear the distinction between the two standards and relied exclusively on the "out of all proportion" articulation of the test in relation to the case on appeal (paras. 33-37) . According to Gibbs J.A., a jury award would be "out of all proportion" if it were one that "would shock the conscience, would be so outrageously large, considering the nature and extent of the injuries sustained" (para. 37).

[104] That *Nance* describes two different tests for appellate review of damage awards is made clear in the dissenting reasons of Laskin C.J.C., with which Spence and Dickson JJ. concurred, in *Wade v. C.N.R.*, [1978] 1 S.C.R. 1064, 80 D.L.R. (3d) 214. In *Wade*, the jury had found the defendant railroad liable in negligence for the injuries of an eight-year old plaintiff, the loss of a leg, sustained while the child was attempting to board a passing train. The jury found that the plaintiff lacked the capacity to be contributorily negligent and awarded general damages at $150,000.

2009 BCCA 260 (CanLII)

The Nova Scotia Appeal Division agreed that the railroad had been negligent but overturned the jury finding with respect to contributory negligence. The Appeal Division also held that the damages awarded were inordinately high and excessive and reduced the award to $75,000. The majority of the Supreme Court of Canada found that the jury had erred in finding the railroad negligent on the ground that there was no duty of care in the circumstances and therefore it was not necessary to decide the issue of damages. The minority concluded that the jury's verdict should be restored on all points and for that reason, addressed the Appeal Division's reduction of the jury award for damages. On the question of what standard of review applied, Laskin C.J.C. stated at 1077-1078:

> In making this reduction, McKeigan C.J. applied as the only available test (there having been no misdirection by the trial judge) whether the sum awarded was "either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage". The authorities cited for this standard of measurement by an appellate Court were Viscount Simon in *Nance v. British Columbia Electric Ry.* [,[1951] A.C. 601], at p. 613 and Ritchie J. in *Sparks and Fairfax v. Thompson* [,[1975] 1 S.C.R. 618], at pp. 628-9.
>
> Unfortunately, the test applied by Chief Justice McKeigan through the use of the quoted words from the judgment in the *Nance* case was that assigned by the Privy Council when an appellate Court is considering damages fixed by a judge alone. The *Sparks and Fairfax* case was of that kind, and my brother Ritchie (I too was a member of that Court) quoted and applied the words of Viscount Simon in the *Nance* case only in so far as they expressed the test that an appellate Court should follow in reviewing damages fixed by a judge. Where the review relates to damages fixed by a jury, it was the view of Viscount Simon that (to quote his words, at p. 614 of [1951] A.C) "The disparity between the figure at which they [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly out of all proportion".
>
> Having applied the wrong test for appellate Court interference with damages, the learned Chief Justice of Nova Scotia then wrongly found comparisons to support his reduction of the jury's assessment in this case by invoking cases in which the trials were held before a judge alone,… This Court is in no worse position than the Appeal Division in reviewing damages and, accepting as I do the test propounded in the *Nance* case, the simple and yet difficult question is whether an award of $125,000 by a jury for the loss of a leg by an 8-year old boy, with all that this imports over his life expectancy in respect of mode and condition of life, career and activities, is an award that is out of all proportion to that at which a jury could properly have arrived. It undoubtedly

2009 BCCA 260 (CanLII)

> presses to the outward limit of what an award for such an injury should be, but I am not prepared to interfere with it.
>
> [Emphasis added]

[105] While parts of the majority judgment in *Cory* contain references to authorities that hold that a jury award is accorded more deference than a judge alone award (see paras. 5, 9, and 10), the Chief Justice's reasons do not emphasize the point. In *Cory* the majority's articulation of the test to be applied on appellate review does not draw the distinction between the two standards set out in *Nance* and to which Laskin C.J.C. referred in *Wade*. As a result, a number of cases subsequent to *Cory* have wrongly merged the two tests referred to in *Nance* so that the question on review of a jury award is expressed as whether "the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" or "is inordinately high, low, or disproportionate", assessed by whether "it falls substantially beyond the upper or lower range for damage awards in the same class of case."

[106] In *Cody v. Leonard* (1995), 15 B.C.L.R. (3d) 117, [1996] 4 W.W.R. 96 (C.A.), Legg J.A. interpreted the majority judgment in *Cory* as implicitly distinguishing between jury and judge awards. In *Cody*, the defendant appealed from the jury's award of $225,000 for non-pecuniary damages for injuries resulting from the defendant's negligence in a motor vehicle collision. On the basis of *Cory*, the defendant submitted that the jury's award for non-pecuniary damages was "so inordinately high as to be a wholly erroneous estimate of the damages." The plaintiff argued, in part, that the majority decision in *Cory* created a new test that was inconsistent with previous authorities and submitted that a five-member division was required to reconsider *Cory*. In *Cody*, Legg J.A. held, at paras. 16-26 of his reasons, that *Cory* did not apply a new test but had applied the *Nance* test in accordance with the principles of reasonableness and proportionality "long established" by case law. In his reasons, Legg J.A. acknowledged that jury awards are to be accorded further deference but in doing so emphasized the fact that the majority in *Cory* had awarded an amount above the range for judge alone damage awards of the same class of

2009 BCCA 260 (CanLII)

case and, on that basis, concluded that *Cory* was not inconsistent with previous authorities (at paras. 25-26):

> 25 … This Court must recognize that a jury award is not necessarily wrong if it does not conform with damage awards made by judges when considering whether a jury award is out of all proportion to the circumstances of the case. This was stated in *Scott v. Musial* [[1959] 2 QB 429, [1959] 3 All ER 193 (C.A.)] by Morris L.J. whose reasons were quoted with approval in *Bisson v. Powell River (District)* [(1968), 66 D.L.R. (2d) 226, 62 W.W.R. 707 (B.C.C.A.)] by Bull J.A. and quoted in *Cory*.
>
> 26 I see no inconsistency, however, between adopting the approach stated in Scott *v. Musial* and adopting the test described in *Cory v. Marsh* by considering whether the award of non-pecuniary damages in the case before us was inordinately high or disproportionate by examining whether the award fell substantially beyond the upper range for damage awards in the same class of case.

[107] In the result, based upon his survey of awards made by trial judges from $50,000-$75,000, Legg J.A. held that the jury's award for non-pecuniary damages "was inordinately high and wholly out of proportion because it was substantially beyond the range of personal injury awards for this class of case" and reduced it to $80,000 (para. 33).

[108] In a number of other decisions, this Court has carefully distinguished between the two standards for appellate review in damage awards in personal injury actions. In *Foreman v. Foster*, at para. 32, Lambert J.A., in his concurring reasons, referred to the erroneous blurring of the two standards in *Nance* when he stated that appellate interference with a jury award is not justified when the award is merely inordinately high or low:

> [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which [they] could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to

2009 BCCA 260 (CanLII)

> change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1984), 58 B.C.L.R. 273 (B.C.C.A.).
>
> [Emphasis added]

2009 BCCA 260 (CanLII)

[109] In *Foreman*, the narrow issue before the Court was whether the case was suitable for a Rule 18A summary trial, and therefore Lambert J.A.'s discussion of jury awards is, as he noted, properly regarded as *obiter* (although concurred in by Braidwood J.A.). However, the paragraph from the reasons of Lambert J.A., quoted above, has subsequently been referred to with approval in *Boyd v. Harris*, at paras. 13-14; *White v. Gait*, 2004 BCCA 517 at paras. 10-11, 244 D.L.R. (4th) 347; and *Courdin v. Meyers*, 2005 BCCA 91 at para. 22, 250 D.L.R. (4th) 213.

[110] In *Boyd v. Harris*, Smith J.A. sought to reconcile the test set out in *Cory* with an acknowledgment that the standard for interference with jury awards is higher than that for interference with judge alone awards. He stated that the test in *Cory* is a comparative one, holding that "this Court should not interfere with a jury award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case", but emphasizing that in this exercise an allowance must be made for the fact that the award was assessed by a jury, which allows for a "greater margin of deviation" from the range than would be given damages assessed by a trial judge (paras. 5, 41-42).

[111] In the context of appeals from damage awards made by trial judges, the Supreme Court of Canada has used a formulation for appellate review that accords with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The Supreme Court has held that as damages are a question of fact, only palpable and overriding error can justify interference: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 at para. 62; *M.B. v. British Columbia*, 2003 SCC 53, [2003] 2 S.C.R. 477 at para. 54.

[112] An earlier articulation of the same approach is found in *McCannell v. McLean*, [1937] S.C.R. 341, in which the test was expressed this way, at 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

2009 BCCA 260 (CanLII)

[113] The Supreme Court's approach to appellate review of jury damage awards was also taken by Finch C.J.B.C. in *Dilello*, at paras. 34-39. In that case, the Chief Justice referred to s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333, and held that the amount of an appropriate non-pecuniary damage award in a negligence action is, by statute, a question of fact. He went on to hold that, as a result, "[d]amages as findings of fact, whether made by judge alone or by jury, are reviewable on appeal only for palpable or overriding error." Citing *Nance*, Finch C.J.B.C. further stated that "[f]indings of fact by a jury are entitled to even greater deference on review than findings of fact by a judge alone." He went on to note, at para. 49, that "[n]on-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases."

[114] The Supreme Court of Canada's articulation of the appellate review test for damage awards as hinging on the award being a question of fact does not depend on a statutory regime. That is clear from the Court's decision in *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108, a case originating in Newfoundland. In *Young*, the jury had awarded $430,000 in non-pecuniary damages in a negligence action outside of the physical personal injury context. On appeal, the majority of the Newfoundland and Labrador Court of Appeal had set aside the award but the Supreme Court of Canada restored the trial judgment in its entirety. With respect to the award for non-pecuniary damages, the Court held that while the amount was higher than that which the Court would have awarded in the circumstances, it was nevertheless not so "wholly disproportionate or shockingly unreasonable" as to justify appellate interference (paras. 64, 66). The Supreme Court also held that a judicially imposed cap on non-pecuniary damages was not appropriate in that case, holding that the policy considerations arising from negligence causing catastrophic

personal injury which justified the Trilogy's upper limit in the contexts of accident and medical malpractice had not been established in the case before it (para. 65), and left open for consideration in another case the issue of "whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context" (para. 66).

2009 BCCA 260 (CanLII)

[115] In *Young*, the Court held that damage awards, as findings of fact, could not be set aside absent palpable and overriding error, which in the case of jury awards, meant an award that was "wholly disproportionate" or "shockingly unreasonable":

> 64 … Damage assessments are questions of fact for the jury. Jury awards of damages may only be set aside for palpable and overriding error. It is a long-held principle that "when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone": *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.), at p. 614. On this test, we cannot conclude that the award for non-pecuniary damages should be set aside. In light of the evidence, the jury's award cannot be said to be wholly disproportionate or shockingly unreasonable.

[116] The formulation of the test laid out in *Young* is consistent with other Supreme Court of Canada decisions on jury damage awards apart from claims for personal injury: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 159, 126 D.L.R. (4th) 129; and also *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 108, where the Court stated that in the case of jury awards of general damages, "the courts may only intervene if the award is 'so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice'".

[117] This Court has held that that the Supreme Court of Canada's formulation requiring palpable and overriding error of a finding of fact does not, in substance, affect the standard of review already established, as previous articulations ("inordinately high or low", "wholly out of proportion", "unreasonable and unjust") would each demonstrate palpable and overriding error: *Lee v. Luz*, 2003 BCCA 640 at paras. 10-13, 20 B.C.L.R. (4th) 283; *Boyd*, at para. 5.

[118] In my opinion, the use of the phrases “inordinately high or inordinately low” and “wholly erroneous” in the context of review of jury awards ought to be avoided because those phrases tend to result in an incomplete articulation of the standard or to wrongly merge the two standards from *Nance.*

[119] I am also of the opinion that while some aspects of the comparative approach in *Cory* may be compatible with the “palpable and overriding error” test, as *Lee v. Luz* and *Boyd* suggest, the preferable formulation of the approach to appellate review of jury damage awards is the one set out by the Supreme Court of Canada in *Young*. The test in *Young* adopts both the “finding of fact” element common to judge alone and jury awards, as well as the added deference traditionally given to jury awards. *Young* imports not only the distinction made in *Nance* between review of judge alone awards and review of jury awards, but in using the specific language of “wholly disproportionate”, also the standard articulated in *Nance* that is to be uniquely applied with respect to jury awards specifically. Moreover, recognition of the applicability of the “palpable and overriding error” test to jury damage awards in personal injury cases would import the reasoning in *Housen v. Nikolaisen* which provides the underpinning or rationalization for the use of that standard not only to findings of fact but also to findings of mixed fact and law.

[120] In *Cory* at paras. 15 and 20, the majority held that in the face of a substantial jury award, the court upon appellate review must respect the role of the jury and assume that the jury resolved all evidentiary conflicts in favour of the plaintiff. Adopting the Supreme Court’s approach to appellate review of damage awards articulated in *Young* would avoid the reliance on the assumption or presumption, postulated in *Cory,* about the jury’s findings or conclusions on the evidence, based on the size of the jury’s awards.

[121] The rationale set forth by the Supreme Court of Canada in *Housen* in support of a deferential standard of review for factual findings of trial judges – the restriction of the number, length, and cost of appeals; the promotion of the autonomy and integrity of the trial proceedings; and the recognition of the expertise of the trial judge

2009 BCCA 260 (CanLII)

and his or her advantageous position – apply equally to civil jury trials: *Boyd*, at para. 6. There are many statements in the case authorities to the effect that judge-made awards are not inherently superior to jury awards: *Brisson*, at para. 26. Juries, unlike a trial judge sitting alone, "bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life": *Boyd*, at para. 10. In *Hill* at para. 158, Cory J. for the Supreme Court of Canada said that jurors speak for their community and are uniquely qualified to assess damages, and went on to approve the principle that the "assessment of damages is peculiarly the province of the jury." It is for these reasons that "an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure."

[122] Additionally, in *Boyd* at paras. 7-9, Smith J.A. noted that there was some evidence that, contrary to popular opinion, the inherent unpredictability in civil jury awards actually enhanced settlement prospects and that appellate interference with jury awards, unless circumscribed, would "tend to remove from the system this incentive to settle cases."

[123] A possible further reason to accord greater deference to jury awards may arise from the fact that it is often the defendant who appeals such an award as excessive when it was that same defendant who had initially sought trial by jury, in the belief that a jury would award an amount lower than that which would be awarded by a trial judge sitting alone. In his dissent in *Stapley*, Finch C.J.B.C. remarked at para. 123 that:

> [123] … The defendant issued the notice for trial by judge and jury. It is, I believe, common knowledge at the bar, that this Court will almost invariably defer to an award made by a jury when it is said to be too low. In such a case the defendant can say – quite properly – that the jury must not have believed the plaintiff, that the award for general damages reflects the jury's view of the plaintiff's credibility, and that accordingly, this Court should not intervene. By opting for a jury trial, the defence may anticipate an award that is within the range a judge alone would have made, or less; but if the award is much higher than the range of judge alone awards, the defence can come to this Court to seek a reduction. It is a kind of "win win" equation for the defence, and has the appearance of unfairness.

2009 BCCA 260 (CanLII)

[124] However, Smith J.A. observed at para. 11 of *Boyd* that the deference accorded to jury awards, while great, is not unlimited. Appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs, and that unadjusted outlier awards could lead to an undermining of public confidence in the courts through a perception that the judicial system operates "like a lottery".

(iv) Summary of the test to be applied on appellate review

[125] An appellate court cannot alter a damage award made at trial merely because on its view of the evidence it would have come to a different conclusion. Whether made by a judge sitting alone or by a jury, damage assessments are questions of fact or mixed fact and law and therefore awards of damages may only be set aside for palpable and overriding error (*K.L.B.* at para. 62; *M.B.* at para. 54; *Young* at para. 64; *Dilello* at para. 39).

[126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para 64 and *Dilello* at para. 39, both citing *Nance* at 614).

[127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" (*Foreman* at para. 32 citing *Nance* at 614, and referred to with approval in *Boyd* at paras. 13-14, *White v. Gait* at paras. 10-11, and *Courdin* at para. 22; *Wade* at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or,

2009 BCCA 260 (CanLII)

in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young* at para. 64).

[128] Support for the view that in order to determine whether a jury award is "wholly out of all proportion" or "wholly disproportionate or shockingly unreasonable", it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in "the same class of case" may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.'s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras. 33-43; and Finch C.J.B.C.'s dissent in *Stapley* at paras. 116-124.

[129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: *Cody* at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

[130] It is generally accepted that it is improper to compare the injuries of a particular plaintiff to those of the plaintiffs in the Supreme Court Trilogy for the purpose of making an award: *Boyd* at paras. 29-34, followed in *Stapley* at paras. 42-43. It is therefore inappropriate to "scale" an award for non-catastrophic injuries to the upper limit. In *Boyd*, Smith J.A. explained the function of the upper limit as follows (para. 32):

> [32] The governor on an engine is a useful analogy. Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

(v) Application of the standard of review to the award of non-pecuniary damages in the case on appeal

[131] There was evidence that the respondent suffered severe and permanent disabilities as a result of the accident and that she continues to suffer from the

2009 BCCA 260 (CanLII)

effects of the mild traumatic brain injury and post-concussion syndrome. As described, her symptoms include debilitating headaches, fatigue, depression, memory loss and inability to concentrate, and these problems are exacerbated by anxiety, emotional liability, and frustration. Dr. Spellacy's evidence, based on the testing he did, showed that the respondent suffers from cognitive deficits. The evidence from her expert witnesses was that her condition is unlikely to improve. The respondent's profession, which from the evidence was clearly central to her life, is forever foreclosed to her because she cannot read complex material, cannot concentrate, and cannot retain what she has read. On the evidence, it was open to the jury to conclude that the accident had a devastating, if not catastrophic, effect on the respondent.

[132] While the non-pecuniary award in the case before us is undoubtedly high and may not have been one this Court would make, I am not persuaded that we ought to interfere in the jury's award of $245,000. The Supreme Court of Canada's decision in *Young* and, to a lesser extent, its decision in *Hill*, along with the relatively recent decisions of this Court in *Boyd* and *Dilello*, are powerful expressions of the deference to be accorded to jury damage awards. As indicated in the recent decisions of *Hill, Brisson*, and *Boyd*, the case law has long acknowledged the unique qualities of the jury that require its findings be respected above those of a trial judge. Furthermore, as directed by *Boyd*, since the jury's award in this case does not reach the Trilogy's upper limit, the amount of that limit and how the injuries in those cases compare to the respondent's injuries are irrelevant considerations.

[133] Given the unique nature and purpose of non-pecuniary damages and the deference demanded for review of jury awards, I am of the view that the jury's award in this case is not so "wholly out of all proportion", "wholly disproportionate" or "shockingly unreasonable" as to justify appellate interference.

2009 BCCA 260 (CanLII)

(vi) Internally inconsistent or contradictory jury damage awards

[134] I turn now to the appellant's argument that it is open to an appellate court to interfere with a jury damage award if the award is internally inconsistent or contradictory.

[135] In *White v. Nuraney*, 2000 BCCA 536 at para. 53, 80 B.C.L.R. (3d) 307, this Court found it was inconsistent for the jury to have made no award for non-pecuniary damages while granting awards under other heads of damage. Most often when this Court has found jury awards to be "internally inconsistent", they are of this type: *Ferguson*, at paras. 62-64. However, in *Novak v. Lane et al*, 2000 BCCA 267, 139 B.C.A.C. 155, the Court ordered a new trial because it found that the jury's award of $3,000 for non-pecuniary damages was inconsistent with its award of $4,000 for cost of future care, in that it was too low; and in *Dubach v. Nahal*, 2003 BCCA 526, the Court based its judgment on its finding that the jury's non-pecuniary award of $5,500 was "inordinately low" (para. 10), but also remarked that the awards for pecuniary damages were "inherently inconsistent with the non-pecuniary award" (para. 11).

[136] Whether an appellate court can interfere when there is an apparent internal inconsistency between a "nil" or very modest award for non-pecuniary damages and a positive award for pecuniary damages may be resolved by asking whether, in the face of such apparent inconsistency, the jury must have misapprehended the principles to be applied in making an award for non-pecuniary loss.

[137] In this case, the appellant argues that the "low" award for costs of future care is inconsistent with the substantial award for non-pecuniary damage. To determine whether there is an inconsistency between the two awards, it is necessary to look at the foundation for the pecuniary award. Respondent's counsel argues that the amount the respondent sought for costs of future care award was limited because her medical advisors had said there was little more that could be undertaken by way of treatment for her injuries. That argument is not refuted by the appellant and is a persuasive one in this case. Put another way, there is no foundation for an argument that the jury must have misapprehended or misapplied the principles

2009 BCCA 260 (CanLII)

underpinning a non-pecuniary award based on the award the jury made for costs of future care. Accordingly, I would not accede to the appellant's submissions on this point.

IV. Conclusion

[138] I would dismiss the appeal.

"The Honourable Madam Justice Rowles "

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice Smith"

2009 BCCA 260 (CanLII)

1951 CanLII 374 (UK JCPC)

NANCE v. BRITISH COLUMBIA ELECTRIC R. CO.

Judicial Committee of the Privy Council, Viscount Simon, Lords Porter, Morton of Henryton, Reid and Asquith of Bishopstone.
June 20, 1951.

1951 CanLII 374 (UK JCPC)

D. A. Sturdy, for plaintiff, appellant.

Hon. J. W. de B. Farris, K.C. and *A. Bruce Robertson,* K.C., for defendant, respondent.

The judgment of their Lordships was delivered by

VISCOUNT SIMON:—This is an appeal and cross-appeal from a judgment of the Court of Appeal of British Columbia (Sloan C.J.B.C., O'Halloran and Sidney Smith, JJ.A.) dated February 23, 1950, ([1950] 3 D.L.R. 64, 65 C.R.T.C. 237), allowing in part an appeal from a judgment of Whittaker J. dated June 24, 1949, upon the trial of an action before a Special Jury, in which the appellant claimed damages in respect of the death of her husband, which occurred on January 18, 1949, through being knocked down and instantly killed by a street car, driven

by a motorman employed by the respondent company. The appellant brought the action under the *Families' Compensation Act,* R.S.B.C. 1948, c. 116, on her own behalf and on behalf of the children and stepchildren of the deceased, and alleged that her husband's death was caused by the negligence of the motorman, for which the respondent company was responsible. The jury so found, awarding damages of $35,000, and in the subsequent proceedings the respondent company's liability for negligence has been admitted.

The respondent company, however, pleaded in its defence that the negligence of the deceased was a contributory cause of his death. The *Contributory Negligence Act,* R.S.B.C. 1936, c. 52, provides that where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, provided that if it is not possible to establish different degrees of fault, the liability shall be apportioned equally. Consequently, if the respondent company made good its allegation of the deceased's contributory negligence, it would be liable for only a portion of the damages awarded.

The jury answered in the negative the question whether the deceased was guilty of negligence which contributed to the accident. Judgment was therefore entered for the appellant for the full amount of $35,000. The respondent company appealed to the Court of Appeal on the ground that the finding of the jury that the deceased was not guilty of contributory negligence was unreasonable and perverse and against the evidence, and further contended that a passage in the summing-up of Whittaker J. dealing with this issue was wrong in law and that the jury would not have found as they did if, in this matter, they had been properly directed.

The accident occurred between 11 p.m. and midnight near the intersection of Kingsway, a main thoroughfare of Vancouver running approximately east and west, and Gladstone St., which runs approximately north and south. Along Kingsway a double pair of rails is laid to carry the respondent company's street cars. Kingsway is 55 ft. wide between the kerbs, and the roadway of Gladstone St. is about 30 ft. across. There was deep snow on the ground, but snow-ploughs had cleared the snow along the middle of Kingsway up to 8 ft. of the kerb on either side, thus leaving a central band of swept surface occupied by the rails and the "devil strip" between them (in all 15 ft.), and also a selvage of a further 12 ft. on either side of

1951 CanLII 374 (UK JCPC)

the rails. The whole of the swept surface was slippery from ice and the piled snow between this surface and the kerbs, though at a higher level, was somewhat trampled down where foot-passengers had previously crossed. The whole area was well lighted. There were no traffic lights to regulate the crossing of foot-passengers or vehicles at the intersection.

The plaintiff and her husband began to cross Kingsway from the northeast corner of the intersection, the lady being on his left and holding his left arm. He was a very tall and heavy man, and somewhat lame. The pair could only proceed across the road at a "slow shuffle", with some slipping on the snowy and icy surface. It was in dispute whether they were crossing at right-angles or were inclining their course slightly to their left.

The street car pulled up on reaching the intersection to take on four passengers, who could be seen to be waiting near the south-west corner to board it. The plaintiff and her husband had already gone some way in crossing the road and were continuing to do so, when the motorman without warning restarted the street car and it advanced rapidly towards them, knocking the deceased down, just before he got clear of the southern-most rail, with such violence that his body projected his wife forward clear of the track: she also was injured. The distance travelled by the street car after restarting, before it collided with the deceased, appears to have been no more than some 75 ft. and the car, which is 44 ft. long, then pulled up within two lengths. The car is of a new type, which can very quickly pick up a high speed amounting to 30 m.p.h. The motorman is the only employee on this type of car and consequently has to take fares and supply tickets, as well as to drive the car. There was evidence that, at the time of restarting, he was giving a ticket to one of the passengers and he admitted that he never saw the injured couple at all, although they would have been clearly within his vision if he had looked.

In these circumstances, the jury had to consider whether the deceased was guilty of contributory negligence. As he was instantly killed, he could not personally testify, but the plaintiff said that she had seen the street car some 250 ft. away and realized that the car would stop on reaching the intersection, as it did. It appears to their Lordships that a properly instructed jury might without perversity come to the conclusion, on the evidence available, that the defendants had not discharged the burden of proving contributory negligence on the part of the deceased. If the deceased, after starting to cross, looked to see

1951 CanLII 374 (UK JCPC)

the position of the street car and noted that it had come to a stop for taking on passengers, he might reasonably have continued to cross the road, assuming that the car would not start up again and advance towards him at a high rate of speed until he and his wife were safely beyond the rails. Even though there was some justification for taking the contrary view, it was for the jury to decide whether they were satisfied that the defendants had proved their plea. Their Lordships consider that there would be no ground for reversing the jury's finding on this point or for ordering a new trial unless the summing-up misled the jury.

As to this, the passage in the learned Judge's charge which is complained of was as follows: "Before you can find that Nance was guilty of contributory negligence, you must find that he owed a duty to the defendant, and that he committed a breach of that duty, and was, therefore, negligent. The onus of proving contributory negligence is upon the defendant, and that must be proved by a preponderance of evidence, which you are prepared to accept."

The three Judges of the Court of Appeal were unanimously of the view that the judgment below could not stand, but for widely different reasons. Chief Justice Sloan held that the passage just quoted from the summing-up was a misleading and inaccurate exposition of the obligations of the deceased. In his view, the deceased owed no "duty" to the respondent company, but was subject to an imperative obligation to exercise reasonable care for his own safety. As the jury was not so instructed, the Chief Justice held that there was misdirection, which had occasioned a miscarriage of justice, and that the verdict of the jury and the judgment entered thereon must be set aside. The learned Chief Justice then substituted the judgment which he considered ought to have been given, *viz.*, that the deceased was at fault in not keeping a proper look-out for the approaching street car; he said: "Had he taken the precaution of a momentary glance, he would not have walked into a position of imminent peril". (On this, their Lordships would respectfully observe that in their opinion there was no evidence that the deceased did not look, and that if he looked, it may be that he saw that the street car was stationary. A person crossing the road in such circumstances cannot reasonably be expected to "keep his eye" continuously on the street car, for he has to look after his own steps on the slippery surface, and the Chief Justice only postulates a "momentary glance".) As for damages, the Chief Justice's view was that the damages award-

1951 CanLII 374 (UK JCPC)

ed by the jury were excessive and $20,000 would fairly represent the pecuniary loss suffered by Mrs. Nance and those she represents. He fixed the degree of fault of the motorman at 60% and that of the deceased at 40%, with the result that judgment should be entered for $12,000.

O'Halloran J.A., on the contrary, took the view that "the jury would have failed to act judicially if they had not reached the decision that the motorman was solely responsible for the collision". The learned Judge met the criticism directed to Whittaker J.'s summing-up by examining the pleadings, which he considered set up the breach of duty owed by the deceased to the respondent company as the only contributory negligence alleged and did not include an allegation of his carelessness apart from duty. In his view Whittaker J.'s charge was entirely correct. He added: "The argument that in crossing the street the deceased owed no duty to the street car to be careful is one which I have struggled unsuccessfully to appreciate." In the result, O'Halloran J., while holding the respondent company solely to blame, was of opinion that the $35,000 awarded as damages appeared to be "purely arbitrary and without foundation in the evidence" and was in favour of directing a new trial to decide the proper quantum.

Sidney Smith J.A. also took the view that there was no contributory negligence by the deceased [p. 79 D.L.R., p. 253 C.R.T.C.]: "The assumption that the deceased did not see the car at all is against the evidence . . . But he was then so far advanced in the intersection that he was entitled to assume the car would give way to him." This learned Judge was not prepared to accept the view that a pedestrian crossing a street owes to approaching traffic the duty to be careful, for he said " a pedestrian carries no menace; and since a pedestrian is practically incapable of causing damage to a vehicle by a collision, only damage to him need be considered". Their Lordships, as will appear hereafter, must not be understood to agree with this proposition. The learned Judge consequently held that there was clear misdirection, but at the same time held that the respondent company had disabled itself from taking the point, since at the end of the summing-up Whittaker J. had inquired of counsel whether there was any objection to his charge and counsel then appearing for the defendants had replied that it was "entirely fair". Their Lordships find themselves relieved from pronouncing upon this view of the matter, which was apparently not shared by the other two Judges of the Court of Appeal. Sidney Smith J.A., however, considered that the award

1951 CanLII 374 (UK JCPC)

of damages was excessive and thought that a figure of more than $12,000 could not be justified.

With this conflict of judicial opinion before them their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it.

The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call upon the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies* v. *Swan Motor Co.*, [1949] 1 All E.R. 620, to which the Chief Justice referred.

This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, *e.g.*, if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the indi-

1951 CanLII 374 (UK JCPC)

vidual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Denning L.J.'s judgment at p. 631 of the *Davies* case, where he says, "when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down", is to be interpreted in a contrary sense, their Lordships cannot agree with it.

Their Lordships do not feel able to accept the view of O'Halloran J.A. that the pleadings in this case debar the respondent company from objecting that the passage complained of in Whittaker J.'s charge is wrong in law. The plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety, even though he did not owe a duty to the respondent company to be careful. It is perhaps unfortunate that the phrase "contributory negligence" uses the word "negligence" in a sense somewhat different from that which the latter word would bear when negligence is the cause of action. It may be pointed out that in the *Law Reform (Contributory Negligence) Act,* 1945, of the United Kingdom Parliament (8 & 9 Geo. VI., c. 28) the contrast between the two meanings is recognized, for that Act, which provides for a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, defines "fault" as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence". The *Contributory Negligence Act* of British Columbia which was passed before the United Kingdom Act, does not contain a definition of "fault", but there is no doubt that in British Columbia the conception of contributory negligence, which is part of the common law, is the same as in this country. Such a plea should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

With the above considerations in mind, both as to the facts and as to the law, their Lordships have carefully considered whether the impugned passage in the summing-up of the trial Judge should be regarded as vitiating the conclusion of the jury. To decide this question, it is necessary to have regard to the summing-up as a whole. The misdirection occurs early

1951 CanLII 374 (UK JCPC)

in the Judge's charge and it is followed by a full and careful survey of the evidence, to which no objection can be taken and which placed the essential issues before the jury very clearly. Moreover, the question put at the end of the summing-up to the jury on contributory negligence is correctly framed and contains no suggestion that the defence would be incomplete unless "duty" is proved to the jury's satisfaction. Their Lordships have come to the conclusion, after weighing these various elements, that the error complained of did not mislead the jury and the verdict that the respondent company was solely to blame should stand.

Their Lordships now turn to the question of quantum of damages.

As already stated, the jury awarded the plaintiff $35,000. The three members of the British Columbia Court of Appeal were unanimous, for different reasons, in holding that this figure could not stand. The Chief Justice was for reducing it to $20,000 (subject to a further reduction to $12,000 in respect of contributory negligence which he found proved); Sidney Smith J.A., who did not find contributory negligence proved would have awarded $12,000; and O'Halloran J.A. would have left the figure to be determined at a new trial on materials more adequate than those available at the actual trial.

In those circumstances two distinct questions arise:

(1) What principles should be observed by an Appellate Court in deciding whether it is justified in disturbing the finding of the Court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case.

(2) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.

(1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then, before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage

1951 CanLII 374 (UK JCPC)

(*Flint* v. *Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601). The last-named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a Court of Appeal, be even wider than when the figure has been assessed by a Judge sitting alone. The figure must be wholly "out of proportion" (*per* Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ltd.* at p. 616).

(2) The second question is, what principles the Court of first instance should itself apply in determining the quantum of damages under the relevant British Columbia legislation, which reproduces with inconspicuous differences the Fatal Accidents Acts in force in the United Kingdom.

(Among these differences their Lordships note that while in the United Kingdom any sums for which the deceased has insured his life are not to be taken into account, in British Columbia a different rule prevails in this regard.)

The claim to damages in the present case falls under two separate heads. *First,* if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? (Under this head in the present case the wife or widow need alone be considered, since his children and stepchildren were all adults and self-supporting, and at the time of his death he contributed nothing material to their maintenance.)

Secondly, in addition to any sum arrived at under the first head, the case has been argued on the assumption common to both parties that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will.

A proper approach to these questions is in their Lordships' view one which takes into account and gives due weight to the following factors; the evaluation of some, indeed most, of them can, at best, be but roughly calculated.

Under the first head—indeed for the purposes of both heads—

1951 CanLII 374 (UK JCPC)

it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be "x" years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and his liberality might have grown or wilted. In the present case it is known that in the years 1945-48, which immediately preceded his death, his "drawings" from his business averaged $2,600 per annum. His wife's maintenance was derived from, and could not have exceeded, these drawings. What proportion of such amount he in fact contributed to her support is a matter of guess-work, but both his widow and her sister give him a good character for generosity. He was a "good provider". Supposing, by this method, an estimated annual sum of $\$y$ is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply $\$y$ multiplied by x because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. Then a deduction must further be made for the benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 (she came into $6,500, one-third of his estate, x years sooner than she would otherwise have done) and of her interest in sums payable on a policy of $1,000 on his life; and a further allowance must be made for a possibility which might have been realized if he had not been killed but had embarked on his allotted span of x years, *viz.*, the possibility that the wife might have died before he did.

And there is a further possibility to be allowed for—though in most cases it is incapable of evaluation—*viz.*, the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.

A figure having been arrived at under this first head, there should be added to it a figure arrived at under the second head. The question there is what additional amount he would probably have saved during the x years if he had so long endured,

1951 CanLII 374 (UK JCPC)

and what part if any of these additional savings his family would have been likely to inherit.

Here it is to be noted that under the law of Alberta (which is the relevant law) he would have been free to leave his whole estate away from his family. There is in that Province apparently no "*legitima portio*" or "*querela inofficiosi testamenti*". However, he had made no will when he died at the age of nearly 54 and it seems reasonable to assume that if he had lived on he would either have died intestate, in which case his widow and his own two children would have taken his whole estate in equal thirds; or that if he had made a will, these three persons would in some proportions (it matters not for the present purpose what proportions) have been the sole objects of his testamentary bounty.

The main question here is:—if he had continued to live for x years what annual sum during this period would he probably have accumulated in the form of savings? The appellant's counsel invited their Lordships to say that he would have saved an average sum of $3,000 a year. This figure, subject to a number of discounts, was based on the evidence that between 1945-48 his earnings had risen in a sharp curve as follows:

	$
1945	1,469.57
1946	4,707.30
1947	7,689.40
1948	9,638.30

and that they would have been likely, if not to increase, to remain somewhere near this peak level. His accountant estimated that his *gross* earnings might have continued at a rate of about $6,000-$7,000 a year. Their Lordships consider this estimate very questionable. The period 1945-48 was abnormal. Before it started the deceased had in all his working life saved only about $4,000. He had enjoyed and then lost an agency in a limited area for the sale of agricultural implements supplied by International Harvester Inc. He recovered this agency in December, 1945, and it was the main staple of his income till 1949: but he might have lost it again. The garage business which he also ran was a subsidiary and quite minor source of revenue. The period of steeply mounting profits was one in which there was a banked-up unsatisfied demand for agricultural implements, carrying with it as a corollary a strong sellers' market and boom conditions. This state of affairs could not have been expected to continue indefinitely. His so-called

1951 CanLII 374 (UK JCPC)

savings in the pre-war years were mostly sums ploughed back into the business. The business itself depended on the world supply and demand for wheat, which is subject to considerable fluctuation. It cannot be assumed that he would in no part of the x years have made a loss or have been affected by fluctuations in the world price of wheat, or that a third world war might not have diverted production from ploughshares to swords and dried up his main source of profit.

Whatever sum he would have saved over x years must again be reduced to its lump sum equivalent here and now, and further discounted to allow for the contingency that his wife might have died before him; though these reducing factors would have been to some extent offset by any interest carried by the savings annually set aside.

Taking all these considerations into account, and basing on them the best estimate they can form, their Lordships are satisfied that a jury could not reasonably have computed the total recoverable damage at a figure exceeding $22,500. This figure in their view falls short of the $35,000 award by a margin wide enough to justify the British Columbia Court of Appeal in rejecting the jury's figure. In that case a new trial on damages could be ordered but the parties through their counsel have expressed their preference for the determination of the figure for damages on the advice of this Board. Their Lordships accordingly will humbly advise His Majesty that the appeal should be allowed, and the sum of $12,000 awarded as damages by the Court of Appeal should be increased to $22,500. The cross-appeal should be dismissed.

The respondents must pay the appellant's costs throughout.

Appeal allowed.

1951 CanLII 374 (UK JCPC)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oberholtzer v. Tocher,*
2018 BCSC 1089

Date: 20180703
Docket: M136390
Registry: Vancouver

Between:

Elizabeth Susan Victoria Oberholtzer

Plaintiff

And

Jaimie Patricia Tocher

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for the Plaintiff:	B.A. McIntosh
Counsel for the Defendant:	D.R. Eyford, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. April 23-27 and 30, May 1-4, 2018
Place and Date of Judgment:	Vancouver, B.C. July 3, 2018

2018 BCSC 1089 (CanLII)

2018 BCSC 1089 (CanLII)

Introduction

[1] On November 23, 2011, the plaintiff Elizabeth Oberholtzer was driving in her Toyota 4Runner down Yale Road in Chilliwack, BC. She had a green light at the intersection of Spadina Avenue. Unfortunately for her, the defendant Jaimie Tocher, who was travelling on Spadina Avenue, had a red light but did not stop. Both cars entered the intersection at the same time and a severe collision occurred resulting in injuries to Mrs. Oberholtzer. Liability for the accident has been admitted by the defendant. Damages are in issue in this trial.

[2] In the case before me, Mrs. Oberholtzer seeks recovery for non-pecuniary damages, future care costs for medical treatment and loss of housekeeping capacity, and future wage loss or loss of earning capacity.

[3] Issues to be determined in this action are:

a) what injuries, if any, did Mrs. Oberholtzer suffer in the accident;

b) did Mrs. Oberholtzer suffer from any medical conditions or injuries prior to the accident or following the accident which are unrelated to the accident and contribute to her current state of health or limit her functional capacity;

c) did Mrs. Oberholtzer fail to mitigate her damages and, if so, to what extent, and

d) what amounts, if any, are payable to Mrs. Oberholtzer for general damages, loss of future earning capacity, and cost of future care?

Background

[4] Mrs. Oberholtzer was 58 years old at the time of trial. She has been married to her husband for 38 years and has two adult children.

[5] Mrs. Oberholtzer presented as a hard-working conscientious woman. She was described by herself, her husband, and by a number of the medical

professionals as stoic. Her husband described her as a person who is “not a quitter, is optimistic, and pursues and pushes onwards.”

[6] Mrs. Oberholtzer has worked at Scotiabank in Chilliwack for over 30 years. Notwithstanding the injuries she suffered in the accident, Mrs. Oberholtzer continued to receive very good performance ratings at Scotiabank. From 2007 to 2016 her workplace evaluations ranged from quality, to distinguished, to exceptional, to superior. It is clear that Mrs. Oberholtzer takes pride in her work and in her ability to continue to perform, notwithstanding the pain she has experienced as a result of her accident.

[7] Prior to the accident, Mrs. Oberholtzer took an active role in maintaining her home, including working with her husband in home renovations over the years. Her husband stated that before the accident she did 100% of the work inside the house and 30% of the work outside of the house. Her husband now does 70% of the work inside the house and 100% of the work outside the house because of limitations she has experienced since the accident.

[8] In 2009 Mrs. Oberholtzer had open heart surgery. This was a major double bypass surgery which required her to be off work for a period of three months. Three months following that surgery Mrs. Oberholtzer had another cardiac event which required surgery to implant a stent in her heart and resulted in her being off work for another three months.

[9] Following her cardiac surgery Mrs. Oberholtzer changed her diet, lost 60 pounds, and began to exercise regularly, including using a treadmill on a regular basis and hiking with her husband. Mrs. Oberholtzer continues to see her cardiologist every year and testified that she has had no issues with her heart since those surgeries.

Injuries suffered in the car accident

[10] Mrs. Oberholtzer suffered a number of injuries in the accident. She claims she suffered soft tissue injuries to her neck, upper back, left shoulder, and thumbs. Mrs.

2018 BCSC 1089 (CanLII)

Oberholtzer also experienced headaches following the accident and claims she suffers from chronic pain disorder, depression and anxiety arising from the accident.

[11] A number of other physical problems were canvassed in evidence. These were not advanced by Mrs. Oberholtzer at trial as resulting from the accident, but were canvassed with her by the defence and will be dealt with in my assessment of pre- and post-accident medical conditions.

Injuries to upper back and shoulders

[12] Mrs. Oberholtzer was taken to the hospital from the scene of the accident, where she was examined. Her chest and right ankle were x-rayed and she was referred to her family doctor. When she got home from the hospital she was not feeling well. She had a very sore neck, upper back, shoulder, left arm, and thumbs. She had chest pain, a sore right ankle, a sore left knee and leg, and a headache.

[13] The symptoms which continued in the years following the accident included pain in her neck, upper back, left shoulder, wrist and thumbs, numbness in the fingers of her left hand, pain in her forearm, and weakness in her left arm.

[14] Dr. Jodi Lippa has been Mrs. Oberholtzer's treating physician for 23 years and saw her in the days immediately following the accident. Dr. Lippa attended at trial and provided an expert report detailing the injuries she observed and associated with Mrs. Oberholtzer's accident.

[15] Dr. Lippa diagnosed Mrs. Oberholtzer with increased anxiety and a post-traumatic reaction, as well as soft tissue injuries of her neck, shoulders, upper back, thumbs, left wrist and left knee.

[16] From November 2013 until the date of trial, Dr. Lippa continued to see Mrs. Oberholtzer and treat her for her injuries. She recommended numerous therapeutic consultations and made recommendations for various treatments over the six years between the accident and the date of trial. Mrs. Oberholtzer has had trigger point

2018 BCSC 1089 (CanLII)

injections to her neck and upper back in an attempt to relieve some of her pain symptoms.

[17] In her report, Dr. Lippa concluded that:

> I therefore feel confident that the worsening of her headaches as well as her ongoing pain and stiffness of her left shoulder, shooting pains of both forearms, parathesias in her bilateral fourth and fifth fingers, and pain and weakness of both thumbs are entirely related to the injuries sustained in her motor vehicle accident. Her ongoing symptoms are consistent with those expected in musculoligamentous injury of the cervicothoracic spine. The parathesias of her forearms and fourth and fifth fingers bilaterally are likely due to a mild functional thoracic outlet syndrome.

[18] Dr. Salvian is a vascular surgeon, with special expertise in post-traumatic thoracic outlet syndrome who testified on behalf of Mrs. Oberholtzer. Dr. Salvian examined Mrs. Oberholtzer on January 29, 2014 and August 30, 2017.

[19] Dr. Salvian confirmed the injuries to Mrs. Oberholtzer's neck and left shoulder, finding that she had sustained a whiplash-type soft tissue injury to her neck and upper back as a result of the accident.

[20] Dr. Salvian determined that Mrs. Oberholtzer's left-sided neck pain was due to chronic myofascial injury to the muscles and ligaments of the neck and upper back. He went further and noted that Mrs. Oberholtzer had gone on to a chronic myofascial pain syndrome. Dr. Salvian testified that there had been an improvement in Mrs. Oberholtzer's neck pain from 2014 to 2017, and that she had learned to manage it with her neck pain presenting primarily when she engaged in certain activities.

[21] Dr. Salvian also noted significant limitations in the range of motion of Mrs. Oberholtzer's left shoulder. He presented a number of possible reasons for the limitation including adhesive capsulitis, rotator cuff syndrome, or tendinitis. Dr. Salvian testified that there was a specific injury that was restricting the movement in her shoulder.

2018 BCSC 1089 (CanLII)

[22] Dr. Salvian has expertise in thoracic outlet syndrome. His examination of Mrs. Oberholtzer confirmed the presence of tenderness and spasm in the muscles around the left thoracic outlet. Dr. Salvian concluded that the pain, numbness and tingling in Mrs. Oberholtzer's left arm and into her fourth and fifth fingers were due to a combination of myofascial pain syndrome with positive trigger points in the scalene and trapezius muscles, as well as post-traumatic thoracic outlet syndrome with irritation of the lower nerves of the brachial plexus by the soft tissues and fibroligamentous structures of the thoracic outlet. In more simple terms, the injury suffered by Mrs. Oberholtzer in the accident resulted in damage to the scalene muscles on her left side, which then irritated the nerves of her brachial plexus causing post-traumatic thoracic outlet syndrome. This has impacted her left arm and fingers.

[23] The possibility of surgery for thoracic outlet syndrome was discussed in evidence. Dr. Salvian did not recommend this surgery for Mrs. Oberholtzer at this time, and commented that the benefit from such surgery at this stage of Mrs. Oberholtzer's recovery was very difficult to ascertain.

[24] The defence challenged Dr. Salvian's assessment of thoracic outlet syndrome, and suggested in cross-examination that this diagnosis was controversial in the medical community. I accept Dr. Salvian's assessment that thoracic outlet syndrome is not controversial and is a recognized medical condition which specialists are capable of diagnosing and treating.

[25] Dr. Kleinman, a medical doctor with a specialty in physical medicine and rehabilitation, was called by the plaintiff to testify with respect to Mrs. Oberholtzer's injuries. Dr. Kleinman examined Mrs. Oberholtzer in 2014 and again in 2017. On his initial examination he found that the muscles, ligaments and capsules of Mrs. Oberholtzer's cervicothoracic spine underwent overstretching with partial tearing and strain likely originating in the motor vehicle accident. He also found that the soft tissue injuries had developed into a chronic scar tissue which was physically painful and functionally disabling for Mrs. Oberholtzer. In addition to these injuries he found

2018 BCSC 1089 (CanLII)

that Mrs. Oberholtzer was suffering from chronic spinal deconditioning, which arose due to the injured musculature lacking the necessary endurance and strength for daily activities and resulting in a reduced pain threshold when fatigue is reached. On his examination in 2017 Dr. Kleinman noted that Mrs. Oberholtzer's condition had not changed to any significant degree and that she continued to have pain with restricted range of motion and functional limitations.

[26] Dr. Kleinman concluded that the likelihood of any future physical or functional improvement was negligible and that her recovery was complete. He indicated that in his opinion she would remain symptomatic in the future.

[27] In his report following his 2017 examination, and at trial, Dr. Kleinman deferred to Dr. Salvian on the diagnosis of thoracic outlet syndrome. I accept the opinion of Dr. Salvian in this respect.

[28] Dr. Barry Vaisler, testified for the plaintiff. He was qualified as an orthopedic surgeon with a specialty in upper extremities surgeries. Dr. Vaisler was of the opinion that Mrs. Oberholtzer had sustained a soft tissue injury to one or more cervical facet joints as a result of the accident. Dr. Vaisler recommended that her neck symptoms should be managed through a regular program of neck strengthening in postural exercises on her own and at physiotherapy, as well as low-impact physical fitness routines. He also recommended that at times where there were acute exacerbations of neck and upper back pain she would benefit from physiotherapy or massage therapy.

[29] Dr. Vaisler commented that cervical facet joint injections could be considered in the future. However, based on his evidence at trial, I do not find Dr. Vaisler recommended this as a necessary treatment.

[30] Dr. Vaisler prepared two reports for trial, the second one written on March 14, 2018 following an MRI of Mrs. Oberholtzer's left shoulder.

[31] Dr. Vaisler concluded that Mrs. Oberholtzer did have a left shoulder injury. Dr. Vaisler concluded that her left shoulder symptoms probably arose from her left

2018 BCSC 1089 (CanLII)

scapular thoracic joint, and she would experience positive subacromial impingement when she engaged in activities which involve sustained or repetitive reaching at and above the shoulder level. Dr. Vaisler noted changes in the rotator cuff of the left shoulder, but concluded that the degenerative changes in the rotator cuff tendons of the left shoulder were probably due to age and wear and tear and were unlikely to have been caused by the accident.

[32] Dr. Vaisler noted that it was possible Mrs. Oberholtzer may, in the future, need to consider a surgical arthroscopic subacromial decompression of her left shoulder to excise the thickened subacromial bursa. However, based on his testimony at trial, I consider this to be a remote possibility.

[33] The defence tendered Dr. Mark Trump at trial to provide an opinion on the extent of the injuries and impairments or disability that Mrs. Oberholtzer may have sustained in the accident. Dr. Trump was qualified as a medical expert with a specialty in orthopedics and a subspecialty in orthopedic trauma and sports injuries.

[34] Dr. Trump provided an opinion on the injuries to Mrs. Oberholtzer's upper back and shoulders, the injuries to her thumbs, and her headaches.

[35] Dr. Trump determined that Mrs. Oberholtzer did have a Whiplash Associated Disorder Type 2 injury in her neck at the time of the accident. It was Dr. Trump's opinion that she had recovered from this whiplash injury at the time he examined her in January 2018. He found that her current symptoms had no objective findings and were not substantiated on physical examination, and also determined that her injuries had not impeded her ability to do work, do any of her home activities or any of her leisure activities.

[36] Dr. Trump noted that she experienced a sprain/strain type 2 injury to her left shoulder in the accident, and stated that this injury was described as improved and not limiting. He discounted the shoulder pain identified in Dr. Lippa's records in January 2012 as not originating with the accident. Dr. Trump suggested that Mrs. Oberholtzer suffered from adhesive capsulitis in her shoulder which he found was

2018 BCSC 1089 (CanLII)

not associated with the accident. Dr. Trump determined that Mrs. Oberholtzer's reported paresthesias in her fingers was positional only with perhaps some mild compression of the ulnar nerve when she places her elbow in a particular position. He also found that the ulnar nerve compression was not associated with the accident.

[37] Dr. Trump's conclusions are at odds with the experts who testified on behalf of the plaintiff. Dr. Trump examined Mrs. Oberholtzer for approximately two hours, and reviewed reports and medical records from her other treating practitioners. Before trial Dr. Trump had reviewed in a cursory way a number of the medical legal reports which were submitted in evidence at the trial. However, these reports were not reviewed by Dr. Trump prior to preparing his report.

[38] Dr. Trump did not test the functional capacity of Mrs. Oberholtzer and I am satisfied based on the cross-examination of Dr. Trump that he did not make sufficient inquiries regarding the ongoing impacts of the injuries on Mrs. Oberholtzer's life. For example, he conceded under cross-examination that he concluded that she had no impacts because she reported that she continued to do things in the household, and continued to participate in activities such as hiking. However, Mrs. Oberholtzer and others testified that she is a stoic person and continues to participate to the best of her abilities in the activities she enjoyed prior to the accident. It was clear from her evidence that although she continues to do what she can around the house, work at her job at Scotiabank, and participate in physical activities, she cannot do so as fully as she did before and she experiences pain and limitations.

[39] I find Dr. Trump's examination of Mrs. Oberholtzer to be less thorough than those of her treating physician, Dr. Lippa, and the other medical legal experts proffered by the plaintiff at this trial. As such, I reject Dr. Trump's conclusions on the recovery of Mrs. Oberholtzer from the injuries she suffered to her upper back and shoulders resulting from the accident.

2018 BCSC 1089 (CanLII)

[40] Dr. Lippa, Dr. Salvian, Dr. Vaisler, and Dr. Kleinman, all gave opinions consistent with Mrs. Oberholtzer remaining symptomatic in the future. All observed that Mrs. Oberholtzer will require intermittent therapies to address exacerbations of her symptoms, which are likely to arise periodically particularly through overuse. All recommended that Mrs. Oberholtzer modify her behaviours to ensure that she does not exacerbate her symptoms. However, and importantly, all also stated that Mrs. Oberholtzer will be able to continue engaging in the activities of her home life and work, albeit certain activities will have to be modified to ensure she does not exacerbate her symptoms. Examples of behaviour modification include avoiding heavy lifting, avoiding repetitive activities, avoiding overhead activities, and adapting her home and work life in accordance with ergonomic assessments.

[41] Louise Craig, a physiotherapist and functional capacity evaluator, was called by the plaintiff to provide her opinion on the functional capacity of Mrs. Oberholtzer. Ms. Craig evaluated Mrs. Oberholtzer in 2014 and 2017. On her most current exam, she found a number of functional limitations including the following:

a) her symptoms increase with sustained walking,

b) her symptoms are aggravated with sustained work-intensive sitting,

c) her symptoms are aggravated with sustained reaching at upper levels,

d) she is limited for reaching to upper levels on the left due to left shoulder movement restrictions, and

e) her symptoms are aggravated in the sustained stooped/head forward position.

[42] I find that as a result of the accident, Mrs. Oberholtzer suffered soft tissue injuries to her neck, upper back, and left shoulder. Through these injuries Mrs. Oberholtzer has developed thoracic outlet syndrome, which has resulted in numbness to the fingers in her left hand. The injuries to her left shoulder have resulted in a limitation in her range of motion and weakness in her left arm. The soft

2018 BCSC 1089 (CanLII)

tissue injuries to her neck, upper back, and left shoulder are persistent and I find they will not resolve over her lifetime. Mrs. Oberholtzer will have restricted movement and strength as a result of these injuries, and will experience persistent levels of pain, exacerbated periodically by flare-ups, or intense pain.

2018 BCSC 1089 (CanLII)

Injuries to thumbs

[43] Separate from the injuries to her upper back and shoulders, Mrs. Oberholtzer claims she injured her thumbs in the accident. She described pain in her thumbs and a significant loss of grip strength, which affected her ability to perform certain routine tasks at home and work, such as using kitchen tools, unscrewing lids, chopping vegetables, picking up heavy pots, painting, using tools over her head, and counting money at work.

[44] Recently, Mrs. Oberholtzer had cortisone injections to both her thumbs and has used splints to relieve some of the pain in her thumbs. The cortisone injections did relieve some of the pain which she had experienced but by trial that improvement was starting to wear off.

[45] In her report, Dr. Lippa concluded that:

> The ongoing strain of the muscles and ligaments surrounding her thumbs could potentially have been triggered by gripping the steering wheel at the time of the impact and thus are consistent with the nature of her injury.

[46] In both 2014 and 2017, Dr. Kleinman assessed the grip strength of both hands, as well as lateral and tripod pinch strength and presence of pain in both hands. He noted that in 2017 there had been some improvement with the left hand but still weakness in grip in her right hand associated with pain. Dr. Kleinman determined that Mrs. Oberholtzer had a chronic soft tissue sprain or strain in her right thumb.

[47] Dr. Vaisler concluded that Mrs. Oberholtzer sustained a contusion to the bases of both thumbs at the time of the accident. When he examined her in 2017, Dr. Vaisler noted that Mrs. Oberholtzer had symptoms and physical findings consistent with early degenerative osteoarthritis of the carpometacarpal joints of

both thumbs. It was Dr. Vaisler's opinion that the accident rendered the osteoarthritis symptomatic. Dr. Vaisler recommended splints for her thumbs to stabilize the thumb carpometacarpal joints. While Mrs. Oberholtzer had attempted to use generic splints in the past, the splints recommended by Dr. Vaisler would be customized thumb splints.

[48] Dr. Vaisler's primary recommendations for Mrs. Oberholtzer were the use of customized thumb splints, anti-inflammatory medication, and periodic steroid injections in her thumbs. He did discuss the possibility that if his recommendations were not sufficient to manage Mrs. Oberholtzer's pain, consideration could be given to surgery for her thumbs. However, I found Dr. Vaisler's evidence on surgery to be equivocal and I do not find that this treatment is medically recommended or necessary for Mrs. Oberholtzer.

[49] Dr. Trump also concluded that Mrs. Oberholtzer had bilateral first carpometacarpal joint arthritis, affecting both her thumbs. It was Dr. Trump's view that the arthritis in her thumbs was degenerative and not caused by the accident, although he noted that the symptoms first associated with this arthritis could possibly be attributed to the accident.

[50] The functional limitations related to her thumbs found by Louise Craig included:

a) she has below-average pinch grip strength bilaterally, and

b) her symptoms in her hands are aggravated with repetitive gripping and handling as well as utilizing the pinch grip.

[51] I find that Mrs. Oberholtzer injured both thumbs in the car accident. While I accept that there is evidence that Mrs. Oberholtzer had pre-existing degenerative osteoarthritis of the carpometacarpal joints of both thumbs, I find that the accident rendered this arthritis symptomatic and, as a result, Mrs. Oberholtzer has lost some functionality in the use of both thumbs.

2018 BCSC 1089 (CanLII)

Headaches

[52] Since the accident Mrs. Oberholtzer reported an onset of painful headaches. These went on for a number of years, but have greatly lessened over time.

[53] In her report, Dr. Lippa concluded that, Mrs. Oberholtzer's "worsening headaches would also be explained by her injuries."

[54] Dr. Salvian linked Mrs. Oberholtzer's ongoing intermittent headaches with the chronic tension she experiences in the muscles which insert into the base of the skull. However, Dr. Salvian testified that while Mrs. Oberholtzer was experiencing headaches during his 2014 examination, by 2017 headaches were no longer a prominent complaint.

[55] Dr. Kleinman also noted that Mrs. Oberholtzer was suffering from headaches which was characteristic of an injury to the upper cervical complex. In 2017 he noted that her chronic post-traumatic headaches had subjectively improved and were occurring with decreased frequency.

[56] Dr. Trump conceded that he was not an expert in headaches, but noted that the short-lived headache Mrs. Oberholtzer had after the accident was likely associated with the accident itself.

[57] I find that, as a result of the accident, Mrs. Oberholtzer did experience ongoing headaches for a number of years. However, I also find that these headaches resolved sometime after 2014 and no longer continue to be a problem for her.

Chronic pain disorder, depression and anxiety

[58] Dr. Anderson was called by the plaintiff to provide an opinion on Mrs. Oberholtzer's psychiatric status. Dr. Anderson was qualified as a medical doctor with expertise in psychiatry relating to physical trauma. Dr. Anderson assessed Mrs. Oberholtzer over a two-hour exam, and reviewed her medical history and reports

2018 BCSC 1089 (CanLII)

prepared by other doctors in relation to this action, as well as clinical records from her treating physician and various rehabilitation clinics.

[59] Dr. Anderson concluded that Mrs. Oberholtzer did not have a major depressive disorder or a generalized anxiety disorder. He did find that Mrs. Oberholtzer had significant anxiety and depressive symptoms consistent with a persistent adjustment disorder with mixed anxiety and depressed mood. He also found that she had a moderate, persistent somatic symptom disorder with predominant pain, a condition previously known as chronic pain disorder.

[60] Dr. Anderson noted that Mrs. Oberholtzer had some of the symptoms prior to the accident occurring. She had been prescribed antidepressant medication in July 2011, and had experienced work-related stressors both before and after the accident. Dr. Anderson noted that she did not have post-traumatic stress disorder arising from the accident, although she had some ongoing driving fears.

[61] It was Dr. Anderson's opinion that Mrs. Oberholtzer's quality of life will be affected over the long-term due to her significant pain and functional limitations, and he also noted that there may be a strain placed on her relationship with her husband and others as long as she is irritable.

[62] I am not satisfied that the accident caused anxiety or depressive symptoms experienced by Mrs. Oberholtzer.

[63] Mrs. Oberholtzer had experienced a number of stressors in her life prior to the accident and following the accident, which were unrelated to her injuries. She had concerns regarding her cardiac health and testified that she was anxious that she would have to have another heart surgery. Mrs. Oberholtzer, Debra Archer, and David Oberholtzer all testified to the fact that Mrs. Oberholtzer's job at Scotiabank was impacted due to the presence of her supervisor for a number of years. Mrs. Oberholtzer described this supervisor as terrorizing the branch. As a result of her problems with her supervisor, Mrs. Oberholtzer did take stress leave in 2011 and sought counselling. She was also prescribed Pristiq, an antidepressant.

2018 BCSC 1089 (CanLII)

[64] When she applied for stress leave in 2011, Dr. Lippa filled out the required forms for her short-term disability insurance. She indicated on those forms that Mrs. Oberholtzer suffered from major depression and anxiety features. Mrs. Oberholtzer did continue working at Scotiabank even though she found it extremely stressful. The plaintiff argues that the fact she continued working through her workplace stress points to her resiliency. While this may point to her resiliency, the fact is that Mrs. Oberholtzer was suffering from significant workplace stress at the time of the accident which continued until November 2016, when her supervisor retired.

[65] Mrs. Oberholtzer also agreed that she experienced stress related to her son in 2008, and the death of her father and the relocation of her mother in the summer of 2017.

[66] Dr. Anderson, under cross-examination, admitted that Mrs. Oberholtzer had only mild psychiatric symptoms. He agreed she had a pain disorder but did not have any secondary depressive disorders. He confirmed that her pain symptoms would affect her emotional functioning but not to a significant degree. Dr. Anderson agreed that Mrs. Oberholtzer did not have a disabling driving anxiety.

[67] Dr. Anderson discussed under cross-examination, cognitive behaviour therapy and confirmed that Mrs. Oberholtzer was not a candidate for this kind of therapy. Because she has a stoic personality, she would not be the kind of person who would enjoy participating in cognitive behaviour therapy.

[68] On balance, I accept that Mrs. Oberholtzer has experienced pain resulting from her injuries and that she may benefit from some treatments aimed specifically at chronic pain. However, I am not satisfied that the accident caused any anxiety or depression in Mrs. Oberholtzer.

Pre- and post-accident medical conditions or injuries

[69] Dr. Lippa gave evidence that prior to the accident Mrs. Oberholtzer had not been treated by her for either upper body musculoskeletal concerns (neck, shoulders, arms) or headaches.

2018 BCSC 1089 (CanLII)

[70] Mrs. Oberholtzer had open heart surgery in 2009, and continues to be treated on a yearly basis by a cardiac specialist. She experienced periodic chest pains both prior to and following the surgery. While the chest pains did not directly contribute to her disability at work or in the home, her chest pains did cause her some anxiety as she feared having to have another surgery. Notwithstanding the periodic chest pains she experienced, Mrs. Oberholtzer was never advised by any physician to reduce her hours at work or reduce her activities in the home due to her chest pains. If anything, the fact that she has cardiac problems resulted in her increasing her physical activity to maintain her cardiovascular health.

[71] A good deal of time was spent in cross-examination addressing pain arising from Mrs. Oberholtzer's lower back and right knee, as well her psychological issues arising from her job stress and cardiac concerns.

[72] In addition to the injuries which I have found to have resulted from the accident, Mrs. Oberholtzer was treated for various other complaints from the time of the accident until the time of trial. These included low back pain radiating into her hips and legs in 2013, sciatic pain in 2013, severe chest pain in 2012, right shoulder pain associated with kayaking in 2013, injury to her right knee in 2014 through 2016, and pain in her right hip in 2015.

[73] When Louise Craig first examined Mrs. Oberholtzer in 2014, she observed some functional limitations arising from Mrs. Oberholtzer's lower back pain and pain in her right knee. These limitations had resolved by 2017 when Ms. Craig re-examined Mrs. Oberholtzer.

[74] Dr. Vaisler noted that an MRI performed in 2018 revealed a high-grade partial thickness tear of the supraspinatus rotator cuff tendon, which he thought was age-related and not due to the accident. Dr. Vaisler opined that this rotator cuff tear was not causing Mrs. Oberholtzer any functional limitations, and that it may remain non-symptomatic.

2018 BCSC 1089 (CanLII)

[75] While the defence challenged Mrs. Oberholtzer's credibility in relation to the other injuries she suffered over the years, I am satisfied that Mrs. Oberholtzer accurately addressed the other injuries under cross-examination. These other injuries were not the focus of this litigation, and the fact that Mrs. Oberholtzer did not remember them as clearly as she remembered the injuries which still trouble her today arising out of the accident does not cause me to find her evidence not credible.

[76] Mrs. Oberholtzer has experienced some ongoing anxiety and depressive symptoms in her life, but I have concluded that these did not result from the accident at issue.

[77] While there is no doubt that Mrs. Oberholtzer experienced pain from a number of different injuries over the years, I am satisfied that the injuries she sustained in the accident stand alone and properly form the basis of the claim she advances in this litigation. In other words, I find that pre- and post-accident conditions and injuries have not exacerbated her injuries or limited her functional capacity at the time of trial.

Mitigation

[78] The defendant takes the position in this litigation that Mrs. Oberholtzer failed to mitigate her damages. Primarily the defendant argues that Mrs. Oberholtzer failed to adhere to recommended physical therapies. The defendant also argues that Mrs. Oberholtzer failed to seek accommodations that would have improved her work situation.

Failure to adhere to physical therapies

[79] Mrs. Oberholtzer was treated by many different doctors and therapists since her accident. She was given recommendations for attendance at physiotherapists, massage therapists, acupuncturists, and to participate in exercise programs. Mrs. Oberholtzer generally commenced all of the programs and therapies recommended to her by her treating physician.

2018 BCSC 1089 (CanLII)

[80] The question is whether Mrs. Oberholtzer completed the programs recommended to her. Her evidence on this point was inconsistent. When giving her evidence-in-chief, Mrs. Oberholtzer stated that she followed all of the recommendations for home exercise programs. However, when she reported to various doctors, particularly in the early years, she indicated that she had not been as diligent as she should have been in completing her home exercise programs.

[81] For example, Mrs. Oberholtzer was recommended to enrol in an independent exercise program for eight weeks, which required her to independently exercise in the gym three times per week. Mrs. Oberholtzer did not fully complete the independent exercise program.

[82] Similarly, at trial Mrs. Oberholtzer testified that she consistently completed stretching exercises at home as recommended by her practitioners. She testified that she continued that program even in 2015. This evidence is at odds with her evidence on discovery where she admitted in 2015 that she was not doing her exercises at all. In 2014 when she was examined by Dr. Kleinman, Mrs. Oberholtzer filled out a form where she stated that she had, “exercises to do but haven’t done too much lately.”

[83] When Mrs. Oberholtzer attended Louise Craig in 2014, Ms. Craig indicated that she was under conditioned, but in 2017 that was no longer a problem. Dr. Lippa indicated that Mrs. Oberholtzer did not do all of the home exercises as consistently as she should have and that it was more likely than not that her recovery would have been better if she had more diligently completed her exercise regime.

[84] Mrs. Oberholtzer admitted that during the period of 2016 and 2017 she did not participate in active rehabilitation to the extent she should have. Her explanation for this was that her father was very sick and later died and she was required to drive back and forth to North Vancouver from Chilliwack to assist him and her mother. Following her father’s death, she assisted in moving her mother to Chilliwack and closing up and selling the family home in North Vancouver. Also in

2018 BCSC 1089 (CanLII)

the summer of 2016, Mrs. Oberholtzer and her husband completed an extensive kitchen renovation.

[85] Mrs. Oberholtzer said that all of these activities in 2016/2017 were extremely time-consuming and did not leave her sufficient time to fully engage in her exercise program. However, Mrs. Oberholtzer's concession that she did not fully do her home exercises in 2016/2017 does not explain her statement to Dr. Kleinman in 2014, Ms. Craig's assessment in 2014, or Mrs. Oberholtzer's discovery evidence in 2015.

[86] The above examples do not represent the totality of the inconsistent evidence of Mrs. Oberholtzer on this point. While I am satisfied that Mrs. Oberholtzer attempted all of the therapies suggested to her, I am not satisfied that Mrs. Oberholtzer performed them all as diligently as she suggested in her direct evidence.

[87] The question in this case is whether Mrs. Oberholtzer's failure to actively engage in active rehabilitation consistently from the accident to date has impacted her recovery. In other words, am I satisfied that her injuries would have either improved or resolved had she fully participated in active rehabilitation?

Ergonomic adjustments at work

[88] The problems that Mrs. Oberholtzer experienced with her supervisor have some relevance in this action as they relate to her treatment plans. Mrs. Oberholtzer was recommended to obtain a workplace ergonomic assessment and obtain certain adjustments from her employer to address her injuries. Mrs. Oberholtzer testified that she was afraid to follow up on some of the recommendations at work because of her difficulties with her supervisor. She appeared to be either afraid to raise the issues with her supervisor or resigned to the fact that raising these issues with her supervisor would only cause greater problems for her at work. As a result, certain workplace ergonomic adjustments were not made in a timely way by Mrs. Oberholtzer.

2018 BCSC 1089 (CanLII)

Conclusion on mitigation

[89] I am satisfied that Mrs. Oberholtzer's injuries would not have resolved had she fully participated in all of the active rehabilitation which was recommended for her, and had she been more aggressive in obtaining workplace ergonomic adjustments. However, I am also satisfied that her injuries would have improved had she been more diligent in completing the treatment recommendations for her, in particular the exercise programs which were recommended to her.

[90] The test for mitigation is that set out by the Court of Appeal in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57: the onus is on the defendant to prove the plaintiff could have avoided all or a portion of his or her loss. In this case where the defence argues the plaintiff did not pursue a course of medical treatment recommended by doctors, the defendant must prove both that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably.

[91] I find that the defendant has proven that Mrs. Oberholtzer acted unreasonably in failing to fully comply with treatments and, in particular, the exercise programs recommended by her physicians. While Mrs. Oberholtzer initially testified that she completed exercise programs diligently, I find that her evidence overstated her compliance and there were significant periods of time where she did not comply with the recommended exercise program. Dr. Lippa agreed that her recovery would have been better had she more fully complied. I find that her recovery was impeded by her failure to fully comply with her exercise program, such that her pain since the accident was worse than it would have been had she fully complied. However, I find that had Mrs. Oberholtzer fully complied, she would still be left with the chronic injuries she experiences today.

[92] This is not a case where the contingency for mitigation should be applied across all heads of damage. I find support from Mr. Justice Sewell's reasons in *Penner v. Silk*, 2009 BCSC 1682 (aff'd 2011 BCCA 135), where each head of

2018 BCSC 1089 (CanLII)

damage was considered individually and then the issue of mitigation was applied to each head of damage, rather than a blanket reduction across all heads.

[93] As such, I find that the plaintiff's non-pecuniary damages which compensate her for her pain and suffering have to be slightly reduced to reflect her failure to reasonably mitigate her injuries by diligently following the recommended treatments. I emphasize the word "slightly" because this is not a case where the plaintiff has not even tried to complete the recommended treatment or has not even started it. In *Gibbs v. Skemp*, [1998] B.C.J. No. 680 (B.C.S.C.), by contrast, the plaintiff did not follow her doctor's advice to be active and exercise regularly and the trial judge accepted that "she basically remained inactive the year that she was off" (at para. 53). The trial judge reduced the non-pecuniary damage award by 10% as a result of her lack of mitigation.

[94] Unlike the plaintiff in *Gibbs*, I accept that Mrs. Oberholtzer did start treatments and pursued them in the years following her injuries. However, her lack of completion of the treatments, coupled with gaps of time where she did not appear to be continuing with the treatments, intensified her pain and suffering.

[95] As a result of Mrs. Oberholtzer's failure to reasonably mitigate the injuries she suffered in the accident, I discount the award for non-pecuniary loss by 5%.

Damages

Non-pecuniary loss

[96] The plaintiff seeks an award of $150,000 in non-pecuniary damages. The cases relied on by Mrs. Oberholtzer resulted in awards to plaintiffs ranging from $95,000-$125,000. The defendant says that Mrs. Oberholtzer is entitled to an award for non-pecuniary damages in the range of $90,000-$100,000, but then seeks a reduction of 40-50% from that range to account for her failure to mitigate her injuries by appropriately completing recommended therapies and making ergonomic adjustments to her place of work.

2018 BCSC 1089 (CanLII)

[97] Non-pecuniary damages are intended to compensate an injured person for such things as pain and suffering, disability, inconvenience and loss of enjoyment of life. The factors to be considered in assessing nonpecuniary damages include:

a) age of the plaintiff,

b) nature of the injury,

c) severity and duration of pain,

d) disability,

e) emotional suffering,

f) loss or impairment of life,

g) impairment of family, marital and social relationships,

h) impairment of physical or mental abilities, and

i) loss of lifestyle.

Stapley v. Hejslet, 2006 BCCA 34, paras. 45-46.

[98] Mrs. Oberholtzer suffered injuries in the accident which have resulted in a long-term impairment in her quality of life. For a number of years the pain was prominent in her upper back, shoulders and arms. Mrs. Oberholtzer suffered from painful headaches for a number of years, and also continues to suffer from pain and reduced functionality in her thumbs.

[99] Mrs. Oberholtzer has found ways to adapt to her current level of pain, but the pain still persists and is exacerbated when she undertakes certain activities which she could perform pain free in the past. She is not expected to significantly improve in the future, and can expect to have flare-ups of pain throughout the rest of her life. While Mrs. Oberholtzer is stoic and continues with activities in her life, it is clear from her evidence and from the evidence of her husband, that these injuries have taken a toll on their relationship and on her lifestyle.

[100] The plaintiff relies on the following cases:

2018 BCSC 1089 (CanLII)

a) *Burke v. Schwetje*, 2017 BCSC 2098, in which a man who was 67 at the time of the accident and suffered thumb and wrist injuries and an aggravation of previously diagnosed arthritis was awarded $95,000. This award included an amount for loss of housekeeping or gardening capacity.

b) *Hooper v. Nair*, 2009 BCSC 862, in which a woman was awarded $110,000, which award included $15,000 for loss of future housekeeping capacity, and was further discounted to $104,500 due to the plaintiff's pre-existing back condition.

c) *English v. Jao*, 2016 BCSC 1975, in which a 32-year-old woman was awarded $105,000 for injuries to her spine, right neck, shoulder girdle, and hip, and the development of thoracic outlet syndrome.

d) *Easton v. Wolovets*, 2015 BCSC 210, in which a 33-year-old man was awarded $125,000 for significant pain and discomfort arising from his injuries which included thoracic outlet syndrome, myofascial pain, chronic pain, depression and anxiety.

[101] The defendant relies on the following cases:

a) *Andrews v. Mainster*, 2014 BCSC 541, in which a 51-year-old woman was awarded $85,000 for injuries to her sternum, an exacerbation of pain in her neck and right arm, soft tissue injuries to her right shoulder, upper back, low back and right hip, and an exacerbation of her anxiety disorder. This award represented the final discounted figure, which took into account the court's conclusion that only half of her psychological injuries and symptoms were caused by the accident.

b) *Quinlan v. Quaiscer*, 2009 BCSC 1288, in which a 43-year-old woman was awarded $90,000 for wrist, shoulder and chest pain arising out of the accident as well as PTSD and chronic pain.

2018 BCSC 1089 (CanLII)

c) *Van Den Hemel v. Kugathasan*, 2010 BCSC 1264, in which a woman was awarded $75,000 for soft tissue damage to the neck, shoulders and back resulting in chronic pain.

d) *McCarthy v. Davies*, 2014 BCSC 1498, in which a 47-year-old woman was awarded $100,000 for chronic pain in her neck, shoulder and back with associated mental distress.

[102] I have reviewed all of the cases relied on by both parties and find that an award of $95,000 is appropriate for non-pecuniary damages in this case, which will be reduced by $4,750 to reflect my conclusion on mitigation.

Future Care Costs

[103] Mrs. Oberholtzer presented two reports by Ms. Craig setting out costs of future care. The total present value of the future care claim advanced by the plaintiff is $238,968.

[104] As stated by the BC Court of Appeal in *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62:

> The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary…

[105] Further, the future care cost must be based on the medical evidence provided and there must be a medical justification for the claim: *Milina v. Bartsch* (1984), 49 B.C.L.R. (2d) 33 (S.C.), at 78, 82-84, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[106] I have reviewed the costs of future care as set out in the report of Louise Craig dated January 5, 2018. In this report Ms. Craig has itemized all of the future care costs which are claimed by Mrs. Oberholtzer, along with the cost of each item.

[107] The plaintiff tendered Mr. Doug Hildebrand, who was qualified as an economist with expertise in providing opinion evidence on the present value of future income loss and the cost of future care. To the extent I accept the costs contained in the Craig report, I accept also the present value of such costs as determined by Mr.

2018 BCSC 1089 (CanLII)

Hildebrand. To the extent my award varies from the amount set out in the Craig report, the present value of the award will have to be determined by an economist. If the parties cannot agree on the calculation it will need to come back before the registrar.

Future medical care costs

[108] Of the future medical care costs set out in the Craig report, the majority of the treatments are covered by MSP and in my view are not recoverable in this action. Procedures which are not covered by MSP include surgery for thoracic outlet syndrome. I do not accept that this is medically required. Dr. Salvian testified that he did not think this would be an appropriate surgery for Mrs. Oberholtzer and Mrs. Oberholtzer herself stated that she did not want to have the surgery. Therapeutic Botox was also set out in the list by Ms. Craig. I do not accept that therapeutic Botox is medically necessary or reasonable on the evidence before me. No medical expert recommended Botox is medically necessary to address Mrs. Oberholtzer's headaches or any other symptoms.

Evaluation Costs

[109] Ms. Craig sets out a number of evaluation costs. She identifies ergonomic assessments at work and home for a total cost of $1,155. Mrs. Oberholtzer has not had an assessment done at home and has had only a fairly rudimentary assessment done at her workplace. I find that both ergonomic assessments at work and at home, which were recommended by numerous physicians, are reasonable and should be allowed. The present value of the ergonomic assessments has been calculated at $1,142, which I accept.

[110] Hand therapy evaluation has been noted at $85 for a therapist to review her splinting needs. The cost is $85 per session. Dr. Vaisler recommended this evaluation. The report does not indicate that more than one session is required and I accept that this is a reasonable cost that should be allowed. The present value of hand therapy evaluation is $84.

2018 BCSC 1089 (CanLII)

Therapeutic Modalities

[111] The Craig report sets out a number of projected therapeutic modalities. My assessment of these is set out below. Where I allow a yearly cost, I have set out the cost based on the Craig report. The present value of such cost over the course of Mrs. Oberholtzer's lifetime will be the subject of a further calculation.

a) *Physiotherapy, (including acupuncture)*. Physiotherapy was recommended by Dr. Kleinman and Dr. Vaisler for symptom management during flare-ups. I accept that physiotherapy will be required for symptom management during flare-ups. Ms. Craig has estimated 6 to 12 times per year ongoing throughout her life. I do not accept that that amount of physiotherapy is reasonable based on the evidence before me. I find it reasonable to award Mrs. Oberholtzer four physiotherapy sessions per year throughout her lifetime. A range of costs were presented for initial and subsequent visits. I award Mrs. Oberholtzer $400 per year for physiotherapy visits. The present value of these physiotherapy sessions will need to be determined.

b) *Physiotherapy - active neck rehabilitation*. Physiotherapy for an active neck rehabilitation program was recommended by Dr. Vaisler. I accept that this is a required treatment and I accept the range set out by Ms. Craig, namely $600-$1,473. Mr. Hildebrand has determined the present value of this cost to be $1,024, which I accept.

c) *Massage therapy*. Dr. Lippa and Dr. Vaisler both recommended massage therapy to manage pain flare-ups. I accept these are medically necessary. In keeping with my assessment of the flare-up episodes which are referred to above, I find that Mrs. Oberholtzer is likely to require four massage therapy sessions per year throughout her lifetime, and I value the annual cost of those sessions to be $450. The present value of these massage therapy sessions will need to be determined.

2018 BCSC 1089 (CanLII)

d) *Physiotherapy required post-surgeries*. Ms. Craig has calculated the cost of physiotherapy required post-surgeries for thoracic outlet syndrome and thumb reconstruction surgery. I do not accept that these surgeries are a reasonable possibility based on the evidence and I do not award any costs for such therapies.

e) *Feldenkrais physiotherapy*. Feldenkrais physiotherapy was recommended by Dr. Salvian. Based on the evidence before me and the testimony of Mrs. Oberholtzer, I do not accept that this is a therapy which is medically necessary or which she would undertake and I decline to award any costs for it.

f) *Supervised exercise program*. Dr. Salvian, Dr. Lipp, Dr. Vaisler, and Dr. Kleinman all recommend a supervised exercise program for Mrs. Oberholtzer. She has had this recommendation for some time and has partially completed it. However, I am satisfied that this continues to be medically necessary and is a reasonable cost to be awarded to Mrs. Oberholtzer. This has not been presented as an annual cost, but rather is a total of 12 sessions. Ms. Craig has costed 12 sessions and I award $840 to complete all 12 sessions. The present value of the supervised exercise program is $830.

g) *Psychological counselling/cognitive behavioural therapy.* As I have concluded that Mrs. Oberholtzer did not suffer from psychological issues arising out of the accident, I make no award for this therapy.

h) *Multidisciplinary pain program*. Dr. Vaisler recommended that Mrs. Oberholtzer be assessed by a multidisciplinary pain clinic to address her neck and upper back symptoms. Ms. Craig provided a range of cost for different programs. I find the program offered by ChangePain to be a reasonable cost flowing from the recommendations of Dr. Vaisler. I award $860 for the cost of that program. The present value of this pain program will have to be determined.

2018 BCSC 1089 (CanLII)

Medications and supplements

[112] The Craig report sets out yearly costs for various pain medications including Tylenol, Flexeril, and Nortriptyline. Based on the Craig report, I find that a yearly cost of $250 for pain medications is reasonable. I do not accept that Mrs. Oberholtzer will require therapeutic doses of antidepressants or anti-anxiety medications as set out in the Craig report. The present value of the award for medications will have to be determined.

Orthopedic equipment needs

[113] I accept the evidence of Dr. Lippa and Dr. Vaisler that customized thumb splints are required for Mrs. Oberholtzer. Ms. Craig has estimated the total cost per year to be between $85 to $250 for two splints (one on each thumb). The average cost for customized working splints is $168 per year. The present value of these costs is $790.

[114] I do not find that surgery on the thumbs is likely to be required, and I decline to award costs for post-operative splints.

[115] Ms. Craig recommended a specialized pillow for Mrs. Oberholtzer. I do not accept that this is medically necessary.

Aids for independent functioning, and supply needs

[116] Ms. Craig has recommended a number of items under these two headings. I do not find that the necessity of these aids has been satisfactorily established and I decline to make any award.

Ergonomic equipment

[117] The Craig report sets out the cost for dictation software and a headset for work. The necessity of these devices has not been satisfactorily established and I decline to make an award for them.

[118] Two workplace adaptations were suggested in the Craig report, including an ergonomically adjustable chair and a sit/stand workstation. I find that the necessity of

2018 BCSC 1089 (CanLII)

the plaintiff providing these workplace adaptations, as opposed to them being provided by her employer, has not been established and I decline to award these costs.

[119] A cost has been provided for a contoured back support, as recommended by Dr. Vaisler. This back support will assist the plaintiff in her non-work environment, including while driving. I accept the necessity of this device and award an amount of $100 every five years. The present value calculation performed by Mr. Hildebrand appears to use a base cost of $505 for this item, and I am not satisfied this is accurate. The present value of the contoured back support will need to be determined based on a cost of $100 every five years.

Attendant/home care

[120] The Craig report sets out costing for home care needs following surgery. I do not accept that surgery is required and so decline to make any award with respect to such home care costs.

Household chores, yard and garden care

[121] The Craig report sets out costs for regular lawn and garden care, and heavier seasonal garden care. Yard and garden care were tasks shared by Mr. and Mrs. Oberholtzer prior to the accident. Mr. Oberholtzer has taken on responsibility for lawn and garden care since the accident.

[122] The plaintiff has been specifically advised by Dr. Lippa and Dr. Vaisler that to do heavy outdoor work will exacerbate her symptoms. I accept that Mrs. Oberholtzer will be required to hire additional people to assist Mr. Oberholtzer with garden and yard care work and I award $500 per year for this cost. The present value of this award will have to be determined.

[123] The plaintiff has been advised by Dr. Lippa, Dr. Salvian, Dr. Kleinman, and Dr. Vaisler that repetitive activities of housework that require reaching out, including cleaning, mopping, vacuuming, etc. will exacerbate her symptoms. I accept that Mrs. Oberholtzer will be required to hire people to perform household cleaning, including

2018 BCSC 1089 (CanLII)

heavier seasonal cleaning. I award Mrs. Oberholtzer $1,440 per year to support her cleaning needs. The present value of this award is $25,030.

Handyman services

[124] Mrs. Oberholtzer claimed 15 hours per year of handyman services to address her inability to do such things as painting and assembling furniture. I am not satisfied that the basis for such an award has been established and I decline to award any costs for handyman services.

Gym pass

[125] The consistent recommendation from all healthcare practitioners who have treated Mrs. Oberholtzer was that she must continue a regular exercise program to alleviate her symptoms. At trial Mrs. Oberholtzer stated that she was reluctant to use a gym because she did not like having to exercise with men, who she felt leered at her. She was also concerned about the cost of memberships.

[126] I am satisfied that it is medically necessary for Mrs. Oberholtzer to have access to a gym facility to maintain her recommended exercise program and alleviate her pain symptoms from the injuries resulting from the accident. She will need this for the duration of her life. The Craig report provided costing for a gym membership, taking into account reduced fees from age 60 forward. I accept the costs set out in the Craig report. The present value of the gym membership is $9,439.

Vocational counselling and assessment

[127] Mrs. Oberholtzer has advanced claims for vocational coaching and assessment in the event she chooses to leave her job. I am not satisfied that Mrs. Oberholtzer will leave her employment with Scotiabank. She has been in that job for over 30 years and gave no indication at trial that she was seriously looking at changing her job. As such, I decline to award any amount for vocational counselling or assessment.

2018 BCSC 1089 (CanLII)

Special damages

[128] The plaintiff claims special damages in the amount of $11,935.19. The defendant agrees with these costs, except for the cost of a self-propelled mower she bought in April 2017 in the amount of $624.96. The defendant takes the position that this mower was unnecessary. Mrs. Oberholtzer takes the position that the mower was a reasonable cost as she was unable to continue to use her old mower due to her injuries.

[129] I find that the cost of the mower was reasonable at the time it was purchased. It was purchased in an attempt to allow Mrs. Oberholtzer to continue doing the yard work she did prior to the accident. Ultimately, even the self-propelled mower was not enough to allow her to continue to do this yard work. However, this does not make the purchase of the mower an inappropriate cost at the time. As such, I allow special damages in the total amount of $11,935.19.

Employment losses and loss of future earning capacity

[130] Mrs. Oberholtzer has a past wage loss claim in the amount of $1,545.11. This claim is accepted by the defendant.

[131] Mrs. Oberholtzer has shown great resilience in her employment since the accident. In 2017, she not only completed a full-time workload but accrued a significant amount of overtime.

[132] In April 2018 Mrs. Oberholtzer began to work reduced hours on a six-month trial basis. This was recommended by Dr. Lippa to address her ongoing pain in her thumbs and the pain in her left shoulder. Dr. Lippa was hopeful that reduced hours would prevent a further decline in function. As a result of her reduced hours, Mrs. Oberholtzer's income has been reduced by $416 every two weeks, or $10,816 per year.

[133] In addition to her reduced hours, Mrs. Oberholtzer has had several modifications made for her at her job. Scotiabank has changed her duties so that

2018 BCSC 1089 (CanLII)

she has reduced responsibility with respect to such things as picking up heavy money bags.

[134] Prior to the accident, Mrs. Oberholtzer intended to work until age 65. She now claims that she will be forced to retire five years earlier than she otherwise had planned to. The plaintiff makes this claim based on her assertion that she is facing a chronic condition which is likely to worsen at least insofar as her thumbs are concerned, and her condition of thoracic outlet syndrome is at risk of worsening as well. She claims that she may need surgeries in the future. Mrs. Oberholtzer also argues that her current and future psychological state is vulnerable and that she is at risk of suffering from a major depressive disorder and generalized anxiety disorder if her physical condition deteriorates, which she says is likely.

[135] For the reasons set out above, I do not accept there is a real and substantial possibility that Mrs. Oberholtzer will require surgeries in the future. I also do not accept that there is a real and substantial possibility that Mrs. Oberholtzer will suffer from a major depressive disorder or a generalized anxiety disorder relating to the injuries she suffered in the accident.

[136] I find that Mrs. Oberholtzer is likely to continue to suffer from pain and limitations of use related to her thumbs in the future. I also find that there is a real and substantial possibility that her thoracic outlet syndrome will continue into the future and will impact her ability to work. However, I do not accept that Mrs. Oberholtzer will retire prior to her originally planned retirement age of 65.

[137] I find that Mrs. Oberholtzer will require a reduced workload until age 65 in order to accommodate her injuries, and to avoid any further exacerbation of her symptoms. As such, I find that as a result of the accident Mrs. Oberholtzer will suffer employment losses of $10,816 per year, and such losses will continue to age 65, adjusted for general wage inflation in BC.

[138] Mr. Hildebrandt provided an economic report which addressed the impact of Mrs. Oberholtzer retiring early. It did not address the impact of a reduced work

2018 BCSC 1089 (CanLII)

schedule until age 65. As such, the determination of the present value of Mrs. Oberholtzer's loss of future income will need to be made by an economist. If the parties cannot agree on the calculation, it will need to come back before the registrar.

2018 BCSC 1089 (CanLII)

Conclusion

[139] I find that Mrs. Oberholtzer suffered injuries to her neck, upper back, shoulder and thumbs in the accident, which injuries remain symptomatic to the present and are likely to continue throughout her life. These injuries have reduced her functional capacity in a number of ways which will require adaptations in her work life and her personal life. I also find that Mrs. Oberholtzer suffered from headaches as a result of the accident, which had generally resolved by the time of trial.

[140] I award the following damages to Mrs. Oberholtzer:

a) Non-pecuniary damages in the amount of $90,250 ($95,000 reduced by 5%).

b) Future care costs for ergonomic assessments, hand therapy evaluation, physiotherapy (active neck rehabilitation), supervised exercise program, thumb splints, cleaning needs, and a yearly gym pass, with a present value of $38,339.

c) Future care costs with a present value to be determined for:

   i. physiotherapy, including acupuncture, of $400 per year,

   ii. massage therapy of $450 per year,

   iii. ChangePain clinic in the total amount of $860,

   iv. medications in the amount of $250 per year,

   v. a back support in the amount of $100 to be replaced every five years, and

vi. additional yard and garden assistance at a cost of $500 per year.

d) Special damages in the amount of $11,935.19.

e) Past wage loss in the amount of $1,545.11.

f) Loss of future earning capacity in the annual amount of $10,816, in 2018, with a present value to be calculated taking into account an effective retirement age of 65 and wage increases at the general wage inflation rate in BC. Loss of future earning capacity is to be calculated commencing on April 1, 2018.

[141] If the parties cannot agree on costs after reviewing my decision, counsel can speak to this issue or provide written submissions. Any submissions on costs shall be completed by August 1, 2018, subject to further direction from the court.

"Baker J."

2018 BCSC 1089 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Olson v. Ironside,*
2012 BCSC 546

Date: 20120416
Docket: M130518
Registry: New Westminster

Between:

Kelsey Lee Olson

Plaintiff

And

Eric James Ironside

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Josephson

Reasons for Judgment

Counsel for Plaintiff:	B. R. Findlay M. A. Sandor
Counsel for Defendant and Third Party:	T. A. Hulley
Place and Date of Trial:	New Westminster, B.C. February 27 – 29, 2012 March 1, 2, 5, 6, 8 and 9, 2012
Place and Date of Judgment:	New Westminster, B.C. April 16, 2012

2012 BCSC 546 (CanLII)

[1] Then 19 years old, Ms. Olson was injured on October 24, 2008 when the vehicle in which she was a passenger was rear ended by another vehicle in a significant collision that pushed her stopped vehicle into the vehicle ahead. Liability is admitted. With the exception of special damages, all heads of damages are in issue. While the evidence of the plaintiff and her lay witnesses was not significantly challenged, experts for the plaintiff and the defendant have markedly different opinions regarding the cause, nature, severity and duration of her symptoms.

[2] Prior to the accident, all the evidence reveals the plaintiff was happy, active, energetic, outgoing, athletic and highly socially active – to the point that her grades suffered. She was a highly valued full time employee at Red Robin, a chain restaurant, and readily capable to meet the significant physical demands associated with her job as a cook. That all changed after the collision. She suffers ongoing pain in the back and neck, headaches, migraine headaches, anxiety, depression and became socially isolated and inactive. She has been terminated from two different restaurants since the accident because of her inability to perform the physical tasks associated with her employment and her frequent absences due to her symptoms. She now works part time with accommodation for her symptoms.

[3] The following is a list of injuries that the plaintiff claims were caused by the collision:

1. Chronic soft tissue injuries with daily myofascial pain in her neck and upper back.
2. Chronic soft tissue injuries with intermittent myofascial pain in her lower back.
3. Chronic daily cervicogenic headaches.
4. Significant and debilitating exacerbation of pre-existing migraine headaches, occurring 2 or 3 times a week.
5. Post-traumatic thoracic outlet syndrome, bilaterally.
6. Chronic sleep disruption.

2012 BCSC 546 (CanLII)

7. Major depression, presently in partial remission.

8. Post-traumatic stress disorder with nightmares, in partial remission.

9. Permanent right temporomandibular joint (“TMJ”) dysfunction.

[4] Prior the collision, she rarely suffered from headaches and would have migraines only one or two times per year. She suffered from bruxism or teeth grinding, for which she wore a mouth guard until 2007, but had no history of pain or TMJ dysfunction. She had full attendance at her work and her competitive soft ball games and practises.

[5] The plaintiff found the collision a most frightening experience, one in which she feared she would die. She was left distraught and in tears. This experience was exacerbated by the death of a friend in a motor vehicle accident not long before the collision. Ambulance attendants advised her to attend a medical clinic as there were four to five hour waits at the emergency department of the nearest hospital.

[6] She was diagnosed with a grade two whiplash injury and prescribed medications. She then briefly attended a pre-planned birthday party for her close friend, but her condition gradually deteriorated. The next day, she testified that she could hardly move and suffered pain in the front and back of her neck and her back. She has suffered from headaches daily since the collision. She developed sleep problems with associated nightmares, sometimes awakening in tears. She suffered migraines once or twice weekly, sometimes accompanied by nausea and vomiting. Prescribed physiotherapy worsened her headaches to the point she could not continue. Light, smell and sound could trigger the onset of a migraine.

Employment

[7] The plaintiff had been a model employee in various positions at Red Robin and was likely to move up to positions of increasing responsibility and income. Her manager, Mr. Ishkanian, whose evidence was unchallenged, described her as a “fantastic” employee, hardworking, reliable, always on time and one who performed her duties at a high level. She enjoyed her work. He would have encouraged her to move up in the management ladder as she had the demeanour and work ethic for

2012 BCSC 546 (CanLII)

success at that level. He testified however that, at present, he likely would not even hire her now because of her inability to perform her duties to a satisfactory level.

[8] The plaintiff was off work for about three months after the collision. When she returned to work at the restaurant in January of 2009, she was assigned lighter hostess duties and then returned to the line cook position, but others had to do the lifting and other more strenuous duties for her. She often had to miss work or leave work early due to her symptoms. This caused much conflict with her supervisor, who happened to be her older sister, Stephanie Olson, to the point that the plaintiff was told to quit or she would be fired. She left the restaurant in June of 2009.

[9] In early 2009 the plaintiff took part-time employment doing inventory for Sears, where her mother was also employed. There she was accommodated with frequent breaks, allowed to lie on the floor, and given a push cart as she couldn't carry the device used for inventory gathering.

[10] In June of 2009, the plaintiff obtained full time employment with another restaurant where she encountered similar problems, but again was accommodated by co-workers and worked through the pain. After the arrival of a less accommodating new manager, she was terminated in June of 2011 for absenteeism and inability to perform her duties.

[11] Her sister Stephanie was transferred to another Red Robin restaurant in order to close it down. Desperate for assistance in that process, she hired the plaintiff on a short term basis, although the plaintiff's performance there was similar to that witnessed prior to her leaving the other Red Robin restaurant.

[12] The plaintiff then secured part-time employment, again with Sears, in July of 2011. Recently, she transferred to the cosmetics department. As that position involves much standing, she has been given a special mat to reduce her symptoms.

[13] The plaintiff made enquiries regarding employment as a dental hygienist. Her education would likely have required much upgrading to gain entry into such a

2012 BCSC 546 (CanLII)

program. The symptoms she now suffers due to the collision have foreclosed what remained a somewhat remote career possibility.

Symptoms

[14] The plaintiff was an entirely credible witness in describing the impact of the post-accident symptoms on her life. Her evidence was corroborated by family, co-workers and a close friend. Her mother describes the plaintiff as “a completely different person” since the accident, i.e. a socially isolated couch potato. There was no serious challenge in the cross-examination of these witnesses. I accept their evidence. She suffers from sleeplessness, constant headaches, frequent migraine headaches, ongoing back and neck pain, depression and anxiety.

[15] In addition, she developed a painful TMJ disorder in December of 2009 and would awake with a locked jaw, requiring extremely painful treatment. Jaw locking and clicking could occur throughout the day. The problem continues and she will require splints to reduce symptoms. She can only eat soft food to this day.

[16] By 2010, the plaintiff was experiencing panic attacks and nightmares. She had little energy and ruminated on her accident and that of her deceased friend. She became socially isolated and disconnected from all her friends but one. Her doctor diagnosed depression in the spring of 2010 and prescribed anti-depressants.

[17] She was referred to a psychiatrist, Dr. Gopinath, who prescribed medication and counselling. The plaintiff returned to playing soft ball, but only on a recreational level far below her previous competitive level, on the recommendation of Dr. Gopinath. She missed nearly half her games, but playing again improved her mood, though not her physical condition.

[18] She also returned to the gym on medical advice and that also improved her mood intermittently. Fatigue and painful migraines did not permit as much gym attendance as she would have preferred. Stress related to this upcoming trial also played a role in that regard.

2012 BCSC 546 (CanLII)

[19] She testified that she awakes with a headache every day that is mild at first but which gradually worsens as the day progresses. She remains anxious, sad and worries much of the time.

Other Alleged Intervening Causes

[20] Shortly before the collision, a close friend of the plaintiff died in a motor vehicle accident. After the collision, the boyfriend of the plaintiff left her after he became intimate with another woman. Also after the collision, the plaintiff became ensnared in a close internet friendship with a person she believed was a young man. In fact, as she eventually discovered, it was a woman. This caused the plaintiff much upset, to the point that she complained to police.

[21] The defendant asserts that these events were, to some degree, causative of her symptoms after the collision. I reject that submission. The evidence is that the plaintiff and her friends went through a normal grieving process after the fatal motor vehicle accident by supporting each other and visiting the scene of the accident. With respect to the boyfriend, the evidence is that they quarreled as the plaintiff no longer wanted to go out or socialize due to her symptoms. Their breakup may have worsened her emotional condition, but it did so only for a brief period of time.

[22] The internet incident was a betrayal and most upsetting, but its impact on the plaintiff, again, was only temporary. I accept the evidence that she then moved on and I find the incident played no role in her emotional condition or any other symptoms thereafter.

Expert Evidence

[23] There is a conflict in the expert opinion evidence of physiatrist Dr. Koo, called by the plaintiff, and that of neurologist Dr. Eisen, who conducted an independent medical examination for the third party. While both have outstanding credentials and experience, Dr. Eisen’s experience and credentials are particularly noteworthy and that is the primary basis on which the third party asks me to prefer his opinion evidence. The plaintiff asks me to prefer that of Dr. Koo, primarily on the basis that Dr. Eisen’s opinion was based on incorrect facts and assumptions.

2012 BCSC 546 (CanLII)

Dr. Koo

[24] Physiatrist Dr. Koo was an impressive witness, one who was confident in his opinion and had a good ability to explain his conclusions. After a very thorough and lengthy interview and examination on September 25, 2010, he concluded at p. 6-7 in his report of September 25, 2010 that the following conditions resulted from the injuries the plaintiff suffered in the collision:

> 1. Chronic soft tissue injuries with myofascial pain arising from the cervical paraspinal muscles, trapezius, periscapular muscles (rhomboids, infra and supraspinatus) and lumbar paraspinal muscles;
> 2. Chronic cervicogenic headaches;
> 3. Exacerbation of migraines (pre-morbid condition);
> 4. Chronic sleep disruption; and
> 5. Post-traumatic thoracic outlet syndrome bilaterally.

He adds the following:

> In addition, the aforementioned primary and secondary diagnoses that have led to the recurrence of daily pain, disruption of sleep, and interference with her work and daily activities, have likely contributed to the subsequent development of:
>
> 1. Major depression, multifactorial; and possibly
> 2. Right TMJ dysfunction in the context of a pre-injury history of bruxism (grinding teeth), and wisdom teeth extraction.

[25] He is of the opinion that her condition has reached a plateau and states at p. 10 of his report that “she remains at a significantly increased risk for future pain exacerbation and may require periods of activity limitation in the future in the event of re-injury or overuse.”

Dr. Eisen

[26] The well qualified neurologist Dr. Eisen stated: “The natural history of a soft-tissue injury is to heal in about two to three months.” He added that, especially in young people, soft-tissues have an excellent potential for healing.

[27] Finding no neurological deficits in the plaintiff, he states at p. 6 of his December 2, 2011 report:

2012 BCSC 546 (CanLII)

> However, Ms. Olson continues to complain of neck and shoulder pain, lower back pain and headache, now almost 3 years since the MVA. Chronic whiplash, continuing for 2 or more years is unusual (<10% of whiplash).

[28] Dr. Eisen is of the opinion that the ongoing back pain suffered by the plaintiff is largely related to her scoliosis and not the collision. At p. 9 of his report, he expresses his opinion that her headaches are likely to respond to Botox injections, hypnosis, biofeedback, or similar treatments and that "stopping the contraceptive pill is an important issue".

[29] Dr. Eisen stated that that plaintiff "went on to a good recovery and back to work. Things got worse, so something new had to happen." I pause to note that this is simply incorrect as the evidence is clear she did not go on to a good recovery at all and was fired from two jobs due to her inability to cope with the physical demands of a job she previously handled with ease.

[30] With respect to depression, Dr. Eisen states his belief at p. 10 that "the depressive symptoms started sometime after the MVA of October 24, 2008" and that they "are not related to the accident." This is contrary to the evidence of psychiatrist Dr. Gopinath, to whom he defers, and the evidence of Dr. Koo.

[31] He disagrees with Dr. Koo's diagnosis of thoracic outlet syndrome ("TOS"), stating at p. 8 that "[t]he Pathological data explaining "neurogenic TOS" is very limited and there is none to confirm the idea of whiplash-induced TOS, in the absence of severe injury to the thoracic outlet area."

[32] While deferring to psychiatrist Dr. Gopinath, Dr. Eisen nonetheless disagreed with the finding of post traumatic stress disorder, believing that only a severe head injury can result in that diagnosis.

[33] At p. 9 of his report, Dr. Eisen concludes that the plaintiff suffered a whiplash injury in the accident, which resulted in "a syndrome complex typical of this type of injury with significant improvement after about four months. The improvement was sufficient to enable her to start working, at first part time and within a few weeks full time." It is clear that Dr. Eisen was unaware of the evidence that the plaintiff

2012 BCSC 546 (CanLII)

continued with significant symptoms that altered all aspects of her life and prevented her from carrying out former employment duties in a satisfactory manner.

[34] After agreeing in cross-examination that the accuracy of his facts and assumptions is important to his opinion, Dr. Eisen acknowledged that he didn't know the frequency of the plaintiff's pre-collision headaches nor that they were not accompanied by seeing purple dots and nausea to the point of vomiting as was the case post-accident. He wrongly believed that, prior to the accident, the plaintiff had attended the emergency ward with migraines. He did not note that pre-accident headaches did not interfere with the activities of the plaintiff, nor that the plaintiff had been an outgoing, happy and well-adjusted young person before the accident.

[35] Dr. Eisen agreed he was unaware of the frequency or time frame of pre-accident back strains, nor that there had been no back problems for two years prior to the accident.

[36] Regarding TMJ symptoms, while outside his area of expertise, he agreed he was wrong regarding pre-accident jaw clicking.

[37] Saying that he was "totally muddled about time sequences", he was mistaken about the time of the death of the friend of the plaintiff when stating that he believed the death was shortly before 2010 rather than a month before the accident.

Reply of Dr. Koo to the Report of Dr. Eisen

[38] Regarding the plaintiff's TMJ symptoms, Dr. Koo responded that, in his experience, this is a common phenomenon for persons with pre-existing vulnerabilities to the disorder, such as the plaintiff, as the symptoms can be exacerbated by the pain and muscular tension in the neck and shoulders, with associated stress and anxiety, flowing from a whiplash injury.

[39] Dr. Koo disagreed with Dr. Eisen's opinion that Botox injections, hypnosis, and biofeedback would be viable treatment modes for the plaintiff's headaches, stating the following at p. 3 of his January 5, 2012 report:

2012 BCSC 546 (CanLII)

> Moreover, given the chronicity of her underlying myofascial pain and the cervicogenic nature of her chronic daily headaches, the treatments he has outlined are worth trying, as they may produce some degree of symptomatic temporary benefit, but are unlikely to be curative, given the chronicity and severity of her headache symptoms to date.

[40] Dr. Koo also disagreed with Dr. Eisen's opinion that the low back pain was likely the result of pre-existing scoliosis, stating that the majority of cases of mild scoliosis are completely asymptomatic. If the cause was scoliosis, Dr. Koo would expect "more indolent, chronically recurring back pain" rather than the sporadic and isolated episodes related to sporting activities (see p. 4-5 of his report).

[41] In disagreeing with Dr. Eisen's opinion that whiplash injuries cannot give rise to the plaintiff's disputed TOS, Dr. Koo produced three articles that demonstrate the opposite.

[42] Regarding depression, Dr. Koo offers this strong opinion at p. 7:

> It is my experience, having worked extensively with patients recovering from life-changing injury or illness, that reactive depression following a significant traumatic event is a common psychological reaction that often begins in a delayed fashion, as the chronicity of pain, impairment and disability start to take their toll, and hope for normalcy fades, requiring emotional adjustment and bereavement of loss. The secondary losses attributed to such traumatic events, including financial strain, loss of employment opportunities, reduced socialization, inactivity, limited leisure pursuits, and disrupted sleep arising from pain, can all contribute to the development of a delayed, reactive depression.

Dr. Koo concludes at p. 8 that:

> In my opinion, Ms. Olson's recovery has been slow, protracted and incomplete, with persisting symptomatic and functional impairment.

Dr. Grypma

[43] Orthopaedic surgeon Dr. Grypma states in his January 25, 2012 report that "I found Ms. Olson's current subjective complaints indicate non-specific neck pain."

[44] He concluded that the plaintiff's lower back symptoms had recovered. This conclusion was based in part on his observation that the last notation of lower back pain was on the date of the accident and there was no further note of such pain in the medical legal report of her family doctor, Dr. Dugdale.

2012 BCSC 546 (CanLII)

[45] He adds the following at p. 10-11:

> Ms. Olson complains of enduring symptoms of burning, aching, dull aching symptoms although on physical examination her symptoms were described as pulling and stretching. I found her symptoms today more compatible with deconditioning rather than enduring injury from the subject motor vehicle accident.
>
> …
>
> No objective findings were noted on physical examination related to the motor vehicle accident and I could not find any signs suggesting any injury or pathology related to the subject motor vehicle accident. The natural history of a soft-tissue injury is to heal in about two to three months.
>
> …
>
> As far as disability is concerned, Ms. Olson likely had total disability for approximately two to three months. She likely had partial disability for two to four weeks. On examination today, I could not find any objective findings to support ongoing disability. In the absence of structural damage, disability is highly unlikely. Ms. Olson states today that she is able to do everything but has some limitations with lifting. Residual disability after two to three months is highly unlikely. There may be some discomfort which is unlikely to cause any limitations.

Reply of Dr. Koo to the Report of Dr. Grypma

[46] After reviewing updated medical information and re-examining the plaintiff, Dr. Koo states in his report of February 10, 2012 that:

> … [S]he continues to have ongoing nociceptive pain of myofascial origin of the neck and periscapular muscles, TMJ dysfunction and that of the mastication muscles of the right side. This does not conform to my understanding of “nonspecific” pain, in that underlying pain identifiers are easily identified.
>
> …
>
> In my opinion, she has ongoing partial disability related to her present and previous vocation and that her enjoyment in working is likely diminished on the basis of her activity-related pain.
>
> She also reports activity restrictions at the gym with relative intolerance of heavier weight lifting as it relates to back strengthening exercises or those that involve shoulder muscles.
>
> In my opinion, she continues to have partial disability as it relates to her work and recreational pursuits, and this disability is likely to be permanent on the basis of the duration and severity of her symptoms to date.
>
> …
>
> Overall, I agree with the work-related estimations which were evidenced in Ms. Olson’s inability to continue working as a line cook, as predicted. I also

2012 BCSC 546 (CanLII)

> anticipate that her pre-injury goal of a dental hygienist is precluded on the basis of her post-accident pain and activity restrictions.
>
> …
>
> In my opinion, she continues to have permanent partial disability on the basis of her motor vehicle accident conditions, as evidenced by her personal history of work intolerance, interference with gym and daily activity, and functional capacity limitations as reported by Ms. Hunt.

Dr. Gopinath

[47] The treating psychiatrist of the plaintiff provided a report dated December 13, 2010. After observing that the plaintiff had functioned well despite a family history of mood disorder and anxiety disorder, he concluded that the plaintiff had coped well with the death of her friend shortly before the accident.

[48] He adds at p. 5-6 of his report:

> The impact of the accident has been many:
>
> 1) Whiplash injury causing soft tissue damage, chronic dull aching pain of the neck, upper back, shoulders, lower back which is continuing even now requiring some analgesics and muscle relaxants. This has considerably limited her level of activity and sleep.
>
> 2) Psychological problems. The accident has caused some Post Traumatic Stress Disorder with increasing anxiety, hypervigilance, poor attention and concentration, nightmares with re-experiencing of the trauma in her dreams as well as nightmares of seeing her deceased friend. It is known that current traumatic events can trigger memories and flashbacks of previous traumatic experiences. However her Post Trayumatic Stress Disorder is in partial remission.
>
> 3) Major depression. Her Post Traumatic Stress Disorder as well as chronic pain with some limitation of movements, disruption of sleep and also loss of relationship has triggered an episode of major depression in the last 8 months which is typical of a mood disorder. Though she is at risk of developing a mood disorder due to the genetic risk unfortunately the accident has brought forward and precipitated the onset of mood disorder. Though she is likely to fully remit from the current episode unfortunately she is vulnerable to future relapses and remissions despite successful resolution of her chronic pain and Post Traumatic Stress Disorder.
>
> 4) Social disruption. In terms of loss of finances from inability to function due to the pain and loss of relationship with her boyfriend due to inability to be engaged in quality time on account of persistent pain, preoccupation of the accident and depression.

2012 BCSC 546 (CanLII)

> …
>
> Ms. Olson in my opinion is suffering from Post Traumatic Stress Disorder, Generalized Anxiety Disorder, panic attacks as a consequence with a mild degree of agoraphobia. Though she had some chronic low-grade depression since the time of the accident on account of the pain and post traumatic symptoms as reminders this has culminated in a major episode of depression making her biological vulnerability for depression to manifest ahead of time. Unfortunately this is likely to recur in the future regardless of any stresses. The Post Traumatic Stress Disorder itself, though likely to improve, unfortunately is going to leave her with some degree of vulnerability to have further anxiety and also Post Traumatic Stress Disorder features with even unrelated stressors.

[49] Dr. Gopinath revisited the issues in his report of November 25, 2011. He concluded that her depression was in remission and that she still suffered from symptoms of mild post traumatic stress disorder. The plaintiff, he concluded, is now vulnerable and fragile and at a much greater risk of suffering another major depressive disorder.

Conclusion Regarding Conflicting Expert Opinion Evidence

[50] I accept the opinion evidence of Dr. Koo where it differs from that of Dr. Eisen and Dr. Grypma. Firstly, Dr. Koo proceeded only after a very thorough review of the information and after a thorough interview and examination of the plaintiff. His opinion was based on an accurate version of the facts and assumptions. His evidence was convincing and best explains why the plaintiff clearly continues to suffer from symptoms, even though she only sustained a soft tissue injury in the motor vehicle accident.

[51] Dr. Eisen, though a highly qualified neurologist, proceeded on the basis of some inaccurate facts and assumptions, which significantly weakens his opinion. In any event, his evidence is that over 90% of persons who suffer soft tissue injuries recover. If so, I would conclude that the plaintiff is in that 10% minority.

[52] I accept the plaintiff's submission that the opinions of Dr. Grypma are weakened by the lack of a thorough and complete examination, his failure to acknowledge her headaches and TMJ dysfunction, and his failure to consider significant material facts.

2012 BCSC 546 (CanLII)

[53] I found the replies of Dr. Koo to the evidence of both Dr. Eisen and Dr. Grypma to be convincing and reliable.

Ms. Janet Hunt

[54] Ms. Hunt did a work capacity evaluation of the plaintiff and estimated the cost of future care. Ms. Hunt found limitations to the plaintiff negatively affecting almost all but sedentary types of employment, including reaching, handling, fingering or feeling. The plaintiff is limited to sedentary and light strength demands with occasional medium strength work up to waist height and light-medium strength carrying over short distances. Even with sedentary types of employment, the plaintiff has sitting, standing and walking limitations.

[55] She recommends care in the nature of physiotherapy, psychological counseling, vocational assessment and counseling, occupational therapy consultation and TMJ treatment.

TMJ Dysfunction

[56] The plaintiff's longtime treating dentist, Dr. Pirani, is of the opinion that the accident is the cause of the TMJ dysfunction. The dentist retained by the third party, Dr. Mehta, expressed some difficulty linking this dysfunction "directly" to the accident, but he basically agrees with Dr. Pirani's assessment.

[57] Dr. Pirani states the following in his March 15, 2011 report:

> The most likely question that will be raised is to why she developed symptoms of the TM Joints almost fifteen months after the MVA.
>
> The etiology of Temporomandibular Joint Disorder (TMD) is multi-factorial, with predisposing, initiating and perpetuating factors. When a patient can no longer compensate or adapt for these factors, the patient becomes symptomatic.
>
> In Ms. Olson's case, she always had increased occlusal forces on the right, but she had been asymptomatic. The macrotrauma was the initiating factor and the perpetuating factors are increase in personal stress, antidepressants, chronic pain and increased parafunctional habit of clenching and grinding her teeth. This microtrauma is defined as prolonged, repeated adverse loading of the masticatory system, through postural imbalance and/or from oral parafunctional habit.

2012 BCSC 546 (CanLII)

> There is a direct relationship between forward head posture, loss of normal cervical curve and the Mandibular position. As the neck loses its normal cervical curve, it brings the Mandible further up and back, resulting in the condyle to posture further back in the fossa, and invading posterior joint space. This results in discal ligaments to elongate and cause disc displacement.
>
> …
>
> During the hyperflexion episode, teeth can come together with tremendous force, resulting in enamel and cervical fractures and hyperemic pulps. These symptoms may not become apparent for months or years later and therefore the dentition has to be monitored for a very long time.
>
> …
>
> Ms. Olson sustained a permanent injury to the right TM Joint when she was involved in a double impact MVA (rear and frontal end collision) on October 24, 2008.

[58] Dr. Mehta puts it this way in his February 14, 2012 report:

> The significant history of pre-motor vehicle collision bruxing history combined with the patient's and family history of depression, anxiety and panic attacks, post traumatic stress disorder coupled with chronic neck and shoulder pains as well as headaches is most likely related to the onset of jaw problems fourteen months following trauma history.

[59] Thus, I have no difficulty in concluding that, but for the motor vehicle accident in issue, the plaintiff would not have developed this TMJ dysfunction.

Summary of Injuries Caused by the Accident

[60] The plaintiff has proved that, but for the accident, she would have continued her healthy, active and outgoing life style. I accept the plaintiff's submission that the following injuries were caused by the accident:

1. chronic soft tissue injuries with myofascial pain in her neck and upper back present on a daily basis;
2. chronic soft tissue injuries with myofascial pain in her lower back present on an intermittent basis;
3. chronic cervicogenic headaches present on a daily basis;
4. exacerbation of her pre-existing migraines;
5. post-traumatic thoracic outlet syndrome bilaterally;

2012 BCSC 546 (CanLII)

6. chronic sleep disruption;

7. major depressive disorder, presently in remission;

8 post-traumatic stress disorder, presently in partial remission; and

9. permanent right temporomandibular joint dysfunction.

Non-Pecuniary Damages

[61] The accident had a dramatic effect on all aspects of this young plaintiff's life because of the symptoms listed in the previous paragraph. She has learned to cope as best she can with those symptoms, but is unlikely to fully recover.

[62] Of the several case authorities cited by the plaintiff to assist the Court in determining non-pecuniary damages in the case at bar, the most helpful are *Parfitt v. Mayes et al*, 2006 BCSC 125; *Houston v. Kine*, 2010 BCSC 1289; *Murphy v. Jagerhofer*, 2009 BCSC 335; *Prince-Wright v. Copeman*, 2005 BCSC 1306; and *Ashmore v. Banicevic*, 2009 BCSC 211. The non-pecuniary damages awards in these cases range from $80,000 to $120,000.

[63] After reviewing the authorities cited to me and considering the impact of the proven injuries on the plaintiff's daily life, I award the plaintiff $100,000 for non-pecuniary damages, which I consider to be a mid-range award for the circumstances of this case.

Past Wage Loss

[64] The plaintiff was earning $10 per hour plus tips as a restaurant employee at the time of the accident, earning about $1,300 per month. She missed three months, returning in late January or early February of 2009, which approximates a loss of $4,000. From then to the end of May of 2009, she lost approximately $2,600. The plaintiff asks me to assume her income for 2009, but for the accident, would have increased by some $4,000 to $20,000 in seeking an additional $3,375 from June to the end of 2009. A more reasonable assumption would be an increase of $2,000 to $18,000 and I award a total of $13,000 from the time of the accident to the end of 2009.

2012 BCSC 546 (CanLII)

[65] It is reasonable to conclude that the plaintiff would have continued to earn modest increases in her salary over the years. In fact, she earned a taxable income of $10,371 in 2010 and $10,974 in 2011.

[66] Assuming that her income would have increased to $20,000 and $25,000, the plaintiff seeks an award for total past loss of income of $38,655. I find it more reasonable to assume increases to $18,000 and $20,000.

[67] From the time of the accident to the time of trial, the plaintiff has proven a total past wage loss of $32,000.

Loss of Earning Capacity

[68] Given her ongoing symptoms, there is a real and substantial possibility to the point of it being a certainty that the plaintiff will continue to suffer income loss. Because of her limitations, many possible career avenues have been foreclosed. The career she enjoyed and excelled at was in the restaurant business. There is evidence that if she eventually worked her way up to the position of manager, her income could approach $40,000 to $55,000. This is a significant contingency.

[69] There is also the contingency that, if the avenues are explored as recommended by Ms. Hunt, there will be some improvement in her condition or an increased ability to cope with her symptoms while employed.

[70] I am to be guided by the principles set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458.

[71] The greatest likelihood, as earlier stated, is that the plaintiff would have continued in the restaurant business and achieved promotions over time. Less likely is that she would have become a dental assistant earning a similar income. An even more remote possibility is that she would have qualified as a dental hygienist.

[72] There is in evidence the report of Mr. Carson providing the present day value of future loss.

2012 BCSC 546 (CanLII)

[73] After applying contingencies, the plaintiff submits that an award in the range of $500,000 to $800,000 is appropriate.

[74] I award the plaintiff $450,000 for loss of earning capacity.

Cost of Future Care

[75] The present day value of following the recommendations of the experts and Ms. Hunt was not challenged. The present day value of those recommendations is $67,625. It is reasonable to assume that there will be additional costs associated with matters such as housekeeping and yard work. I will award a total of $75,000 under this heading.

Special Costs

[76] These have been proven at $397.55.

Summary

1.	Non-Pecuniary Damages	$100,000.00
2.	Past Wage Loss	$32,000.00
3.	Loss of Earning Capacity	$450,000.00
4.	Cost of Future Care	$75,000.00
5.	Special Costs	$397.55
TOTAL		$657,397.55

[77] The plaintiff will have her costs, with leave to apply in that regard.

"Josephson J."

2012 BCSC 546 (CanLII)

Court of Appeal
No. CA007958

Vancouver Registry

BETWEEN:

KIMBERLEY RENDALL, an infant, by her Guardian ad Litem, MARILYN DORLAND

PLAINTIFFS

(APPELLANTS)

(RESPONDENTS BY CROSS-APPEAL)

AND:

JEFFREY GEORGE EWERT, JOHN EWERT and MARION GRACE EWERT

DEFENDANTS

(RESPONDENTS)

(APPELLANTS BY CROSS-APPEAL)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE ESSON

Before: The Honourable Mr. Justice Carrothers

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Wallace

Counsel for the Appellant: Peter J. Fominoff

Counsel for the Respondent: G. Bruce Butler and T.R. Easton

Date of Hearing: February 3, 1989

Vancouver, British Columbia

1989 CanLII 232 (BC CA)

June 20, 1989

The plaintiff appeals the dismissal, pursuant to the verdict of a jury, of her action for damages against the defendants John Ewert and Marion Grace Ewert.

[Page 2]

The action arises out of a vicious assault perpetrated by the defendant Jeffrey Ewert upon the plaintiff on June 17, 1984. His liability was never in doubt. He did not defend and damages have been assessed against him.

The plaintiff was then aged fifteen years. She was a close friend of Becky Ewert who, like Jeffrey, is an adopted child of Mr. and Mrs. Ewert. Becky had for some time been the girlfriend of the plaintiff's brother Donald, then aged about 18. On June 16, a Friday, the plaintiff was invited to attend a birthday party for Becky at the Ewert residence and to stay overnight. Donald was also at the party and stayed overnight.

The Ewert residence, a two-storey house in Surrey, had been occupied by the Ewerts for over twenty-five years. They had two other adopted children all of whom had grown up in the house. At the time of these events, Becky was the only child living full-time at home with the Ewerts but, on the night in question, her 19 year old sister Sara and one Robert Dyck, an adult friend of the family, stayed overnight in the house. The parents, as well as Sara and Mr. Dyck, slept in the bedrooms on the upper floor.

Jeffrey was then 22. He had for some time been living in an apartment some distance away with a girlfriend. He still had a key to the house and was free to enter and leave when he pleased. On the night in question, it was apparently not expected by anyone in the house that Jeffrey would be there. The plaintiff, her brother and Becky Ewert, after spending the evening outside where there was a barbecue, bedded down in the living room of the Ewert residence.

[Page 3]

It is common ground that, sometime after 3:00 a.m., Jeffrey Ewert entered the house, forcibly removed the plaintiff and administered a beating which has left her permanently brain damaged to the point where she is almost a vegetable. Her absence from the house was not discovered by any of the other occupants until about 7:00 or 8:00 a.m. It was not until 11:00 a.m. that the plaintiff was discovered by the police lying under a bridge where

1989 CanLII 232 (BC CA)

she had apparently been left for dead. At that time, Jeffrey was not suspected as the perpetrator. Some weeks later, it came to light that he had killed a young woman in a somewhat similar fashion about a month before his attack on the plaintiff. He has since been convicted of first degree murder.

The action against Mr. and Mrs. Ewert is based on the Occupiers Liability Act, R.S.B.C. 1979, c. 303. The particulars of negligence set out in the Statement of Claim (in a somewhat abridged form) are these:

> (a) Failing to take any steps to secure the home against entrance by undesirable persons and, particularly, Jeffrey Ewert;
>
> (b) Failing to supervise or protect the plaintiff adequately or at all while a visitor in their home;
>
> (c) In directing or permitting the plaintiff to sleep in an open, unprotected area within the house;
>
> (d) In providing Jeffrey Ewert with a key to the premises;

[Page 4]

> (e) Failing to install or secure proper locking devices;
>
> (f) Permitting or promoting the plaintiff to sleep in the living room in nightwear;
>
> (g) Failing to provide safe accommodation for an infant guest;
>
> (h) Exposing the plaintiff to the foreseeable risk of assault;
>
> (i) Failing to warn the plaintiff either of the foreseeable intrusion of Jeffrey or the risk of assault or abuse;
>
> (j) Failing to protect the plaintiff against assault or abuse;
>
> (k) Promoting or allowing this infant guest to be exposed to or participate in a situation where alcohol or other mind and mood altering substances were available.

The statement of claim includes a number of other allegations relating to the period of time after the abduction of the plaintiff but none of those are now relied upon as a basis for

1989 CanLII 232 (BC CA)

liability. The trial took place over seven days in June 1987. The trial judge left only one question with the jury. That question was:

[Page 5]

> Should Marian and John Ewert or either of them have reasonably foreseen that Kimberly Kendall might be harmed having regard to all the circumstances of the case including what they knew of Jeffrey Ewert, the condition of the premises, activities on the premises and the conduct of Jeffrey Ewert and others on the premises?

The jury answered no to that question.

The appellant raised four grounds of appeal in its factum. Those grounds, along with a fifth ground which the appellant was permitted to raise at the hearing were that the trial judge erred:

> 1. in summarizing the evidence for the jury in a manner contrary to the weight of evidence given at trial;
>
> 2. in restricting the question to the jury to a subjective test as to what the Ewerts knew, rather than the objective test as to what they reasonably ought to have known;
>
> 3. in posing the question to the jury in terms of foreseeability rather than in terms of the duty upon an occupier pursuant to the Occupiers Liability Act;
>
> 4. in failing to instruct the jury concerning the standard of care owed to an infant;
>
> 5. in failing to instruct the jury that there should be a shift in the onus of proof where a breach of duty of care has created a risk where injury occurs within that area of risk.

The only issue of substance arises from grounds two and three combined with a defect in the charge not raised in the factum. Before dealing with those, I will state briefly why I see no substance in Grounds 1, 4 and 5.

[Page 6]

The first ground relates to a brief reference in the charge to one answer by a witness to the effect that the plaintiff's older brother "would look out for her when they were doing things for her." The trial judge said that the witness had stated "that Donald would look out for Kim." I see no possibility of prejudice to the plaintiff from that abridgment of a rather innocuous piece of evidence. No objection was taken at the trial.

The fourth ground is based upon the line of cases holding that a higher standard of care is called for in relation to young children. Those cases have no application to the facts of this case.

1989 CanLII 232 (BC CA)

The fifth ground is based upon McGhee v. National Coal Board, [1972] 3 All ER 1008. That case has sometimes been said to be authority for the proposition that, where it is proved that there has been a breach of duty of care which has created a risk, and injury has occurred within that area of risk, the onus shifts to the defendant to prove absence of causation between the breach and the injury. It is doubtful that, except for a dictum of Lord Wilberforce speaking for himself, the case is authority for that proposition. The question was considered by the House of Lords in Wilsher v. Essex Area Health Authority [1988] 2 W.L.R. 557. Lord Bridge of Harwich, speaking for a unanimous House, referred to those passages in the speech of Lord Wilberforce and said at p. 567:

> My Lords, it seems to me that both these paragraphs, particularly in the words I have emphasised, amount to saying that, in the circumstances, the burden

[Page 7]

> of proof of causation is reversed and thereby to run counter to the unanimous and emphatic opinions expressed in Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613 to the contrary effect. I find no support in any of the other speeches for the view that the burden of proof is reversed and, in this respect, I think Lord Wilberforce's reasoning must be regarded as expressing a minority opinion.

After extensive consideration *of the speeches in* McGhee, Lord Bridge of Harwich said at p. 569:

> The conclusion I draw from these passages *is* that McGhee v. National Coal Board [1973] 1 W.L.R. 1 laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

In any event, the point has no possible application to the circumstances of this case. There is no doubt that the dreadful harm inflicted on the plaintiff resulted from Jeffrey Ewert having entered the house on the night in question. If the Ewerts were in breach of their duty of *care* to the plaintiff in permitting Jeffrey to enter, or in failing to protect her against the consequences that occurred, liability will follow. No question of causation arises.

[Page 8]

1989 CanLII 232 (BC CA)

I return to the second and third issues raised by the appellant. The first complaint is that the question to the jury was phrased in terms of what the Ewerts knew, rather than in "objective" terms as to what they reasonably ought to have known. The second is that it was wrong to put the question in terms of foreseeability rather than in terms of the duty upon an occupier pursuant to the Occupiers Liability Act.

1989 CanLII 232 (BC CA)

The duty of care under the Occupiers Liability Act *is* defined in s. 3 which, so far as relevant, reads:

> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the *case* is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises;
>
> (b) activities on the premises; or
>
> (c) conduct of third parties on the premises.

We were told by Mr. Butler, who was counsel for the defendant at trial, that the question was framed by the trial judge after hearing submissions of counsel and that no objection was made on behalf of the plaintiff to the form of the question. Indeed, it appears that none of the points raised on this appeal were made the subject of objection at trial. Mr. Butler did make a submission to the trial judge based upon what was said by the House of Lords in Home Office v. Dorset Yacht Co. Ltd., [1970] 2 All ER 294 and, in particular, this passage in the speech of Lord Reid at p. 300:

[Page 9]

> These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant.

The submissions of counsel to the trial judge were not recorded but it appears from his ruling, in advising counsel of the language of the question, that he said this (at p. 373 of the transcript):

> ... That question is, Should Marion and John Ewert or either of them have reasonably have foreseen that Kimberley Kendall might be harmed; might be harmed, I do not say would be harmed. I say might be harmed, having regard to all the circumstances in the case, including what they knew of Jeffrey Ewert, the condition of the premises and activities on the premises and the conduct of Jeffrey Ewert and others on the premises, and Mr. Butler, I do not propose talking about Novus Actus, because I think in doing so I might well be taken to be cautioning them against the finding of liability which stems from the Occupiers Liability Act, and I do not think it would be right to do that, ...

It is apparent that the ruling, and the wording of the question, were based on s. 3(1) of the Act. I see no merit in the objection that there should have been no reference to foreseeability. The fundamental issue arising from the

facts was foreseeability. If the risk of Jeffrey Ewert doing what he did, or anything like it, was reasonably foreseeable to the Ewerts, there was a reasonable basis for imposing liability on them. Without that being foreseeable, there could be no basis for liability.

The fact that the word "foreseeability" does not appear in the Occupiers Liability Act is, in my view, of no moment. The most authoritative analysis of the Act is in the judgment of Aikins J.A. speaking for this court in Weiss v. Young Men's Christian Association of Greater Vancouver (1979), 11 B.C.L.R. 112. The essential point which emerges from that decision is that, in applying s. 3(1), it is neither necessary nor desirable to refer to any of the specially formulated standards of care laid down in the common law cases relating to the liability of occupiers. At p. 119, Aikins J.A. quoted the language of Lord Denning M.R. in relation to the analogous English legislation in Roles v. Nathan, [1963] 1 W.L.R. 1117, [1963] 2 All E.R. 908. At p. 912, Lord Denning said:

> ... All the fine distinctions about traps have been thrown aside and replaced by the common duty of care.

The requirement of reasonable foreseeability is, of course, fundamental to the common duty of care. I agree with what was said by Smith J. of the Ontario High Court in

1989 CanLII 232 (BC CA)

Allison v. Rank City Wall Can. Ltd. (1984), 45 O.R. (2d) 141 at p. 145 in discussing the equivalent Ontario statute:

[Page 11]

> As far as the common law is concerned, it may be said to have been superseded by the Act, but only in the sense of the Act having abolished the distinction between invitees and licensees. The case law had of itself gone a long way in that direction. The question which subs. 3(1) directs the Court to ask itself, "Did the defendant take reasonable care in all the circumstances to ensure that persons were reasonably safe while on the premises both in respect of their condition and regarding the activities carried on therein", is not at all different from the questions based upon M'Alister (Donoghue) v. Stevenson, [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L. and the cases following it. Who is my neighbour? Foreseeability and causation remain with us as well.

The question left with the jury, in my view, properly stated the issue which had to be resolved. The real issue in the case arises from a defect in the charge which, although not directly raised by the appellant, must be considered. That is that the charge provided no instruction on the law to be applied by the jury. The charge is the proper place for providing direction on such matters as the duty of care and the application of the objective standard of the reasonable man. The charge should provide the foundation of legal principle to be applied by the jury in answering the question. This charge provided no such foundation.

Again, it appears that no objection was taken by counsel for the plaintiff (who was not counsel before us) to the absence of any instruction on the law. In a civil trial, that is a powerful circumstance militating against treating the defect as grounds for setting aside the verdict. In Kralj v. Murray, [1954] O.W.N. 58, Hope J.A. in giving reasons for dismissing an appeal said at p. 60:

> I am of the opinion that while in certain circumstances a new trial should be ordered, nevertheless

[Page 12]

> the principles set out on behalf of this Court by Meredith J.A. in Caswell v. Toronto R.W. Co. (1911), 24 O.L.R. 339 at 350-1, are here applicable, namely:
>
> > A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests and may fairly be described as necessary evils, when necessary...

1989 CanLII 232 (BC CA)

> A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases, where an injustice has been done to one of the parties at the trial a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.
>
> It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising discretion of its own, grants a new trial, but seldom, and only when the interests of justice plainly require it.

in the present case, no objection was taken at the trial to the learned trial judge's charge on the grounds now advanced by counsel for the appellant and I do not consider that any injustice has been wrought in the light, as I previously stated, of the answers of the jury to the questions submitted.

I would therefore, on all grounds, dismiss the appeal with costs, if demanded.

Counsel for the plaintiff at trial in this case was experienced in jury trials. It is a reasonable assumption that he was content with the way in which

[Page 13]

the case was left with the jury. It is entirely possible (I think likely) that, had objection been made and had the *jury* been charged on the legal principles which it was to apply, '.the plaintiff's position would have been made more rather than less difficult. For one thing, it would have been necessary, in my view, to charge on the issue of novus actus interveniens, generally along the lines stated by Lord Reid in Dorset Yacht (supra).

In any event, I am satisfied, as Hope J.A. was in Kralj v. Murray, that there was no miscarriage of justice. Having considered the whole of the evidence, I see no reasonable possibility that any jury, however fully instructed, would have come to any different conclusion. That is because I see nothing in the evidence from which it could reasonably be inferred that any reasonable person in the position of the Ewerts would have foreseen, even as a possibility, that the plaintiff was at any risk of harm arising from Jeffrey Ewert having access to the house or that any greater precautions were needed.

The Ewerts had no knowledge, and so far as appears no reasonable means of knowledge, of any propensity on the part of Jeffrey to unprovoked violence of the kind which took place. Certainly, they knew nothing of the earlier murder. The relationship *between Jeffrey* and his mother had *been* consistently difficult, sometimes dropping to the level of his pushing, striking and otherwise physically demeaning her. But always that seems to have arisen out of an ongoing bickering relationship between them. On one occasion, he had shown

1989 CanLII 232 (BC CA)

unwanted sexual attention to a friend of his sister of about the same age as the plaintiff, but that was not known about by the parents and seems to have

[Page 14]

been treated by the girl *as a matter* of little consequence. His behaviour and general attitude had, so far as his parents could see, improved in the months since he started living with his girlfriend.

The Ewert home seems in some ways to have been a squalid place where drugs and alcohol were tolerated in a way and to a degree that *is* anything but admirable. Jeffrey had shown himself a difficult and sometimes rather hostile member of the family. But that is different from a propensity for serious or unprovoked violence. He had no criminal record. On the night in question, Mrs. Ewert made a tour of the house about 3:00 a.m. Of the three young people in the living room, only the plaintiff was awake. She was watching television but was very sleepy. She agreed to Mrs. Ewert turning off the television and then appeared to fall asleep. Mrs. Ewert went to the kitchen, had coffee with Robert Dyck and then retired, *as* he also did. Everything appeared peaceful. Sometime later, both parents heard a car arrive and depart. They did not think it sounded like Jeffrey's car but Mrs. Ewert at least thought it might be somebody dropping him off. So each had some means of knowledge of the possibility that Jeffrey entered the house during the hours of darkness. That was not unusual. He kept some of his possessions at the house, had a room in which to sleep, and sometimes returned during the night for that purpose. I see nothing in the evidence from which it could reasonably be inferred that either of the parents should reasonably have foreseen that, if Jeffrey entered the house, he would be a hazard to the guest.

[Page 15]

While it would have been preferable for the jury to have been properly instructed on the law, I see no possibility that the failure to do so affected the result.

ADDENDUM

My reasons to this point were drafted having regard to the issues and authorities raised by the parties. Since writing those reasons, I have read the draft reasons of Mr. Justice Wallace for reaching an opposite conclusion. The authorities cited in those reasons, and a number of the points made, were no part of the submissions before us. I do not propose to respond in any

1989 CanLII 232 (BC CA)

detail to that analysis but will explain briefly why it does not persuade me to alter my conclusion.

1. Whatever the scope of s. 46 of the Supreme Court Act, to which no reference was made during submissions, it does not require a new trial -to be ordered simply because its provisions were not complied with.

2. The differences between our legislation and that of Ontario, although significant, do not render Ontario authorities of no assistance. Section 46 provides that the failure to object at trial does not bar a right to appeal based on the deficiencies in

[Page 16]

the charge, but does not require the appeal to be allowed where no injustice is established.

3. In Pike v. B.C. Electric Railway Company, [1939] 3 W.W.R. 220, 221, Macdonald J.A. for the court said that a new trial would not be directed if it is clear that in any event the action should have been dismissed. I see that as a somewhat different way of stating the test which I have applied.

4. I see no reason to think that the absence of an express direction to apply the standard of the reasonable person, rather than the subjective standard of the Ewerts, had any effect on the result. The natural approach of the jury would be to apply their collective view, not that of the Ewerts, to determine what is reasonable. The issue, although unusual, was straightforward and eminently capable of being understood by the jury. I contrast that with the complex legal and factual issues involving matters outside the ordinary experience of jurors which were involved in the early leading case of Spencer v. The Alaska Packers Assocciation (1904), XXXV S.C.R. 362. In this case, I doubt that a learned disquisition on the law would have added anything useful.

5. The essential fact remains, in my view, that the jury rendered the only verdict reasonably open to it on the *evidence,* and did

[Page 17]

so in response to a question which framed the issue in a way which, if in error at all, was too favourable to the plaintiff.

1989 CanLII 232 (BC CA)

I would dismiss the appeal.

I AGREE:

The Honourable Mr. Justice Carrothers

Court of Appeal

CA007958

Vancouver Registry

BETWEEN:

KIMBERLEY RENDALL, an infant, by her Guardian ad Litem, MARILYN DORLAND

PLAINTIFFS

(APPELLANTS)

(RESPONDENTS BY CROSS-APPEAL)

AND:

JEFFREY GEORGE EWERT,

JOHN EWERT

and

MARION GRACE EWERT

DEFENDANTS

(RESPONDENTS)

(APPELLANTS BY CROSS-APPEAL)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE WALLACE

1989 CanLII 232 (BC CA)

Before: The Honourable Mr. Justice Carrothers

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Wallace

Counsel for the Appellant Peter J. Fominoff

Counsel for the Respondent G. Bruce Butler and T. R. Easton

Date of Hearing: February 3rd, 1989

Vancouver, British Columbia

June 20, 1989

[Page 2]

INTRODUCTION

I have had the advantage of reading the reasons for judgment of my colleague, Esson, J.A., and as I have reached a different conclusion from that which he has expressed, I propose to set out in some detail my reasons for holding that the appeal should be allowed and a new trial be held.

On Friday, the 16th of June 1984, Kimberley Rendall, then 15 years of *age, was* invited to the birthday party of her close friend Becky Ewert and to stay overnight at the Ewert home. At around 4:00 a.m. on the 17th of June, Kimberly was forcibly abducted from the living room of the Ewert home where she had been sleeping. Some distance from the home her abductor physically assaulted her—inflicting injuries which resulted in extreme brain damage to a degree which reduced the child to a vegetative state. He then left her, more dead than alive. As a result of the injuries received, Kimberley is now completely spastic—unable to voluntarily control her movements—unable to speak more than one or two words.

Kimberley's abductor was Jeffrey Ewert, the 22 year old son of Mr. and Mrs. Ewert, whose propensity for violence and episodes of uncontrolled temper I shall review in greater detail later in these reasons. Jeffrey Ewert did not defend the action and damages have been assessed against him. He *is* presently serving a life sentence for the previous murder of a young lady which came to light after his attack on Kimberley.

1989 CanLII 232 (BC CA)

[Page 3]

CHARGE:

In his opening address the trial judge assured the jury that, in his charge, he would explain the law in the context of the facts. However, when he came to charge the jury he only reviewed the evidence. He failed to instruct the jury with respect to the Occupiers Liability Act, 1979 R.S.B.C., c. 303 or to the objective standard of care encompassed within the Act's provisions or how the law should be applied to the particular facts of the case.

Section 46 of the Supreme Court Act R.S.B.C. 1979, c. 397 provides in part:

> " Nothing in an Act or the Rules takes away or prejudices the rights of a party to an action to have the issues for trial by jury submitted and left by the judge to the jury before whom they come for trial, with a proper and complete direction to the jury on the law and the evidence applicable to the issues. The right may be enforced by appeal without exception having been taken at the trial."

It is readily apparent from a reading of s. 46, and from *a* review of the authorities, that it is the duty of a trial judge to direct the jury as to the applicable law and as to how that law is to be applied to the *facts* before them *as* they might find them. Craig v. Struben, [1951] 1 W.W.R.(N.S.) 769, 771 (B.C.C.A.); Prudential Assurance Company v. Edmonds, [1877] 2 A.C. 487 (H.L.); Spencer v. The Alaska Packers Association, [1904] S.C.R. 362, 371.

[Page 4]

In L. V. Wolfe and Sons v. Geisbrecht, [1945] S.C.R. 441 at 451, Mr. Justice Kellock stated:

> "To adopt the language of Lord Watson in Bray v. Ford, cited by Nesbitt, J. in the Spencer case at p.367;
>
> > 'Every party to a trial by jury has a legal and constitutional right to have the case which he has made either in pursuit or defence, fairly submitted to the consideration of that tribunal.'"

Accordingly, as it is the trial judge's obligation to properly instruct a jury, the duty is not negated or diminished by the failure of trial counsel, through neglect or lack of experience, to object to the form of the charge.

TRIAL JUDGE'S DIRECTION TO THE JURY:

As previously noted, the trial judge, in his opening address to the jury, stated:

> " Now then, when all of the evidence is in and you have heard counsel, it will be for me to address you and deliver what is known as my charge to you, and in doing so, I will try

1989 CanLII 232 (BC CA)

> to explain the law to you as it applies to this case. You will have these questions, incidentally, as I say, before you to answer, and I will try to tell you what the law is in respect to those questions, and at the conclusion of that, I will go through my notes with you and recite the evidence as I have it in my notes, so as to remind you of that evidence, and the idea is that you can then put the law, as I will try to explain it to you, in the context of the facts..."

[Page 5]

In the absence of the jury, counsel for the plaintiffs addressed the trial judge in these words:

> "MR. SISETT: Thank you, My Lord. There was another matter, My Lord, that arose in your initial instruction to the jury, that is that we were suing the parents for the conduct of the son, and I just ask Your Lordship to clarify that at some time to the jury, that is, that is not the case. We're not suing the parents on the conduct of the son, we're suing them as occupiers under the three heads of the section.
>
> THE COURT: Are you not suing them under negligence as well?
>
> MR. SISETT: As well, as well, but primarily it's as occupiers of the premises, where there were activities on the premises, where there was a conduct of third parties on the premises and —
>
> THE COURT: I see.
>
> MR. SISETT: Those matters. The actual section —
>
> THE COURT: Well, I will leave that to you Mr. Sissett. You can explain that to the jury and say you have discussed it with me and put that portion forward, so I will not state your position..."

Mr. Sisett commented in these terms, still in the absence of the jury:

> " Now what we're dealing with is under the Occupiers Liability Act. I have a copy of a section to be made available for Your Lordship, in particular section 3, and you'll note the duty of care referred to in subsection 1. I'm reading subsection 2 of section 3.
>
> 'The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises
>
> (b) the activities on the premises
>
> (c) the conduct of third parties on the premises.'
>
> And what is relevant here is the conduct of Jeffery Ewert and his propensity, as we will be dealing with the objective standards of care that applies to negligence and

[Page 6]

> the objective standard of care that applies in this Act in terms of things parents ought to have known about, and of course before we can get to —..."

The addresses of counsel to the jury were not transcribed, so I am unable to comment on the extent to which, if at all, counsel addressed the jury with respect to the Occupiers Liability Act.

1989 CanLII 232 (BC CA)

At the commencement of his address to the jury the trial judge put before the jury the question which they were required to answer. It was in this form:

> "Should Marion and John Ewert or either of them have reasonably foreseen that Kimberley Kendall might be harmed, having regard to all the circumstances of the case, including what they knew of Jeffrey Ewert, the condition of the premises, activities on the premises and the conduct of Jeffrey Ewert and others on the premises?"

The trial judge then reviewed what was said in examination in chief and on cross-examination of each of the witnesses in turn and, having done so, made the following remarks:

> "That concludes the evidence, members of the jury, you will be happy to know, and I will not bother you further with that. As I have told you your verdict, if you are able to arrive at one, must be unanimous, and that is the sole question you have before you which must be answered."

[Page 7]

After further submissions of counsel, which were not transcribed, the trial judge addressed the jury clarifying certain aspects of the evidence and directed them to retire to consider their verdict.

It is apparent from the above that the jury received no instruction from the trial judge on the applicable law or how the law was to be applied to the circumstances of the case. In this respect the trial judge clearly failed in his duty to give that "proper and complete direction to the jury on the law and the evidence applicable to the issues" required by s. 46 of the Supreme Court Act and by the common law.

THE APPROPRIATE DIRECTION AS TO THE LAW:

The Occupiers Liability Act provides in part:

> "Application of Act
>
> 2. Subject to section 3(4), and sections 4 and 9, this Act determines the care that an occupier is required to show towards persons entering on the premises in respect of danger to them, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is by law responsible.
>
> Occupiers' duty of care
>
> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person,

1989 CanLII 232 (BC CA)

[Page 8]

> whether or not that person himself enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises;
>
> (b) activities on the premises; or
>
> (c) conduct of third parties on the premises.
>
> (3) Nowithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risk."

The duty imposed upon occupiers pursuant to the Occupiers Liability Act in the circumstances of this case is the objective duty of reasonable persons fulfilling the role of parents and hosts for an overnight birthday party for their teenage daughter—taking into account the condition of the premises, the activities on the premises, and the conduct of others on the premises.

The standard of conduct is an external and objective one, rather than the individual judgment, good or bad, of the particular occupiers. The duty, and possible breach thereof, cannot be viewed in the light of conduct which Mr. and Mrs. Ewert (with all their particular human frailties) might view as reasonable. Rather, it requires *a* regard for such caution as a person of ordinary prudence would exercise in the view of the prevailing circumstances.

In Glasgow Corporation v. Muir et al., [1943] A.C. 448, [1943] 2 All E.R. 414, Lord Macmillan at p. 457 said:

> "The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal

[Page 9]

> equation and is independent of the idiosyncracies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view...What to one judge may seem far-fetched may seem to another both natural and probable."

1989 CanLII 232 (BC CA)

It is because of that "room for diversity" that the litigants chose to have the issues tried by a jury. In such circumstances they are entitled to the verdict of a properly instructed jury, rather than the opinion of the presiding trial judge or an appellate court.

Regrettably, the question put to the jury was framed so the only issue for the jury's consideration was confined to what Marion and John Ewert should have "reasonably foreseen" in the circumstances. It did not refer to the standard of care which the law requires occupiers to observe as persons of ordinary prudence under the same or similar circumstances.

The question should have put the issue as one of whether or not the defendants failed to take such care, in all the circumstances, as was reasonable to see that Kimberley Rendall could be reasonably safe in using the premises (Weiss v. Y.M.C.A. (1979), 11 B.C.L.R. 112, 119; Allison v. Rank City Wall

[Page 10]

Canada Ltd. (1984), 45 O.R. (2d) 141, 145) and the question should have been considered in the objective context of the reasonable person. It is true, reasonable foreseeability of damage of some kind is an important element in determining the standard of care and liability, but it must be considered in the light of all the circumstances and the duty of the occupier.

The applicable principle has been enunciated by Lord Reid in Wagon Mound No. 2, [1966] 2 All E.R. 709 at 719:

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense."

Although risk of harm to Kimberley Rendall, in all the circumstances, might be considered remote, such remoteness may not preclude the risk from being reasonably foreseeable by a prudent parent or one acting in a like capacity. One is acutely aware of the many instances where the concern of a reasonably prudent parent and their action in negating a risk of harm to their children has avoided damage which many would have characterized as "unforeseeable" when, in fact, it was simply a more remote risk than that which a casual observer usually considers.

1989 CanLII 232 (BC CA)

[Page 11]

In the circumstances of this case the jury should have been directed to consider whether there was a "real risk", although remote, and whether it was a risk which could have been readily avoided with little difficulty, for example, by having the children sleep upstairs in their daughter Becky's bedroom adjacent to the parents' room, the door of which could be locked—or by simply not extending the invitation to Kimberley to stay overnight.

1989 CanLII 232 (BC CA)

THE FAILURE TO INSTRUCT THE JURY ON THE EFFECTIVE TEST OF THE REASONABLE OCCUPIER:

It is apparent from defence counsel's opening that the defendants' case was put to the jury on the basis of what the Ewerts "believed" or anticipated might occur and on what they "knew" about Jeffery and their "foreseeability" with respect to the particular incident—rather than on what persons of ordinary prudence, acting as hosts of teenage children, ought to have appreciated with regard to the potential risk of harm to their young guest and the standard of care to be expected from such prudent hosts in order to avoid foreseeable risk of harm.

After referring to the Occupiers Liability Act defence counsel, in his opening address, stated to the jury:

> "What that comes down to is what did Mr. and Mrs. Ewert know as of June 16th, 1984.
>
> [Page 12]
>
> I know some of the things I've heard in this courtroom that Mr. and Mrs. Ewert didn't know about. You are going to have to consider what they knew about Jeff Ewert."

(Emphasis added.)

Counsel then went into detail about what the Ewerts knew of the conduct of their son (without reference being made as to what prudent parents ought to have appreciated about the boy's conduct) and observed:

> "They [the Ewerts I will also say they didn't think there was any concern for someone sleeping overnight in their house.
>
> You'll hear that they never thought that *Jeff, their* son, who they had raised for 22 years, could be capable of this violent act.
>
> In my submission, you will conclude, when you do that, it was not even *a mere* possibility in the minds of those people who knew Jeff Ewert that he could do this, let alone something that would be reasonably forseeable."

(Emphasis added.)

It is apparent from this submission that the jury was being asked to reach their verdict on what Mr. and Mrs. Ewert knew and appreciated about their son's conduct and their foreseeability of the specific violent acts committed by Jeffrey Ewert.

In my opinion, the issue the jury was directed by the trial judge to decide was not the issue upon which liability of an occupier in the circumstances of this case would be properly determined. This misstatement of the pertinent

[Page 13]

issue for the jury's decision might possibly have been corrected by the trial judge 'instructing the jury on the proper objective test to be applied in answering the question, and in directing them as to the appropriate standard of care. However, in the absence of such instruction the jury might well conclude that the defendants were not negligent if they used their best judgment or if they believed they were using reasonable care or if they didn't foresee the specific incident ocurring [sic]. Without instruction to avoid any such perception on the part of the jury, the charge amounts to misdirection or non-direction on a vital element of the plaintiff's case.

LEGAL PRINCIPLES RE DIRECTING NEW TRIAL:

Having reached the conclusion that the charge to the jury constituted a misdirection, in that the jury received no direction by the trial judge on the law related to the issues which the jury was required to decide—in what circumstances will the Court of Appeal direct a new trial?

Legislation governing the trials before juries differs from province to province and, accordingly, different approaches have been taken as to when a new trial will be directed consequent upon a misdirection of the jury by the trial judge. In Ontario, s. 28 of the Judicature Act R.S. Ont. 1950, c. 190 (now s. 30(1) of the Judicature Act, R.S. Ont. 1980, e. 223) provides in part:

> "A new trial shall not be granted on the ground of misdirection...unless some substantial wrong or miscarriage has been thereby occasioned."

[Page 14]

There is no such statutory provision in British Columbia, although, as noted in Hayes v. Thompson & Bell (1985), 60 B.C.L.R. 252 (B.C.C.A.), s. 27(1) of the Court of Appeal Act

1989 CanLII 232 (BC CA)

gives the Court of Appeal a general discretion as to when it should or should not grant *a* new trial.

In the course of considering whether a new trial should be directed in the Hayes case, Hutcheon, J.A. referred to the Ontario Court of Appeal decision of Arland v. Taylor, [1955] 3 D.L.R. 358 at 361 and noted that the discretion of the court to refuse to grant a new trial "unless in the opinion of the court some substantial wrong or miscarriage had been thereby occasioned" was, prior to the coming into force of the Court of Appeal Act, S.B.C. 1982, c. 7 and the Rules thereunder in September 1982, expressly set out in former Court of Appeal Rule 34. He concluded that, although such language is not in the present Court of Appeal Act or Rules, the general direction to grant or refuse to grant a new trial was available pursuant to the general discretion given by s. 27(1) of the Court of Appeal Act.

Section 27(1) provides:

> "If on the hearing of an appeal it appears to the court that there should be a new trial or hearing, the court may set aside the verdict, finding or order and direct *a* new trial or hearing."

It is to be noted that the Hayes case did not expressly deal with the effect of counsel's failure to object at the trial to the misdirection of the trial judge on the exercise of the court's discretion to grant or refuse a new trial.

[Page 15]

In resolving this issue, one must commence with the statutory right of the plaintiff, pursuant to s. 46 of the Supreme Court Act, to have the issues for trial submitted and left by the judge to the jury "with a proper and complete direction to the jury" upon the law and as to the evidence applicable to the issues. [Pike *v.* B.C. Electric Railway Company, [1939] 3 W.W.R. 220, 221 (B.C.C.A.), Bray v. Ford, [1896] A.C. 44, 49J

In Ontario there is no equivalent provision to s. 46 of the British Columbia Supreme Court Act.

Laidlaw, J.A., in Arland v. Taylor, [1955] O.R. 131 (Ont.C.A.), concluded that a new trial could not be granted because of misdirection "unless some substantial wrong or miscarriage has been thereby occasioned" and that in Ontario there existed *a* conflict of opinion *as* to whether or not the onus of proof that substantial wrong or miscarriage was occasioned rested on the appellant or the respondent. Laidlaw, J.A. related the failure at the

1989 CanLII 232 (BC CA)

trial of counsel to object to the direction of the trial judge to the conclusion he reached that no substantial wrong was occasioned by the misdirection in the particular circumstances of the case. The appeal was dismissed.

In Leslie v. Canadian Press, [1956] S.C.R. 871 Kerwin C.J. addressed the issue of where the onus lay in demonstrating "substantial wrong or miscarriage" pursuant to s. 28(1) of the Ontario Judicature Act. He concluded:

[Page 16]

> "...I am of opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show that a misdirection may have affected a verdict and not that it actually did so; and that, if an appellate court is in doubt as to whether it did or not, it is then for the opposite party to show that the misdirection did not in fact affect the verdict."

(Emphasis added.)

In Mann v. Balaban and Fersu Hotel Limited, [1970] S.C.R. 74 the court was again asked to consider a purported misdirection of the trial judge against the background of s. 28(1) of the Ontario Judicature Act. Mr. Justice Spence, speaking for the majority, repeated the above quote from Leslie *v.* Canadian Press and went on to state at 90:

> " For the reasons which I have already outlined, I am of the opinion that the misdirection might well have affected the verdict and caused a miscarriage of justice. Therefore, despite the fact that no objection was made by counsel for the plaintiff at the close of the charge, I would allow the appeal and grant a new trial. In view, however, of that lack of objection, I am of the opinion that the plaintiff should not be allowed any costs of the first trial."
>
> (Emphasis added.)

In British Columbia the Court of Appeal considered this issue in the case of Pike v. B.C. Electric Railway, (supra), and Macdonald, *J.A.* expressed the test in these words:

> " I have considered the evidence to determine whether or not failure of the trial judge to place the real

[Page 17]

> determinative evidence and issues before the jury was material. If clear that in any event the action should have been dismissed, a new trial would not be directed."
>
> (Emphasis added.)

He went on to observe that the non-direction concerned *a* question of fact and concluded that s. 60 [now section 46] of the Supreme Court Act R.S.B.C. 1936, c. 56 should have been

1989 CanLII 232 (BC CA)

followed. Because counsel had not taken any objection to the charge at the trial, the costs of the successful appeal were ordered to be paid by the appellant and the costs of the abortive trial to be in the discretion of the court.

In Whitehead v. City of North Vancouver (1937), 53 B.C.R. 512 (B.C.C.A.) Chief Justice Martin, dissenting in the result, expressed this view at 516 to which exception was not taken in the judgment of the majority:

> "It is only necessary, in the view I take, to add that though the defendant's (appellant) counsel did not renew his application after the charge to a direction upon ultimate negligence, yet by section 60 of the Supreme Court Act, Cap. 56, R.S.B.C. 1936, he is saved from the former consequences of that omission to take 'exception' at the trial, subject to the special penalty of costs thereby imposed."

See also Budd v. Canadian Pacific Railway Company, [1932] 2 W.W.R. 85 (B.C.C.A.).

In my view, the principles expressed in the Ontario decisions respecting counsel's failure to object to the trial judges misdirection of the jury,

[Page 18]

based as they are on s. 28(1) of the Judicature Act, are not applicable to British Columbia, and that in British Columbia, s. 46 of the Supreme Court Act dictates the appropriate approach to take when reviewing a jury's decision on an appeal where counsel has failed to object to the alleged misdirection by the trial judge.

In my view, the court's approach in exercising its general discretion to grant or refuse a new trial involves the following steps:

> (1) The appellant must first satisfy the Appeal Court that the trial judge failed to have the issue for trial submitted and left to the jury with a proper and complete direction to the jury on the law and the evidence applicable to the issues.
>
> In this respect there is no distinction to be drawn between non-direction and misdirection—either constitutes a failure to comply with the requirements of s. 46 of the Supreme Court Act. The litigant who asks for trial by jury is entitled to have that jury instructed in full compliance with the Supreme Court Act.
>
> (2) If the appellant satisfies the court that the trial judge's failure to comply with s. 46 of the Supreme Court Act may have affected the verdict, the onus then shifts to the respondent to satisfy the Appeal Court that, had the trial judge given a proper and complete direction to the jury on the law and the evidence applicable to the

[Page 19]

1989 CanLII 232 (BC CA)

issues of the action, the result would have been the same. (Leslie v. Canadian Press, (supra).)

(3) If the respondent fails to satisfy the onus set out above, the appeal should be allowed and a new trial ordered.

(4) The failure of counsel to object at the trial is a matter to be considered by the Appeal Court when ruling upon the costs of the appeal and the costs of the aborted trial. It should not be considered to be a relevant factor in determining whether or not the misdirection might well have affected the verdict and caused a miscarriage of justice. (Whitehead v. City of North Vancouver (supra).)

WOULD THE ACTION NECESSARILY HAVE BEEN DISMISSED HAD A PROPER CHARGE BEEN GIVEN BY THE TRIAL JUDGE?

I have reviewed in detail the transcripts of the trial evidence and am of the opinion there was evidence from which a properly instructed jury might reach the conclusion that a reasonably prudent person, as parent of Jeffrey Ewert and host of Kimberley Rendall, in all of the circumstances would appreciate:

(1) That Jeffrey Ewert has a psychothatic personality—i.e. person who cannot learn that his conduct is unacceptable regardless of the lectures or punishment he receives as a consequence of such conduct

[Page 20]

(2) That Jeffrey Ewert progressively had become more aggressive and violent from *age 14* to 22—this was particularly evident when he was under the influence of drugs or liquor.

(3) That this progressively violent conduct was manifested by:

(a) frequent fights with his mother—on at least one occasion inflicting a black-eye and bleeding nose;

(b) physical *fights* with *his* father on at least two occasions;

(c) *a* physical assault on a neighbour, Diana Rendall;

(d) violent conduct, both irrational and illogical;

(e) sexual assault on the daughter of a neighbour—S.S.;

(f) physically assaulting his sister Becky.

(4) That Mr. and Mrs. Ewert were aware of their son's propensity to react in a violent and illogical way as was evident by the testimony that:

(a) the mother was in constant fear of Jeffrey Ewert;

(b) the father lectured Jeffrey in the hope that he would mend his ways;

(c) on three occasions the father complained of Jeffrey's conduct to the police;

[Page 21]

1989 CanLII 232 (BC CA)

(d) Mrs. Ewert was informed by the neighbours of the objectionable nature of Jeffrey's conduct;

(e) the Ewerts were aware that Jeffrey had recently deliberately wrecked his girlfriend's car when he was in a fit of anger and drunk.

(5) That apparently the parents were psychologically incapable of appreciating the problem associated with their son's behaviour or, if they appreciated it, were incapable of dealing with it in any meaningful way as would appear from evidence that:

(a) Mrs. Ewert hoped the police would take Jeffrey away and keep him from the home because of her constant fear of him;

(b) Mrs. Ewert wanted her husband to change the locks on the home.

(c) Mr. Ewert was reluctant to interfere with Jeffrey's activities or to exercise any real control over Jeffrey—in or out of the house. Mr. Ewert was a heavy drinker;

(d) parties were held at the house where juveniles were present and drinking was common place;

(e) drugs, marijuana and magic mushrooms were stored on the premises and used by Jeffrey and others;

(f) it was a home where "you could do your own thing" without control being exercised by Mr. or Mrs. Ewert.

[Page 22]

(5) That Jeffrey—an increasingly violent psychopath—had the freedom to come and go in his house because, as was apparent from the testimony that:

(a) he had his own key;

(b) he had his own room;

(c) he frequently would come home and stay overnight without advising his parents or asking their permission.

(6) That the evidence related that the following events took place on June 16th, 1984:

(a) an overnight party with young teenagers present;

(b) drinking to excess *by* some *of* the guests, one of which, Donald Rendall, became inebriated;

(c) that Kimberley Rendall was a shy, quiet girl of 15 years of age who did not know Jeffrey Ewert and knew nothing of Jeffrey Ewert's character or propensities;

(d) the three young people, Rebecca Ewert, Kimberley Rendall and Donald Rendall, fell asleep at approximately 3:00 a.m. in the morning on couches in the downstairs livingroom—Kimberley was in her nightie—the others were in their day clothes;

[Page 23]

(e) that Mr. and Mrs. Ewert heard a car come into their driveway at approximately 4:00 or 5:00 a.m. on the morning of June 17th and thought that it might be Jeffrey Ewert coming home. They went back to sleep without making any

1989 CanLII 232 (BC CA)

> investigation as to who drove in or, if it was their son, whether he was under the influence of drugs or alcohol. •

It is my view, had the jury been instructed that occupiers in the position of Mr. and Mrs. Ewert had a duty to take reasonable care to see that their premises were reasonably safe for their teenage guest, insofar as activities on the premises and the conduct of others on the premises was concerned; and, had this duty been related to the evidence in the case, the jury might not have dismissed the claim.

The absence of instruction relating the occupier's legal duty to that evidence which supported the inference that there was a real foreseeable risk of harm (albeit remote) arising from the possibility of Jeffrey returning home under the influence of drugs or drink, and forcing Kimberley to leave the house with him and causing her physical harm, which risk could readily *have* been eliminated by simply directing the teenage girls to sleep upstairs in the daughter's bedroom, precludes one from concluding the case would necessarily have been dismissed by the jury.

[Page 24]

Rather, I am of the opinion that had a proper charge been given to the jury, they might well have found that Mr. and Mrs. Ewert were guilty of breach of the duty imposed on them by the Occupiers Liability Act.

Since I considered the failure to properly charge the jury arose in large part from the inept and confused manner in which the plaintiffs counsel presented the case, as well as from his failure to object either to the form of the question put to the jury or to the deficiencies in the charge in the light of that question, I would not grant the appellant the costs of this appeal or of the aborted trial.

I would allow the appeal without costs to either party.

[ScanLII Collection]

1989 CanLII 232 (BC CA)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Stapley v. Hejslet,***
2006 BCCA 34

Date: 20060126
Docket: CA031706

Between:

James William Stapley

Respondent
(Plaintiff)

And

Victor Lloyd Hejslet

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Kirkpatrick

S.B. Stewart
M. Wilhelmson — Counsel for the Appellant

R.M. Moffat
J. Currie — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
9 November 2005

Place and Date of Judgment: Vancouver, British Columbia
26 January 2006

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Mr. Justice Lowry

Dissenting Reasons by:
The Honourable Chief Justice Finch (P. 39, para. 114)

2006 BCCA 34 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellant, Mr. Hejslet, (defendant at trial) appeals from the February 13, 2004 order entered upon the verdict of the jury that awarded the respondent, Mr. Stapley, non-pecuniary damages of $275,000. The award arises from injuries sustained by the respondent in a motor vehicle accident that occurred on May 20, 2000.

[2] The jury's verdict is recorded in the order as follows:

1. The Plaintiff is found to be 7% contributorily negligent.
2. The Plaintiff is awarded damages against the Defendant, subject to apportionment of liability, as follows:

2.1	Non-pecuniary damages	$ 275,000.00
2.2	Gross Income loss to date of trial	$ 25,000.00
2.3	Loss of Future Income Earning Capacity	$ 305,000.00
2.4	Cost of Future Care	$ 13,000.00
2.5	Special Damages	$ 4,259.52
	Total:	**$ 622,259.52**

[3] The only issue is whether the jury's verdict as to the respondent's non-pecuniary damages is inordinately high and a wholly erroneous estimate of those damages such as to warrant interference by this Court.

[4] The appellant asks that the award be adjusted to an amount in the range of $80,000 to $100,000.

2006 BCCA 34 (CanLII)

BACKGROUND

[5] Because the trial order appealed from is from a jury trial, it is necessary to review some of the more salient evidence in order to place the issue on appeal in context.

[6] The respondent, James Stapley, was born on November 15, 1952. He was 51 years of age at trial. He was raised on his grandmother's farm. He completed high school and attended university for one year. He did not carry on with his university studies because of lack of funds and because he wanted to work outdoors. As he testified: "I was more into physical labour than I was into mental labour."

[7] Mr. Stapley took a pre-apprenticeship heavy duty mechanics course. After working in various shake, pulp and lumber mills and logging, in 1979 he secured full-time salaried employment as a heavy duty mechanic at the Coldstream Ranch near Vernon, B.C. He is married and he and his wife have raised their three children on the ranch.

[8] A central issue on this appeal concerns, at least from the respondent's perspective, the primary importance to Mr. Stapley of his employment on the ranch. In his factum, the respondent summarized the evidence in this regard as follows:

> One of the most glaring omissions from the Appellant's factum relates to the tremendous importance of Mr. Stapley's job on the Coldstream Ranch to almost all aspects of his life. The job not only provided Mr. Stapley with an income and the satisfaction of doing work he loved and was good at; it provided Mr. Stapley and his family with their home, community and very lifestyle. This is an unusual and important feature of the case, on which the jury heard the following

2006 BCCA 34 (CanLII)

evidence from Mr. and Mrs. Stapley, as well as neighbours and co-workers from the ranch.

Mr. Stapley had been living on the Coldstream Ranch since 1979. Like other resident employees, he was supplied with a house at nominal rent and given the freedom to use the ranch's extensive facilities and many thousands of acres of land. The evidence concerning ranch "culture" was to the effect that the resident employees within the ranch formed a small, close-knit community where people don't lock their doors and everyone feels like family and pitches in where needed. Mr. Stapley testified that most of his activities centred around the ranch. He described his love of the place, its features and the unique lifestyle it had afforded him and his family, saying he would not choose to live anywhere else. Before the Accident, he had intended to stay there for the rest of his working life, which he had hoped and expected would extend well past the age of 65.

The evidence indicated that if Mr. Stapley had to leave his job and seek less physically demanding work, he and his family would also be forced to leave their home on the ranch and all that this had afforded them - the unique ranch lifestyle, the sense of community, the wide-open spaces and 8,000 acre backyard. Mr. Stapley's boss, Mr. Osborn, testified that it was very unlikely there would be any way for Mr. Stapley, as a non-employee, to remain on the ranch, even at a substantial rent. There was no evidence to suggest that Mr. Stapley could hope to secure anything like a similar place and way of life elsewhere, either at his own expense or as an adjunct to the less physically demanding employment he would be forced to seek.

[9] The respondent's submissions are amply supported by the evidence.

Mr. Stapley testified in chief:

Q.: And did you gain, you know, from your point of view is there any benefit to living on the ranch as opposed to somewhere else in terms of where you live?

A.: Oh, yeah. It's a great place to bring up a family. I wouldn't live anywhere else. Everything is accessible there. You've nobody around. You've got the whole ranch as your basic backyard so you can go hunting and fishing and anything on the ranch.

. . .

2006 BCCA 34 (CanLII)

Q.: I've asked you what your physical state of well-being was before the tractor accident. I want to ask you what your mental or emotional situation was before the tractor accident, Jim. How was life treating you or how were you treating life?

A.: Life was great. I enjoy it. I was having fun, doing what I wanted to do. And I had a great family and a great life that let me do what I wanted to do and so it was perfect.

. . .

Q.: Now, what in the year -- let's just take the year 1999, the year before the tractor accident. What did the future hold for you? Did you have any specific plans about what you were going to do with your life, or how things were going to go in the future?

A.: Basically I figured I'd just keep on working at the ranch until I couldn't work there any more. And we never talked about retiring or anything. The ranch is a great place to live, so we figured we had it made.

Q.: Sometimes wives aren't entirely accepting of their husbands' view of the world. What was Wendy's approach to, you know, what the future was going to hold at that time, 1999?

A.: Oh, she thought it was great. She figured we'd be still at the ranch, too. She loves it at the ranch. Because she's sort of an old farm girl, too, so she likes the wide open spaces and not in town stuff.

Q.: And how are the kids doing in that period of, you know, within a year or two before the tractor accident?

A.: They were doing great. Grades were up. They played sports. Nothing wrong with them at all.

And in cross-examination:

Q.: Now, earlier we discussed, and you've indicated, that one of your benefits of living at the ranch was the cheap auto parts that you say you get?

A.: Yes, I get them at ranch price.

2006 BCCA 34 (CanLII)

Q.: And the children's schools are quite close to the ranch?

A.: Yes, they are.

Q.: Most of your activities take place around the ranch?

A.: Yes.

Q.: Most of the things that you do recreationally are done around Vernon or the Lumby area?

A.: Yes, they are.

[10] The general manager of Coldstream Ranch, Edward Osborn, testified:

Q.: Okay. Prior to the accident, what did the future hold for Jim at the ranch in terms of how long he could work there?

A.: Well, it would be similar to any other person working at the ranch. His stay could -- as long as they could maintain their ability to do the work that was necessary, given the ranch's operations -- it changes over time, and be able to change with the time to new techniques, new requirements. As long as you're able to keep that, the future looked good in terms of the prospects for him.

Q.: So, from your point of view, as long as he was able to continue doing quality mechanics work and continue being able to help out during the -- if necessary, in the field work, as long as he could do those things, he had a job.

A.: Yes, and as long as we were along the same lines of a business, and I don't see anything on the horizon to change the significant nature of our business. So his ability to keep up to date in terms of troubleshooting the machinery problems and the new machinery over time, as required, he had a good -- good opportunity to work at the ranch until retirement as long as he could perform the work that was necessary.

Q.: Now, prior to the accident, did the ranch have any mandatory retirement at age 65?

A.: No.

2006 BCCA 34 (CanLII)

Q.: If a person was able to meet the standards that you've just expressed, would they have been able to continue working past 65?

A.: Yes, if they so wished to do, so wished to, on their behalf, and also if we felt it was safe for them to do it.

[11] Mr. Stapley's wife, Wendy Stapley, testified:

Q.: In the period of time before the tractor accident, as I'll, you know, just use the 1990's as a -- as a period of time to think about, what was the relationship between your family and the other families on the ranch?

A.: Pretty close-knit, you know. There -- we go through barbecues together or Christmas parties or -- there's a few of us that actually camp all the time together and hunt. It's -- it's very close and even the people that we don't know very well, you care about, you know. It's a little community-type thing.

Q.: In the period of time before the tractor accident, take a period of say five years before the accident, what was the social -- what -- what kind of things did you and Jim do socially, as opposed to your own personal relationship? And I'll get to that in a minute.

A.: Did we do socially? Well, we would go out to friends' places or have barbecues or go out. Maybe a group of us would go out to -- back when they used to have those western bars, we'd go dancing or something like that together. Basically, socializing with friends.

Q.: Did -- and what -- and did you have a lot of friends or just a few or …?

A.: We have quite a few in town. We've lived her[e] a long time.

Q.: Okay. When you say "in town", where are you talking about?

A.: Well, between Lumby and Vernon.

Q.: Out in the Valley?

2006 BCCA 34 (CanLII)

A.: Yeah, we do have some people that live right in town but --

Q.: Okay.

A.: -- our closest friends are where we are.

. . .

Q.: What was it like being on the ranch and having him working just kind of around the corner? Did that -- did that interfere with how the family ran or -- or …?

A.: No, and it was -- it was pretty nice because when he was out in the fields and stuff like that, I'd get to go out and take his lunch out to him and spend a few minutes together. Or he -- you know, if he was in the shop and having a lunchtime, he could come home and we could have some time together. You know, I'd get to see him regularly.

Q.: What was his attitude towards work prior to the tractor accident?

A.: We enjoy it. He -- he loves to -- he loves to monkey wrench, being a mechanic, and he -- as much as he loved that, he loved to be out in the field because getting being in the shop all the time and you're constantly working on things and people are talking at you and when he's out in the field he's got time away from that. So he had a little bit of variety. He wasn't stuck in the same old, same old.

. . .

Q.: What did the future hold for you, as far as you were concerned? What did the future hold for the family in the year 1999? What was -- you know, what -- what did the next ten, 15, 20 years look like?

A.: I figured we'd probably be on the ranch until Jim retired and that was fine with me. Once the kids were out of the house, we probably would have had to move to a smaller home, but we -- we were set. We had a house over our -- or a roof over our heads, meat on the table; we were kind of secure, as far as I was concerned.

2006 BCCA 34 (CanLII)

[12] The evidence put before the jury portrayed Mr. Stapley as an extremely hard-working, independent man who loved his work and the unique opportunities that his work on the ranch allowed him to enjoy.

[13] Coldstream Ranch is situated on about 8,000 acres. It employs between 12 to 25 staff, most of whom live in subsidized housing on the ranch at extremely favourable rents. Ranch employees are able to purchase meat and produce from the ranch at cost. Mr. Stapley is able to purchase automotive parts for his own vehicles at reduced cost. He has access to the ranch shop. He and his family take advantage of the many recreational amenities of the ranch.

[14] Mr. Stapley described the nature of his work prior to the motor vehicle accident as "really physically demanding." His work included maintenance of the ranch vehicles, as well as seasonal field work. Indeed, he was driving a tractor that was pulling a corn planter to a field when the tractor was hit from behind.

[15] The accident occurred at about 3:00 a.m. on May 20, 2000. Mr. Stapley heard a loud bang. He thought a tire had blown. He managed to bring the tractor to a stop. The tractor's axle housing was broken, one of the seeders was smashed, and the hitch was bent.

[16] Mr. Stapley carried on working that day, although he noticed that his neck and arm were sore. He developed a headache, sore back and shoulder pain. The headache increased. The following day, a Sunday, he was unable to work more than an hour because of back and neck pain and a "pounding headache."

2006 BCCA 34 (CanLII)

[17] Mr. Stapley was off work for four weeks. He saw his family doctor, Dr. Henderson, on the Monday following the accident. Dr. Henderson prescribed massage therapy and, when that did not help, physiotherapy.

[18] Mr. Stapley experienced numbness in his fingers. He had pain from his forearm, upper arm and across his back. By the fall of 2002, his hand was numb most of the time and he had decreased strength.

[19] In May 2001, Mr. Stapley received treatment from a pain clinic in Kelowna and at Vernon Jubilee Hospital.

[20] On October 2, 2002, he was diagnosed with thoracic outlet syndrome. Dr. Nelems performed a rib resection to relieve the pressure. Mr. Stapley was off work until March 15, 2003, at which time he was cleared to work his regular hours of 45 to 50 hours per week. The surgery relieved Mr. Stapley's arm pain and numbness to the extent that he feels it is "80 per cent improved."

[21] However, following that surgery, Mr. Stapley continued to have residual complaints of pain in his mid-back, right side neck pain, a "constant burning" between his shoulder blades, stiff neck and back, and a constant headache. He consumes a great deal of pain relief medicine. In the month before trial he was taking, on average, five to eight Tylenol No. 3 per day and Flexeril at night which he acknowledged "can't be good for me."

[22] There was a considerable body of medical evidence tendered at trial.

2006 BCCA 34 (CanLII)

[23] Dr. Robert Hillis, Mr. Stapley's current family physician, provided an extensive medical/legal report dated October 21, 2003, in which he described Mr. Stapley's injuries:

> The nature of Mr. Stapley's injuries resulting from the motor vehicle accident of May 20, 2000 include:
>
> a. myofascial pain syndrome, more commonly labelled "whiplash", affecting his neck.
>
> b. strain of the ligaments along the back of his 4th and 5th vertebrae in the thoracic region (T4 - T5 posterior interspinous ligamentous strain).
>
> c. aggravation of right sided thoracic outlet syndrome; resolved surgically with resection of his right first rib.
>
> d. chronic pain syndrome.

[24] Dr. Hillis' prognosis was described, in part, as follows:

> With respect to prognosis it is important to reflect that at this time it is more than three years since the motor vehicle accident. Mr. Stapley has had significant rehabilitation efforts through massage therapy, physiotherapy, surgical intervention, various medications, and continued work activities. In my opinion the following symptoms are therefore likely to be permanent in nature, causing permanent partial disability:
>
> a. mid back pain
>
> b. shoulder blade pain
>
> c. headaches
>
> . . .
>
> The likelihood of further problems or disabilities arising in the future as a direct consequence of these injuries relate mainly to the quality of life of Mr. Stapley. In particular his chronic pain renders him more at risk for psychological stress or even depression. His inability to fully participate in recreational and work activities that he was capable of before the accident certainly lead to the psychological

2006 BCCA 34 (CanLII)

> distress. Finally, potential for side effects from ongoing use of pain killers or muscle relaxant medication must be considered as well.

[25] Dr. Hillis noted the wide range of activities Mr. Stapley is expected to undertake at the ranch as part of his employment. Although Mr. Stapley remains able, in Dr. Hillis' assessment, to perform the work expected of him, "he does so at the expense of finishing his workshift in considerable pain … [leaving] him unable to participate in any further activities of daily living or recreational ventures when he returns home."

[26] Dr. Duncan Laidlow, a physical medicine and rehabilitation specialist, provided a report dated November 3, 2003, which largely echoes the conclusions of Dr. Hillis. Like Dr. Hillis, Dr. Laidlow is of the view that Mr. Stapley's pain will not significantly improve. Dr. Laidlow concluded that Mr. Stapley had problems with a musculoligamentous strain to the cervical and thoracic spine and a thoracic outlet syndrome that had resolved. He stated:

> With regard to the musculoligamentous strain, this man developed significant pain in the neck and mid back fairly shortly after the accident. Subsequent investigations have shown no evidence of any bony injury or disc injury. He has, however, continued to have ongoing problems with muscle tenderness and tightness in the neck and mid back area. Over the course of time he has tried to keep things active, in the course of his work as a mechanic. The therapy tends to be more modality oriented and acupuncture oriented. He did show some improvement over what he was initially but over the course of time he has continued to have ongoing neck pain and back pain. There are days when it is worse than others but he continues to have symptoms, nonetheless. Given the fact that he has continued to have symptoms this long after the accident, it is likely that he will continue to have some ongoing symptoms in the future.

2006 BCCA 34 (CanLII)

[27] Dr. Laidlow did not foresee escalating physical difficulties for Mr. Stapley, but recognized that Mr. Stapley will not be able to carry on his employment at the ranch as before. As Dr. Laidlow noted:

> … At this point in time he is capable of carrying out the work of a mechanic but does not tolerate the jarring and vibration that goes in operating a tractor, in addition to the heavy mechanic job. This tractor work used to serve as a form of overtime for him and he was involved in doing it during planting and harvesting seasons. At this time, when he tries to do this, his pain is greatly worsened and as such he cannot do it. I do believe that he will be able to carry on as a mechanic in the fashion that he has up until now but I would suspect that he will not improve to the point where he would tolerate the jarring and high vibration that goes with operating a tractor in the way that he did before. I do not believe that there is anything that is likely to deteriorate as a result of this musculoligamentous strain so I would anticipate that if he is able to do his job at the present time, to his employers satisfaction, he will continue to be able to do that. Given the fact that this has been his work for many years, he really is not very well set out to look at other work. I do not believe he is causing himself harm by doing the work he does, which he enjoys.

[28] Thus, from a medical perspective, Mr. Stapley's medical condition seems to have plateaued. There seems little doubt that he will continue to experience ongoing pain and discomfort for the remainder of his life.

[29] Notwithstanding Dr. Hillis' prognosis that Mr. Stapley has a permanent partial disability and chronic pain, the evidence before the jury also established that Mr. Stapley is able to continue to work as a mechanic on the ranch. He is regarded as a valued employee and is keeping up with his work. He no longer performs field work but, as Dr. Laidlow observed, that was a form of overtime work and did not form part of his regular duties.

2006 BCCA 34 (CanLII)

[30] As well, he has continued to actively participate in recreational pursuits. Since the accident, Mr. Stapley continues to play slo-pitch softball. His position has changed from left field to the pitching mound. He resumed curling in the fall of 2003 (having last played in the early 1990s). He plays third and can play the entire game. He participated in a bonspiel three weeks before the trial. He can buck 10 to 15 blocks of firewood. He continues to play ice hockey. He testified that, "I'm not bad for two periods, and in the third period then I start getting sorer and sorer and I'll miss a couple of shifts here and there or don't even go out in the third period sometimes." Mrs. Stapley said that he "doesn't go into the corners anymore" when playing hockey. He fishes and boats, but not as often as before the accident. He golfs, but with pain. He continues to hunt, but his friends say that he is more of a hindrance than a help.

[31] However, the unique and central loss to Mr. Stapley is the potential loss of his employment on the ranch and the concomitant loss of the lifestyle that living on the ranch provides.

[32] As can be seen from the medical evidence reviewed above, the physicians did not state that Mr. Stapley will be unemployed by reason of his ongoing pain. Indeed, both Drs. Laidlow and Hillis believed that he would continue to be able to do the work he has always done and which he enjoys. In addition, Dr. Hillis believed that, with modifications to his work regime as a mechanic, Mr. Stapley would be able to receive increased enjoyment from his recreational pursuits.

[33] However, the jury also heard compelling evidence from Mr. Stapley and his wife as to his ability to continue working on the ranch.

2006 BCCA 34 (CanLII)

[34] Mr. Stapley testified:

> Q.: What does the future hold for you as far as your work goes?
>
> A.: To tell you the truth, I don't know.
>
> Q.: Well --
>
> A.: And I just don't know if I'm going to be able to last very much longer, or Ted's going to come up to the point where my production is down and they're not getting what they want out of me, then I'll probably be let go; a whole different bunch of scenarios. But I know one thing, I just -- the way I've been going on the last couple of years, I just don't know how much longer I'll be able to do it.
>
> Q.: Tell us what it is that raises that doubt in your mind about "how much longer I can do it"? What's going on that's creating that concern?
>
> A.: Well, I'm a person who's always given 110 percent, it didn't matter what I've done, and I don't like giving less than 110 percent. And I know at the ranch I'm giving way less than 110 percent what I done before. And like I say, every day waking up in pain and going home in pain and not spending time with my family and not being able to do anything like I used to do it is starting to work on me quite a bit.
>
> . . .
>
> Q.: Forgetting for a moment about Ted Osborn and the ranch and the possibility that they may lay you off, just ignoring that for a moment, how much longer are you going to carry on working at the ranch?
>
> A.: I really couldn't tell you for sure, but I don't think it would be too much longer, in the near future that I'm just going to have enough and have to quit.
>
> Q.: What are you going to have to quit? What is it that's going to push you over that point?
>
> A.: Just getting to the point where the pain's never going to go away and I've got to try and deal with it. But it's just getting that everything I do is in pain, and it's just not worth it.

2006 BCCA 34 (CanLII)

Q.: Okay. Now, you've used the term "near future" and I -- none of us can predict the future, but, you know, are you able to give us any idea about how long you can hang in?

A.: The way things are going the last little while, I'd say maybe two years if I'm lucky.

[35] Mrs. Stapley testified:

Q.: Okay. What does the future hold for you in terms of -- do you think that's on the ranch?

A.: I don't believe he can.

Q.: Why not?

A.: I told you that we -- I was able to get him to come and spend some time out at the lake with me. I told you that I was able to just, you know, suggest that he stay on an extra couple of days and he did it. He has been taking more time off work and he's come to realize that no matter what he's doing, whether he continues with his physio and he's taking all these stupid drugs and he's doing everything he's been told to do, he's not getting any better.

And it doesn't matter how proud or strong he thinks he is, he -- he knows that he's probably not going to be there much longer. And I don't -- I don't see any business keeping a man on who's not able to fully do the work that he's been hired to do, no matter how loyal they are or how long he's been there.

Q.: Do you have any idea what -- what he might do as an alternate to the ranch?

A.: I have -- I have no idea. He's -- neither one of us is -- up until this summer, I didn't even consider it. I -- we just always assumed that that's where we would be. And if we chose to go somewhere, it's something we'd do as a family and -- you know, something that we wanted to do. I don't know how much longer he has that choice.

Q.: So how does the future look today to you?

A.: I have no idea. I don't know what we're going to do.

2006 BCCA 34 (CanLII)

[36] It is significant that, among the other heads of damage, the jury awarded Mr. Stapley $305,000 for loss of future income earning capacity.

[37] The evidence was that Mr. Stapley earned $12 per hour. His total income for income tax years 1999, 2000, 2001 and 2002 was, respectively: $38,828; $36,601; $38,706; and $34,639. The average income over the period was $37,194. An economist's report was tendered in evidence to, in part, assist the jury in assessing Mr. Stapley's future loss of income. Although it is impossible to know how or if the jury made use of the report, the $305,000 amount awarded closely approximates the income loss multiplier that assumes Mr. Stapley's loss of income will commence in 2007 when he will be 54 ($310,000).

[38] For our purposes, however, the significance lies with the fact that it is obvious that the jury must have accepted that Mr. Stapley would, contrary to the belief held by the physicians, be forced, by reason of his injuries, to leave his employment at the ranch at some time in the near future. This must also mean that the jury accepted that, with that loss of employment, Mr. Stapley would also lose the lifestyle he had enjoyed for more than 25 years.

DISCUSSION

[39] The appellant concedes that the decision of this Court in ***Boyd v. Harris*** (2004), 237 D.L.R. (4th) 193 at para. 5, 2004 BCCA 146, accurately summarizes the process of appellate review of jury awards of damages. In ***Boyd***, Smith J.A., speaking for the Court, reviewed the recent authorities and the historical development of the comparative test that "this Court should not interfere with a jury

2006 BCCA 34 (CanLII)

award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case" [emphasis added].

[40] Smith J.A. acknowledged that "[t]he difficult problem is how to identify the extent of permissible deviation from the conventional range of awards" (at para. 12). He took guidance from the decision in ***Foreman v. Foster*** (2001), 84 B.C.L.R. (3d) 184 at para. 32, 2001 BCCA 26, where Lambert J.A., speaking for the majority, said:

> [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1984), 58 B.C.L.R. 273 (B.C.C.A.).

[41] However, deference to the jury must be balanced against the need for predictability. As Smith J.A. held in ***Boyd***, at para. 11:

> [11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.

2006 BCCA 34 (CanLII)

[42] The appellant initially argued that, in addition to the principles outlined in ***Boyd***, appellate review must also be consistent with the guidelines for the 'upper limit' for non-pecuniary damages established by the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; ***Thornton v. Board of School Trustees of School District No. 57 (Prince George)***, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and ***Arnold v. Teno***, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (collectively, the "Trilogy"). The appellant suggested that it was open to this Court to consider whether an award approaching the upper limit is fair in circumstances where a given plaintiff has not suffered injuries as serious as the plaintiffs in the Trilogy.

[43] The appellant sensibly resiled from that position at the hearing of the appeal. The authorities cited in ***Boyd*** at para. 29 negate the proposition that it is proper to compare injuries of a particular plaintiff to those of the plaintiffs in the Trilogy: see ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263; ***Penso v. Solowan***, [1982] 4 W.W.R. 385, 35 B.C.L.R. 250 (C.A.); ***Black v. Lemon*** (1983), 48 B.C.L.R. 145, [1983] B.C.J. No. 1389 (C.A.) (QL); ***Bracchi v. Horsland*** (1983), 147 D.L.R. (3d) 182, 44 B.C.L.R. 100 (C.A.); and ***Leischner v. West Kootenay Power & Light Co. Ltd.*** (1986), 24 D.L.R. (4th) 641, 70 B.C.L.R. 147 (C.A.), a decision of a five-judge panel of this Court.

[44] Thus, we are left to apply the so-called "horizontal" comparative approach outlined in ***Boyd*** at para. 41:

> [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine

2006 BCCA 34 (CanLII)

> whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from ***Lindal v. Lindal****, supra*, at 637 is a helpful reminder:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [Emphasis added.]

[46] The inexhaustive list of common factors cited in ***Boyd*** that influence an award of non-pecuniary damages includes:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering; and

2006 BCCA 34 (CanLII)

(f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[47] The cases cited to us by the appellant and the respondent are summarized below. I have approximated the awards in those cases to 2004 dollars to correspond to the award granted in the case at bar at the time the jury made the award.

Appellant's Cases

Mowat v. Orza, [2003] B.C.J. No. 577 (QL), 2003 BCSC 373

[48] This was a trial by judge alone. Ms. Mowat was awarded $50,000 in non-pecuniary damages, which is equivalent to $51,000 in 2004 dollars.

[49] Ms. Mowat's age is not given in the reasons for judgment, although reference is made to her completing teaching qualifications in 1999 and moving from her

2006 BCCA 34 (CanLII)

parent's home in 2000. From this I would infer that she is significantly younger than Mr. Stapley.

[50] Ms. Mowat suffered flexion/extension injuries to the cervical spine as result of a motor vehicle accident. She was later diagnosed with mild post-traumatic thoracic outlet syndrome. She suffered from headaches, some numbness of the extremities and tongue, and back pain. She did not require surgery for her thoracic outlet syndrome.

[51] Ms. Mowat suffered emotional problems that had multiple sources, including the injuries she suffered. Melnick J. found Ms. Mowat to have "demonstrated a concern for tactical and financial advantage rather than exploring reasonable avenues to recovery." However, Melnick J. did not find the failure to mitigate "affected the bottom line of her entitlement to damages in a quantifiable way." He also relied on expert evidence that suggested that the prognosis was good for Ms. Mowat's symptoms to improve and for her to resume full-time employment as a teacher if she were to apply herself to her own recovery.

Dembowski v. Streliev, [1998] B.C.J. No. 1693 (S.C.) (QL)

[52] This was a trial by judge alone. Mr. Dembowski was awarded $60,000 in non-pecuniary damages, which is equivalent to $69,000 in 2004 dollars.

[53] Mr. Dembowski was 30 years old at the time of his accident. His initial injuries were more severe than Mr. Stapley's and consisted of bruising, inflammation of the kidneys, haematuria, a fractured vertebra, and a fistula-in-ano. He developed

2006 BCCA 34 (CanLII)

numbness and tingling in the arms a year later and was diagnosed with thoracic outlet syndrome. His prognosis for recovery from thoracic outlet syndrome was poor, but his condition was not considered serious enough to warrant surgery. He had only intermittent lower back pain as a result of his other injuries.

[54] Williamson J. found this to be a mild to moderate case of thoracic outlet syndrome which did not interfere with Mr. Dembowski's ability to work long hours, but which did interfere with his family and social life.

Smyth v. Gill, [1999] B.C.J. No. 983 (S.C.) (QL), aff'd 2001 BCCA 650

[55] This was a trial by judge alone. Ms. Smyth was awarded general damages of $50,000, which is equivalent to $56,500 in 2004 dollars.

[56] There was no age given for Ms. Smyth in the reasons for judgment of Quijano J. As a result of a motor vehicle accident, Ms. Smyth suffered (at para. 50):

1. Moderately severe temporomandibular joint injury with associated migraine headaches.
2. Soft tissue injury to the neck and left shoulder area.
3. Thoracic Outlet Syndrome.

[57] Ms. Smyth suffered from a long list of complaints before the accident and did not follow her physicians' advice to return to a more normal lifestyle.

[58] There is no account in the reasons for judgment of impacts to Ms. Smyth's social or recreational life.

2006 BCCA 34 (CanLII)

Heartt v. Royal, [2000] B.C.J. No. 1691 (QL), 2000 BCSC 1122

[59] This was a trial by judge alone. Ms. Heartt was awarded non-pecuniary damages of $60,000, which is equivalent to $66,000 in 2004 dollars. Ms. Heartt argued at trial that the appropriate range was $45,000 to $75,000.

[60] Ms. Heartt was 25 years old at the time of the accident. At the time of trial, she continued to suffer from chronic pain as a result of the accident. She had been diagnosed with thoracic outlet syndrome, but did not require surgery. Her ability to interact with her children and enjoy recreational activities was compromised. She was unlikely to return to her pre-accident condition despite following the treatment regimes recommended by her doctors.

[61] The trial judge considered that Ms. Heartt made valiant efforts to engage in normal activities with limited success. Dorgan J. awarded non-pecuniary damages at the higher end of the scale suggested to the court by Ms. Heartt.

Letourneau v. Min (2003), 9 B.C.L.R. (4th) 283, 2003 BCCA 79

[62] This was a trial by judge alone. Mr. Letourneau was awarded non-pecuniary damages of $40,000, which is equivalent to $43,000 in 2004 dollars, in the Supreme Court decision, the reasons for which are found at 2001 BCSC 1519.
Mr. Letourneau had asked for non-pecuniary damages in the range of $50,000 and $60,000. Non-pecuniary damages were not in issue on the appeal.

2006 BCCA 34 (CanLII)

[63] At the time of trial, Mr. Letourneau experienced intermittent neck, shoulder and back pain that limited his recreational activities and sapped his energy levels. He still worked full time, but had abandoned plans to start his own business.

2006 BCCA 34 (CanLII)

> ***Schellak v. Barr and Duplessis***, [2001] B.C.J. No. 5 (QL), 2001 BCSC 1323, var'd on other grounds 2003 BCCA 5, leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 91 (QL)

[64] This was a trial by judge alone. Mrs. Schellak was awarded non-pecuniary damages of $80,000, which is equivalent to $85,500 in 2004 dollars. Mrs. Schellak had asked that damages be assessed in the range of $75,000 to $110,000.

[65] Mrs. Schellak was 50 years old at the time of the trial. She experienced chronic pain, shaking and numbness as result of soft tissue injuries sustained in a motor vehicle accident. The symptoms “waxed and waned”. The chronic pain resulted in cognitive difficulties including trouble concentrating and memory loss. Mrs. Schellak made several concerted efforts to return to work, but they were unsuccessful. She became addicted to the pain-killers she had been prescribed to help her control her pain. Mrs. Schellak described the inability to return to her career as “devastating” to her. The expert evidence tendered in the case suggested, and Martinson J. noted, that there was little objective confirmation of Mrs. Schellak’s injuries.

> ***Munro v. Faircrest***, [1985] B.C.J. No. 322 (S.C.) (QL)

[66] This was a trial by judge alone. Mr. Munro was awarded non-pecuniary damages of $60,000, which is equivalent to $100,000 in 2004 dollars.

[67] Mr. Munro was 71 years old at the time of the trial. He had suffered a badly broken wrist and ankle in a motor vehicle accident. He was left with considerable disability and pain in the wrist and ankle and the wrist was deformed. The accident also exacerbated an existing rheumatoid arthritis condition. Low J. (as he then was) found that the life of Mr. Munro and his wife had been drastically altered by the accident. He had limited ability to partake in his usual recreation activities after the accident.

2006 BCCA 34 (CanLII)

[68] Of some interest in the instant case, Low J. noted at para. 29:

> [29] The defendants have not suggested that Mr. and Mrs. Munro should give up their home. That requirement would be an unreasonable demand upon them. They are entitled to enjoy the surroundings which they chose and improved for themselves.

[69] In addition to non-pecuniary damages, Mr. Munro received a considerable future care award and special damages that enabled him to purchase the boat accessories he required to resume fishing, an activity he had greatly enjoyed before the accident.

> ***Nuttall v. Thunder Bay (City)***, [2001] O.T.C. 94, [2001] O.J. No. 545 (Sup. Ct. J.) (QL), aff'd [2002] O.J. No. 2387 (QL)

[70] This was a trial by judge alone. Ms. Nuttall was awarded non-pecuniary damages of $40,000, which is equivalent to $43,000 in 2004 dollars.

[71] Ms. Nuttall was the victim of a slip and fall accident. She was 60 years old at that time. She suffered injuries to her knee that prevented her from working in the capacity to which she was accustomed. In *obiter*, at para. 50, McCartney J. stated

that the upper limit of non-pecuniary damages for a knee replacement where "the person's whole way of life is permanently disrupted" is $75,000. This conclusion is inconsistent with British Columbia law insofar as it sets tariff-like limits based on the nature of the injury.

[72] McCartney J. referenced his conclusion to ***Farrell v. White Rock Players' Club***, [1997] B.C.J. No. 507 (S.C.) (QL). In that case, however, there was only the potential for knee replacement surgery in the future. Ms. Farrell was limited in her recreational activities and had to take on a more sedentary job as a result of her injuries.

> ***Corkum v. Sawatsky*** (1993), 126 N.S.R. (2d) 317, [1993] N.S.J. No. 490 (C.A.) (QL)

[73] This was a trial by judge alone. Mr. Corkum was awarded non-pecuniary damages of $60,000, which is equivalent to $74,000 in 2004 dollars.

[74] Mr. Corkum, a landowner, logger, sawyer, farmer and businessman, suffered whiplash as a result of a motor vehicle accident. He was 53 years old at the time of the accident.

[75] Mr. Corkum's life revolved around his work. The whiplash injury had serious physical, emotional and psychological implications. He was significantly disabled. He was going to be forced to sell much of his land. However, he did not engage in many recreational activities before the accident.

2006 BCCA 34 (CanLII)

Kumlea v. Chaytors, [1993] 4 W.W.R. 277, [1993] B.C.J. No. 530 (C.A.) (QL)

[76] This was an appeal of a decision of a trial judge. An award of non-pecuniary damages of $40,000, which is equivalent to $51,000 in 2004 dollars, was upheld on appeal.

[77] Mrs. Kumlea suffered a severe break of her right wrist that resulted in pain, loss of function and deformation. She was no longer able to assist her husband in pursuing the rural and self-sufficient way of life they formerly enjoyed together. Mrs. Kumlea's age is not readily apparent from the decision.

Meyer v. Wadsworth, [1995] B.C.J. No. 1558 (S.C.) (QL)

[78] This was a trial by judge alone. Mrs. Meyer was awarded non-pecuniary damages of $30,000, which is equivalent to $36,000 in 2004 dollars.

[79] Mrs. Meyer was 69 years old at the time of the trial. She had received injuries as a result of two motor vehicle accidents: the first in 1990; and the second in 1993. She suffered injuries to her spine that resulted in long-term pain and disability. There is little information about her change in lifestyle from pre- to post-accident. Much of her time, it seems, was taken up before the accident working in partnership with her husband operating a group home for the developmentally disabled.

Baker v. Manion, [1997] B.C.J. No. 1018 (S.C.) (QL)

[80] This was a trial by judge alone. Mr. Baker was awarded non-pecuniary damages of $85,000, which is equivalent to $99,000 in 2004 dollars.

2006 BCCA 34 (CanLII)

[81] Mr. Baker was 34 years old at the time of the trial. He had suffered serious injuries to his left knee and foot in a motor vehicle accident. He was a highly regarded carver. The injuries he sustained made it difficult for him to sit for extended periods and so reduced his carving output. He experienced pain, his range of activities had been reduced and his leg had been disfigured. Future degeneration was likely. Mr. Baker had lived on the Squamish reserve all of his life and planned to continue to do so. While carving had been "his whole life" prior to the accident, he was limited to recreational carving after the accident.

2006 BCCA 34 (CanLII)

Respondent's Cases

Lindal v. Lindal, *supra*

[82] This was a decision by the Supreme Court of Canada upholding the decision of this Court to reduce the trial judge's award of non-pecuniary damages from $135,000 to $100,000. The final award was the equivalent of $220,000 in 2004 dollars. The award was initially made four months after the decisions in the Trilogy and the Supreme Court refused to adjust the cap for inflation.

[83] Mr. Lindal suffered extensive brain damage as a result of a motor vehicle accident. His injuries caused severe physical and mental impairment including serious speech and mobility problems. Mr. Lindal's injuries also resulted in personal and emotional disorders, leaving him extremely depressed with suicidal tendencies.

Alden v. Spooner (2002), 6 B.C.L.R. (4th) 308, 2002 BCCA 592, leave to appeal to S.C.C. dismissed [2002] S.C.C.A. No. 535 (QL)

[84] This was an appeal of a jury damage award for non-pecuniary damages of $200,000, which is equivalent to $214,000 in 2004 dollars. This Court upheld the award.

[85] Ms. Alden was injured in a series of four motor vehicle accidents over a span of five years. She was 17 at the time of the first accident. Ms. Alden suffered soft tissue injuries as a result of the accidents that developed into chronic pain syndrome and serious depression. There was conflicting evidence over the extent of her injuries, resulting disabilities, and prognosis for recovery. She was still able to run competitively as she had before the accidents, but was unable to work in real estate because of the long hours and her apprehension about driving. There was evidence that Ms. Alden was motivated in her attempts at recovery.

Boyd v. Harris, *supra*

[86] This was an appeal of a jury damage award for non-pecuniary damages of $225,000, which was equivalent to $234,000 in 2004 dollars. This Court upheld the award.

[87] Mr. Boyd was 36 years old at the time of the accident. He suffered injuries to his spinal cord. These injuries caused pain and mild disability and could potentially lead to degeneration of the spinal cord and other complications. He could no longer engage in physical activities that he previously enjoyed, could no longer play guitar

2006 BCCA 34 (CanLII)

as frequently as he used to, and had difficulty with basic tasks such as dressing himself and opening jars.

Dilello v. Montgomery (2005), 250 D.L.R. (4th) 83, 2005 BCCA 56

[88] This was an appeal of a jury award of $362,000 for non-pecuniary damages. The award was reduced by the trial judge to the then-present value of the Trilogy cap of $281,000. Both parties on appeal agreed that the award was excessive. This Court further reduced the award to $200,000, an amount that the plaintiff agreed was reasonable.

[89] Ms. Dilello was 19 years old at the time of the accident. She suffered significant spinal injuries. Finch C.J.B.C. summarized her symptoms as follows at para. 11:

> [11] The plaintiff has experienced headaches daily, neck pain, emotional lability, depression, fatigue, anxiety, altered sensation in her hands, upper limb weakness, increased reflexes, scalp hypersensitivity, temperature sensation, decreased manual dexterity, cognitive deficits and memory difficulties, dizziness, and low back pain. Some consequences are permanent, and others may improve over time. Her vertebral joint fractures and facet joint injuries will cause degeneration within five to ten years, resulting in arthritis and increased pain that will limit her neck movement.

The injuries were characterized as resulting in mild, long-term disabilities.

[90] The specific injuries and impacts are less instructive than is the Court's overall approach to the consideration of a jury award for non-pecuniary damages. Finch C.J.B.C. said at para. 49:

2006 BCCA 34 (CanLII)

> [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases.

Bob v. Bellerose (2003), 227 D.L.R. (4th) 602, 2003 BCCA 371, leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 408 (QL)

[91] This was an appeal of a jury award of $575,000 for non-pecuniary damages. The award was reduced by the trial judge to the then-present value of the Trilogy cap of $281,000. This Court further reduced the award to $275,000, consisting of $200,000 for pain and suffering and $75,000 for aggravated damages. The pain and suffering component has a value of $205,000 in 2004 dollars.

[92] Mr. Bob was gravely injured in a carjacking incident in which he was dragged under the front tire of his own van for one city block. He was 50 years old at the time of the incident. He suffered chronic pain and disfigurement as a result of his injuries; lost the ability to ride horses, which was his primary source of recreation since childhood; and, was no longer able to provide for his family, which is what gave his life a sense of purpose.

Courdin v. Meyers, [2005] B.C.J. No. 266 (QL), 2005 BCCA 91

[93] This was an appeal from a jury award of $950,000 in non-pecuniary damages. The jury award was reduced to the then-present value of the Trilogy cap, $292,823, by the trial judge. This Court further reduced the non-pecuniary damage award to $200,000. The appellant suggested that the appropriate quantum was

2006 BCCA 34 (CanLII)

$110,000. The respondent, Ms. Meyers, argued that the jury made no palpable or overriding error that justified further reduction of the award.

[94] Ms. Meyers was 43 years of age at the time of trial. She and her husband operated a landscaping business and a video game rental business together before her accident.

[95] Ms. Meyers was involved in a multiple vehicle accident that ultimately resulted in myofascial injuries and fibromyalgia. The injuries were described by this Court in its reasons as have "crippling effects on her" (at para. 11). Ms. Meyers and her husband separated shortly after her accident. She blamed the separation in part on her injuries and resulting emotional effects. Before she was injured Ms. Meyers was physically active and enjoyed a wide range of sports and recreational activities in which she was no longer able to participate. Although she was still involved in a landscaping venture in a reduced capacity at the time of trial, she did not believe she would be able to continue working in that industry as a result of her injuries.

[96] As I have noted at para. 39, the comparative approach suggested in ***Boyd*** is that this Court should not interfere with a jury award of damages unless the award falls substantially outside the upper or lower range of awards set by judges in comparable cases.

[97] The cases provided by the appellant are all from trial judge decisions in somewhat comparable cases. As can be seen, none of the cases reveal circumstances identical to Mr. Stapley. However, there will rarely be such identical comparators and the best that can be expected is a revelation of rough similarity of

2006 BCCA 34 (CanLII)

injuries and their consequent impact on the plaintiffs. It is doubtful that identical comparator cases can ever be produced. All the ***Boyd*** analysis calls for is "similarly situated" plaintiffs in order for there to be a degree of fairness in the award of damages as between plaintiffs who have suffered similar injuries and similar losses.

[98] The appellant's cases generally disclose plaintiffs who, like Mr. Stapley, suffered a mild to moderate whiplash injury and who, as a result, lost a degree of enjoyment of life's amenities. The range suggested by the appellant's decisions is from $36,000 to $100,000.

[99] The respondent has, with the exception of ***Lindal***, provided us with appellate decisions that have reviewed juries' awards of damages. Of those, only the awards in ***Alden v. Spooner*** and ***Boyd*** were not modified by this Court. In my opinion, the decisions featuring jury awards are of limited assistance in determining the appropriate comparator for an acceptable award in this case. First, the decisions (with the exception of ***Lindal***, ***Alden*** and ***Boyd***) dealt with substantial moderations of jury awards and are thus not truly representative of the jury's view in the particular case. Second, the injuries and consequent losses experienced by the plaintiffs in those cases were generally more serious than those experienced by Mr. Stapley.

[100] Following the approach outlined in ***Boyd***, the conventional decisions cited to us by the appellant that seem to most closely approximate Mr. Stapley's non-pecuniary loss are ***Heartt v. Royal***, ***Schellak v. Barr and Duplessis***, ***Munro v. Faircrest*** and, perhaps most particularly, ***Corkum v. Sawatsky***. They disclose a range from $66,000 to $100,000.

2006 BCCA 34 (CanLII)

[101] However, none of the cases provided to us by counsel have as part of their factual matrix the unique position that Mr. Stapley enjoyed for 25 years on the ranch and the jury's evident acceptance that he would lose that employment and all the tangible and intangible benefits of his life on the ranch. It was, for Mr. Stapley, far more than simply a job and a means of supporting his family; and those are traditionally regarded as essential components of self-worth and emotional well-being: ***Reference Re Public Service Employee Relations Act (Alberta)***, [1987] 1 S.C.R. 313, 3 W.W.R. 577 (S.C.C.).

[102] Mr. Stapley faces the loss of his long-term employment and the attendant loss of his home, community and chosen lifestyle. The depth of that loss was poignantly described by Mr. Stapley and his wife. Although Mr. Stapley may not in fact lose his employment on the ranch, we must accept the jury's evident finding of that eventuality.

[103] It is clear that Mr. Stapley suffered some negative impacts in all of the enumerated factors that are considered in an award of non-pecuniary damages, including his physical well-being, work, home, relationships and recreation.

[104] The appellant concedes, and indeed it seems impossible to deny, that the jury was most favourably impressed by Mr. Stapley. The jury, drawn from the local community in which Mr. Stapley lives, undoubtedly had a keen perception and understanding of the loss that Mr. Stapley would incur if forced, by reason of his injuries, from the Coldstream Ranch. It was open to the jury to conclude that Mr. Stapley's loss of employment on the ranch and all that that entailed, coupled with

2006 BCCA 34 (CanLII)

the other impairments he has and will continue to experience, constituted a profound loss, and generated a substantial need for solace.

[105] The appellant was critical of the respondent's counsel's use of the word "catastrophic" in his description to the jury of Mr. Stapley's loss. Although another adjective might well have been used, I doubt that the jury assigned to that adjective the legal significance that lawyers and judges would attach to it. Nevertheless, in layman's terms, the loss suffered by Mr. Stapley might well be regarded as catastrophic. I think that must have resonated with the jury in the context of all of the considerable body of evidence they had to consider.

[106] We are obliged to consider Mr. Stapley's case in the most favourable light reasonably possible. As I have said, the jury evidently accepted that Mr. Stapley would lose the way of life he and his family have enjoyed. The jury's appreciation of that and Mr. Stapley's other losses need not correlate with the seriousness of his injuries. It need only reflect the specifics of his particular circumstances.

[107] The jury assessed Mr. Stapley's non-pecuniary damages award without reference to other such awards: ***Brisson v. Brisson*** (2002), 213 D.L.R. (4th) 428, 2002 BCCA 279. However, we are obliged to consider whether the jury award in this case is clearly anomalous in the context of other similarly situated plaintiffs. It must be recognized that the jury accepted that Mr. Stapley would lose the lifestyle afforded to him by reason of his employment on the ranch. However, that is only one component of his non-pecuniary award, *albeit* a significant one. It must also be recognized that Mr. Stapley continues to work and is capable of supporting his family, a matter that means much to him. Furthermore, he is able to enjoy

2006 BCCA 34 (CanLII)

recreational pursuits and is not, as with some other plaintiffs referred to above, incapacitated in that regard.

[108] If, as Smith J.A. noted in ***Boyd***, non-pecuniary awards should reflect a reasonable degree of fairness between similarly situated plaintiffs, then the jury's award in this case must, in my opinion, be moderated.

[109] I accept that the $100,000 non-pecuniary damage award made in ***Munro v. Faircrest*** represents the high end of conventional awards for a somewhat similarly situated plaintiff. However, as I have noted, Mr. Stapley's unique loss deserves to be compensated. In my view, that loss must be reasonably balanced with the other impairments (and relative abilities) that Mr. Stapley has and will experience. The loss of his work and lifestyle on the ranch, while not catastrophic in the legal sense of the term, are nevertheless very significant.

[110] In other words, Mr. Stapley is able to work, support his family, and participate in recreational activities. The chronic pain he experiences has not and, according to the medical evidence, will not in the future preclude those activities. In ordinary circumstances, an award of non-pecuniary damages for those losses would not exceed $100,000.

[111] What, then, is reasonable compensation for the additional potential loss of lifestyle? In my opinion, it cannot reasonably exceed an additional $75,000. In saying this, I am mindful of the difficulty in ascribing to Mr. Stapley's loss an amount that will provide solace to him for that loss. However, I am driven to conclude that the jury award of $275,000, which represents additional compensation of $175,000

2006 BCCA 34 (CanLII)

above the highest conventional award for a similarly situated plaintiff is clearly anomalous and a wholly erroneous estimate of Mr. Stapley's loss.

[112] In my view, based on the evidence before the jury and having particular deference to the jury's assessment of Mr. Stapley's loss, a reasonable award for non-pecuniary damages at the highest level would be $175,000.

[113] I would therefore allow the appeal and substitute an award of non-pecuniary damages of $175,000.

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Mr. Justice Lowry"

2006 BCCA 34 (CanLII)

Reasons for Judgment of the Honourable Chief Justice Finch:

[114] I have had the advantage of reading in draft form the reasons of Madam Justice Kirkpatrick, and find myself, with respect, unable to agree in her proposed disposition.

[115] This is yet another appeal where the defence challenges a jury's award for general damages for non-pecuniary losses as inordinately high, and a wholly erroneous estimate of the appropriate compensation to provide the plaintiff with substitute amenities for that which he has lost. The appeal again presents the issue raised in so many recent such appeals as to the standard by which an award is to be judged inordinate, out of all proportion, or wholly erroneous. Some of those cases are referred to in ***Dilello v. Montgomery***, [2005] B.C.J. No. 177 (QL), 2005 BCCA 56.

[116] For many years, this Court has used the approach of comparing the award under appeal with the awards made by judges when sitting alone, examining the latter awards to see if a pattern or range could be determined for similar cases. This approach is exemplified by the judgment of this Court in ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (B.C.C.A.), and re-examined more recently in ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146.

[117] In my view, recent experience has shown that comparing jury awards to those made by trial judges is no longer a useful exercise. To begin with, juries, unlike trial judges, do not give reasons for their verdicts. It is therefore impossible to know what facts the jury found as proven to support their awards. Consequently, it is

2006 BCCA 34 (CanLII)

impossible to compare the factual basis of the jury's award with the facts found by trial judges in "comparable" cases.

[118] Secondly, since 1978, when the Supreme Court of Canada limited awards for general damages in the most serious cases to $100,000, all trial judges, either consciously or unconsciously, will have had that upper limit in mind when assessing damages in the cases before them. (See ***Dilello****, supra* at paras. 23 to 26.) While the $100,000 upper limit has been adjusted for inflation over the years (to an amount now said to be approximately $281,000 for the purposes of this case) that upper limit has not been adjusted in any other way to reflect current community values.

[119] That adjustment, historically, was supposed to be facilitated by reference to jury awards, and the "valuable corrective" they were meant to provide. (See ***Cory v. Marsh****, supra* at para. 10, and the cases there cited, and ***Boyd v. Harris****, supra* at para. 42.)

[120] In fact, the corrective effect of jury awards on awards made by judges alone has been substantially, if not entirely, negated by the imposition of the 1978 $100,000 limit. Awards by judges alone do not reflect what juries have awarded in recent cases. To the contrary, to the extent judge alone awards are used to test the reasonableness of a jury's award, the informative process is reversed. This Court is asked to accept that the jury's award is wrong because it is too far outside the range established by trial judges; whereas if jury awards were given their corrective function, the process would be for judges to adjust their awards so that they would approximate what a jury might give in a similar case.

2006 BCCA 34 (CanLII)

[121] Judging from the number of recent cases in this Court where the jury's award is challenged as excessive, there is in my view a substantial basis for believing that non-pecuniary awards by judges alone, which are inevitably a reflection of the $100,000 upper limit, as adjusted for inflation, are now in a number of cases significantly out of touch with community values as reflected in jury awards.

[122] That this is so can be amply demonstrated in this case by referring to the authorities relied on by the appellant, and fully canvassed in my colleague's reasons at paras. 48 to 81. The appellant says these cases demonstrate a range of general damages in similar cases of between $40,000 to $80,000. On this basis, the defendant seeks a reduction in the award to an amount of between $80,000 to $100,000.

[123] For the reasons referred to above, I am not prepared to accede to this submission. The defendant issued the notice for trial by judge and jury. It is, I believe, common knowledge at the bar, that this Court will almost invariably defer to an award made by a jury when it is said to be too low. In such a case the defendant can say – quite properly – that the jury must not have believed the plaintiff, that the award for general damages reflects the jury's view of the plaintiff's credibility, and that accordingly, this Court should not intervene. By opting for a jury trial, the defence may anticipate an award that is within the range a judge alone would have made, or less; but if the award is much higher than the range of judge alone awards, the defence can come to this Court to seek a reduction. It is a kind of "win win" equation for the defence, and has the appearance of unfairness.

2006 BCCA 34 (CanLII)

[124] If then, the "range" of awards made by judges sitting alone is not a proper basis for testing a jury award the question is, by what other standard should the reasonableness of the jury's award be judged.

[125] In this case, counsel for the appellant in oral submissions, expressly disavowed the upper limit as a proper yardstick. Counsel for the appellant told us that the upper limit had "no relevance" in this case, and that this Court should not try to scale the appropriate award to the upper limit. He then of course relied on the "judge alone" comparables, which I have already said I do not find a helpful guide. (I have not overlooked the submission in the appellant's factum at paras. 54-55 which seems to suggest that this Court should "consider whether an award approaching the upper limit is fair" where the plaintiff has not suffered injuries approaching those at issue in the ***Andrews*** trilogy.)

[126] I remain of the views I expressed in ***Dilello***, *supra*, that the upper limit is not a helpful guide in cases such as this, and is moreover, an impermissible restriction on the function of the jury as triers of fact, and a fettering of the proper principles of appellate review.

[127] Having the view that awards by judge alone, and the upper limit, are both inappropriate standards, it seems to me the only remaining guideline by which to measure jury awards, are the decisions of this Court (or other appellate courts) made on review of jury awards. In such cases, this Court is asked to decide whether the jury's award is a wholly erroneous estimate, having regard for the evidence adduced in that case. In other words, the question is whether the appellant can

2006 BCCA 34 (CanLII)

meet the test of showing that the award is a palpable and overriding error of fact, such as will permit appellate intervention. My colleague has fully summarized the appellate decisions that fall in this category of cases at paras. 82 to 95 of her reasons. These cases are not a perfect guide because some of them are the result, in part, of comparison to awards made by judges sitting alone. However, even as adjusted by this Court, the results are in my view a better reflection of community values. The upper range of these awards is in excess of $230,000.

[128] The question then is, whether this jury's award of $275,000 for general damages is so far beyond that range as to meet the standard for appellate intervention. In my view, it is not. The award is a deviation from the range of about 20%, which is well within an acceptable limit, applying appropriate deference to the jury's award as a finding of fact. (The appellant concedes that an award of $100,000 would not be wrong even where it says the upper limit is $80,000.)

[129] My colleague has provided, if I may say respectfully, a very full and fair summary of the evidence in this case. The case was heard by eight local citizens residing in or near Vernon, British Columbia. The defendant asked, and the plaintiff did not object, to having the issues tried by a jury of the parties' peers. The jury obviously accepted the case for the plaintiff on the footing most favourable to him, and believed what he had to say about the impact of his injuries on his life. The jury applied their common experience and judgement to the questions put to them. I am not persuaded that any proper basis has been shown for substituting for their

2006 BCCA 34 (CanLII)

verdict, what I might have considered an appropriate award had I been hearing this case as a judge alone.

[130] I would dismiss the appeal.

"The Honourable Chief Justice Finch"

2006 BCCA 34 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Taraviras v. Lovig,*
2011 BCCA 200

Date: 20110418
Docket: CA037943

Between:

Chris Taraviras

Respondent
(Plaintiff)

And

Randal Anthony Lovig, GMAC Leaseco Limited, also known as GMAC Leaseco Limited/GMAC Location Limitee, Longridge Motion Pictures Inc., also known as Longridge Motion Pictures Inc.

Appellants
(Defendants)

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

On appeal from: Supreme Court of British Columbia, February 12, 2010,
(*Taraviras v. Lovig*, New Westminster Docket No. S84374)

Counsel for the Appellant: D.L. Dorey
R.R. von Ruti

Counsel for the Respondent: T.L. Spraggs
M.T. Cleary
K.B. Gardner

Place and Date of Hearing: Vancouver, British Columbia
March 2, 2011

Place and Date of Judgment: Vancouver, British Columbia
April 18, 2011

Written Reasons by:
The Honourable Madam Justice Garson

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

2011 BCCA 200 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] This is an appeal by the defendants/appellants from a verdict of a jury in a personal injury action. The appellants appeal the $300,000 non-pecuniary damage award and the $347,000 award for loss of future earning capacity. The appellants argue that the non-pecuniary damage award is wholly out of proportion to the loss the respondent actually suffered. They argue that there was no evidentiary basis grounding the award for loss of future earning capacity.

Background

[2] The respondent, Mr. Taraviras, is a 44-year-old, unmarried man. He has no dependants. He has co-managed his father's restaurant business, Top's Restaurant, since 1972. He also owns and manages four small apartment buildings.

[3] Mr. Taraviras was injured in a motor vehicle accident on February 28, 2002. At that time, he was rear-ended by a pickup truck owned by GMAC Leaseco Limited, leased to Longridge Motion Pictures Inc. and driven by Randal Anthony Lovig. These three parties were defendants at the trial and are appellants in this Court. The impact was of sufficient force to push Mr. Taraviras' vehicle into a vehicle in front of it.

[4] The injuries Mr. Taraviras complains of are primarily neck and back injuries with referred pain down his left leg.

[5] The claim was tried on February 1, 2010, for 10 days before Mr. Justice Verhoeven sitting with a jury.

[6] The appellants admitted liability at trial and the jury awarded damages as follows:

Non-pecuniary damages	$300,000
Special damages	$27,000
Past loss of income and lost opportunity	$10,000
Loss of future earning capacity	$347,000

2011 BCCA 200 (CanLII)

Cost of future care	$3,500
Loss of housekeeping capacity	$3,750
Total	**$691,250**

[7] At trial, the appellants argued: that Mr. Taraviras had a pre-existing back condition that was responsible for his long-term symptoms; that the injuries he sustained were caused by one or more other accidents in which he was involved; and that, in any event, his injuries were neither significant nor disabling. The appellants also argued that as Mr. Taraviras had continued his employment (after an initial six-week period of disability following the motor vehicle accident), there was no proof he had sustained any past loss of income, nor that he would sustain any future loss of earning capacity. It is evident from the verdict pronounced that the jury did not agree with the defences raised by the appellants.

[8] Mr. Taraviras testified that he suffered severe pain, particularly in his left leg, and that this pain was unrelenting for six years after the accident. He said the pain was relieved considerably by spinal decompression treatment which he underwent in 2008. Mr. Taraviras testified that for years following the accident, his neck pain lingered and worsened until 2005 when he finally saw a chiropractor who could help him. He considered his neck pain to be 95 percent resolved at the time of trial. Mr. Taraviras testified that he experiences a constant dull pain in his back and that none of the treatments which he tried over the years assisted with that aspect of his pain.

[9] Despite the improvement in his symptoms, Mr. Taraviras did not think he could perform adequately in an alternative restaurant/manager position (in a restaurant he did not own or partially own) because he could not perform all tasks normally expected of a manager. He had previously expected to purchase the restaurant from his father, but because of his inability to properly manage the restaurant, his father had put it up for sale.

[10] Mr. Taraviras gave evidence about his work history and his real estate business.

2011 BCCA 200 (CanLII)

[11] From age 12 he began working at Top's Restaurant every day after school. By the time he had turned 16, he had saved $8,000. He purchased a Corvette motor vehicle. In 1986, when Mr. Taraviras was 20 years old, he assisted with a remodelling of the restaurant. He helped with the demolition, all the light duties and supervised the workers.

[12] By 1989, he had purchased his first house with the money he had saved from his employment. He renovated the house together with his friend and co-owner. He sold it nine months later at a profit of $57,500, noting that he and his friend did all the labour themselves.

[13] Next, at age 24, he purchased a 10-plex apartment building. He worked at renovating that apartment building every day while continuing his work at the restaurant every night. He testified that at the rate of one suite per month, it took one year to remodel the whole building. He did much of the work himself.

[14] Then he bought another house, renovated it and sold it three months later, for $40,000 more than the purchase price. He did the same thing on a third house.

[15] In 1991, he bought a townhouse for $160,000, renovated it, and sold it 13 days later for $185,000. During this same period of time he was working the 4:00 p.m. to midnight shift at the restaurant while doing his renovation work from 8:00 a.m. until late afternoon.

[16] In 1991, he bought a property on Parker Street in Burnaby, again renovated it, and again sold it four months later for a significant profit.

[17] In 1995, he bought a house immediately behind the restaurant and that is where he resides. He renovated that property, lives in the top floor and rents out the basement. This was the last property which Mr. Taraviras purchased before the 2002 motor vehicle accident.

[18] In the several years following the motor vehicle accident, Mr. Taraviras purchased three more small apartment buildings. He testified that as a consequence of his injuries, he hires others to do the necessary labour associated

2011 BCCA 200 (CanLII)

with maintaining these properties. The jury rejected his claim for $15,821 for damages for rental building maintenance.

[19] Mr. Taraviras usually works six days a week at the restaurant. His normal shift is from 4:00 p.m. to midnight. He testified that between his real estate business and his managerial duties at the restaurant, he has always worked more than 40 hours a week.

[20] As to his other accidents and injuries, he acknowledged seeing a chiropractor following an earlier accident and he continued to have what he described as “regular maintenance” right up until the 2002 motor vehicle accident.

[21] A few days after the 2002 motor vehicle accident, Mr. Taraviras fell down the stairs. He attributes that fall to balance problems stemming from the motor vehicle accident. He says the fall aggravated the pain he already had.

[22] Prior to the 2002 motor vehicle accident, Mr. Taraviras was active in snowmobiling, snowboarding, jet skiing, tennis, cycling and boating. He tried returning to jet skiing two to three months after the accident, lost his balance and broke his right fibula. He said that event increased his back and neck pain. Now he does no recreational sports.

[23] Various witnesses described him as appearing to be in pain, not as energetic as before the accident, nor as good natured. Mr. Taraviras testified that he has been unable to maintain a long-term romantic relationship since the 2002 accident. He attributes this problem to his ongoing pain and disability.

Grounds of Appeal

[24] The appellants argue the following grounds of appeal:

> (1) The jury’s award for non-pecuniary damages is wholly out of proportion to the loss the Plaintiff actually suffered. Absent a new trial, the Defendants ask this Court to substitute a non-pecuniary award in the range of $40,000 to $100,000.
>
> (2) The jury’s award for loss of future earning capacity is without basis in the evidence, inconsistent with other aspects of the award, and the result of confusing submissions to the jury which were not properly corrected by the

2011 BCCA 200 (CanLII)

> Judge's charge. The Defendants ask this Court to set aside the award entirely. Alternatively, the Defendants ask this Court to order a new trial.

[25] With respect to non-pecuniary damages, Mr. Taraviras submits that the jury's award is not wholly disproportionate or shockingly unreasonable. He further argues that:

> ... this Court should not canvass judge-alone trial awards for comparable cases, as the Appellants suggest. Rather, the proper approach, and the approach the Court of Appeal has most recently used, is to use decisions of appellate courts reviewing jury awards as comparable cases.

[26] As for the second ground of appeal, Mr. Taraviras argues that the award for loss of future earning capacity is supported by the evidence and the trial judge's instructions were sufficient to avoid confusion on the part of the jury.

Analysis

Non-Pecuniary Damage Award

[27] The first issue for consideration is the appellants' argument that the award for non-pecuniary damages is wholly out of proportion to the loss Mr. Taraviras suffered.

[28] The appellants ask this Court to consider that Mr. Taraviras was suffering from some pre-existing pain, he had degenerative changes in his spine, he had previously broken a vertebrae in his spine and he had required chiropractic treatment before the accident. He also suffered from migraines before the accident. They note, not all Mr. Taraviras' pain was referable to the 2002 accident. They note that Mr. Taraviras' pain had largely resolved by 2005 at the latest. They note that approximately four months after the accident, Mr. Taraviras told Dr. Hii, his general practitioner, that his lower back had improved by 75 percent. In October 2005, Mr. Taraviras reported to Dr. Apel that he was about 80 percent improved and to Dr. Hershler, the same thing three days later. By the time of the trial, Mr. Taraviras rated his back pain as a one or two on a ten point scale. The appellants argue that the complaint of burning or tingling down his left leg could not possibly be related to the 2002 accident because Mr. Taraviras did not report this pain until three and one

2011 BCCA 200 (CanLII)

half years after the accident. The appellants note that his numerous accidents following 2002 interfered with his recovery, aggravated his injuries, and demonstrated a "striking failure to take care of himself and thus mitigate his losses".

[29] The appellants note that Mr. Taraviras' level of activity, both at work and in his private life, suggests he is in fact able to function in a reasonably normal way. They note that Mr. Taraviras has continued to "work full time in the same position, albeit with some accommodation, over the last eight years, and he has been able to pursue his interest in real estate by purchasing and managing several rental apartments". I think it reasonable to assume, given the verdict reached by this jury, that the jury did not accept these arguments raised at trial, and again on appeal by the appellants.

[30] The appellants argue that Mr. Taraviras' injuries and symptoms fall far short of the kind that would warrant an award in the upper range of non-pecuniary damages. The appellants ask this Court to substitute an award in the range of $40,000 to $100,000 for non-pecuniary damages.

[31] In *Boyd v. Harris*, 2004 BCCA 146, K. Smith J.A. commented upon the important role of juries and the deference that ought to be accorded a verdict of a jury. At paras. 9-12 he stated:

> [9] ... Because juries are not made aware of the range of awards that trial judges have established in previous cases, common sense and collective values must guide their deliberations. As a result, jury verdicts are unpredictable or, at least, less predictable than those of trial judges. This uncertainty of result inherent in a jury trial of a claim for damages, coupled with the additional costs associated with that mode of trial, must surely spur the parties to reach an accommodation short of trial. Risk, an important factor in settlement negotiations, is amplified when the trial is to be by jury; the range of settlements acceptable to the parties is thereby broadened and settlement prospects are enhanced. Appellate interference with jury awards, unless circumscribed, will tend to remove from the system this incentive to settle cases.
>
> [10] Further, juries bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and its opinions of what would be fair, just, and reasonable in the circumstances. Mr. Justice Cory referred to the qualifications of juries to assess damages in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 ¶ 158 where he said:

2011 BCCA 200 (CanLII)

> Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd*. (1987), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.
>
> [11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.
>
> [12] The difficult problem is how to identify the extent of permissible deviation from the conventional range of awards. [...] what is the acceptable range and what is an excessive deviation from the range in a given case are questions on which there may be reasonable differences of judicial opinion.

And at para. 42, he concluded:

> [42] ... Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.

[32] The standard of review on appeal of a non-pecuniary jury verdict was described recently in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 127. There, Rowles, J.A. speaking for the Court said, "in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that 'rare case' where it is 'wholly out of all proportion' or, in other words, when it is 'wholly disproportionate or shockingly unreasonable'" (citations omitted).

[33] Importantly, she drew a distinction between this Court's standard of review on an appeal of a judge alone award (that of "inordinately high or low" or "wholly erroneous"), as compared to the more deferential standard of review on an appeal of a jury verdict. Rowles J.A. confirmed what K. Smith J.A. said in *Boyd* at paras. 5 and 41-42, that a jury award of damages should be allowed "a 'greater margin of

2011 BCCA 200 (CanLII)

deviation' from the range that would be considered reasonable if the damages were assessed by a trial judge" (*Moskaleva* at para. 110).

[34] This case is not one in which the victim has suffered catastrophic injury. Mr. Taraviras' permanent disability is, by all accounts, a moderate one, thus it is irrelevant how Mr. Taraviras' injuries compare to those of the plaintiffs in the Supreme Court Trilogy (*Moskaleva* at para. 132).

[35] What is relevant is how the non-pecuniary award in this case correlates to Mr. Taraviras' particular circumstances.

[36] In my review of the non-pecuniary jury verdict in this case, I must accept that the jury resolved all evidentiary conflicts in favour of Mr. Taraviras. I have described some of his evidence and I proceed on the assumption that the jury did accept this evidence. In other words, the question to be resolved is – taking Mr. Taraviras' case at its most favourable, is the award nevertheless so exorbitant that it would shock this Court's conscience and sense of justice? (*Moskaleva* at para. 116; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18).

[37] At paras. 41-42 of *Boyd,* K. Smith J.A. provided a helpful structure to the analysis of an alleged 'wholly disproportionate' non-pecuniary award:

> [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.
>
> [42] The identification of comparable cases is not a simple task. Each case is unique. The process should be systematic and rational, not conclusory. We must therefore search for common factors that influence the awards, such as, most obviously, the age of the plaintiff and the nature of the injury. However, comparisons can be made on a more abstract level, as well. The factors to be considered include the relative severity and duration of pain, disability, emotional suffering, and loss or impairment of enjoyment of life. The awards in the comparable cases must be adjusted for inflation. When the appropriate range is identified, adjustments must be made for the particular circumstances of this case, including the plaintiff's need for solace, which must be considered subjectively. Then, in determining whether the award falls so far outside the acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury.
>
> [Citations omitted.]

2011 BCCA 200 (CanLII)

[38] Counsel for Mr. Taraviras argues on appeal that this Court should restrict its review of what I would call the comparator cases, solely to appellate reviews of jury awards. The approach favoured by the respondent is based upon the Chief Justice's dissent in *Stapley v. Hejslet,* 2006 BCCA 34, in which he noted that the present regime of using comparator cases is a "kind of 'win win' equation for the defence, and has the appearance of unfairness" (*Stapley* at para. 123).

[39] Mr. Taraviras further argues that *Moskaleva*, and perhaps *Ferguson v. Lush*, 2003 BCCA 579, support the approach advocated by the Chief Justice in *Stapley*. In *Moskaleva*, Rowles J.A. said in respect to comparison of jury verdicts to judge alone awards, at para. 128:

> [128] Support for the view that in order to determine whether a jury award is "wholly out of all proportion" or "wholly disproportionate or shockingly unreasonable", it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in "the same class of case" may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.'s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras. 33-43; and Finch C.J.B.C.'s dissent in *Stapley* at paras. 116-124.

[40] In *Ferguson*, Thackray J.A. expressed some doubt about the comparator approach (at paras. 45-50), on the basis that it is illogical to withhold from a jury comparator cases, but then hold that the jury has made a palpable error by assessing damages wholly out of proportion to similar cases (see also: Thackray J.A.'s dissenting comments in *White v. Gait*, 2004 BCCA 517 at para. 70). Nevertheless, he accepted that such an approach has been adopted by this Court (*Ferguson* at para. 52). As I understand the judgment of Rowles J.A. in *Moskaleva*, she did not reach a firm conclusion about the correctness of the comparator approach. From my review of these authorities, I conclude that it is appropriate and logical to use comparator cases as a rough guide to assist the court on appellate review: *Cory*, *Cody, Boyd,* Smith J.A. in *Lam v. Main*, 2003 BCCA 517 at para. 8.

[41] In my view, the concerns expressed in the dissenting reasons of Gibbs J.A. in *Cory*, and Finch C.J. in *Stapley* are adequately addressed by the more deferential standard of review applied to jury awards and the greater 'margin of deviation' which is permitted in the range of such awards. The standard expressed by Rowles J.A. in

2011 BCCA 200 (CanLII)

Moskaleva, and the approach described by K. Smith J.A. in *Boyd* strike the appropriate balance between the need to ensure fairness and uniformity on the one hand and the corrective, settlement-enhancing function of juries on the other.

[42] There is no doubt that a jury award ought not to be set aside for failing to conform to judge alone awards (*Cody* at para. 125), but in my view, to fail to consider comparator cases as some sort of rough guide could "lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts" (*Boyd* at para. 11). At para. 49 of his dissent in *Cory*, Gibbs J.A. acknowledged that comparator cases might serve this limited purpose. I see nothing inconsistent with the test enunciated in *Moskaleva* and the use of comparator cases to inform the appellate court in the application of the *Moskaleva* test. To do otherwise leaves the appellate review as a wholly intuitive exercise which risks inconsistent results from case to case.

[43] Thus, I view the task on appellate review of an award alleged to be inordinately high is to assume that the jury found the facts most favourable to the plaintiff, and then to first compare the award to judge alone assessments in a generous way, and then to assess the appropriate "margin of deviation"' applying the *Moskaleva* test – that is, whether the award would "shock the court's conscience and sense of justice". As to what deviation would shock the court's conscience, I do find other appellate cases to be a useful guide. It is clear from the authorities discussed that considerable deference must be accorded a jury verdict and even where on appellate review the award must be reduced, such reduction should continue to reflect the views of the jury implicit in the verdict.

[44] The appellants rely on the following cases in support of their position that an assessment of Mr. Taraviras' non-pecuniary claim, before a judge sitting alone, would have fallen in the range of $40,000 - $100,000: *Verhnjak v. Papa,* 2005 BCSC 1129; *Jang v. Khera*, 2002 BCSC 60; *Dawson v. Gee*, 2000 BCSC 147; *Notenbomer v. Andjelic*, 2008 BCSC 509; and *Ayoubee v. Campbell*, 2009 BCSC 317.

2011 BCCA 200 (CanLII)

[45] Ms. Notenbomer was, at her trial, a 45-year-old insurance underwriter. As a consequence of a motor vehicle accident, she suffered a permanent partial disability owing to continuous low back and sciatic pain. She did have some pre-existing back problems. She underwent two spinal surgeries. The judge concluded that the motor vehicle accident caused or contributed to her injuries and assessed non-pecuniary damages of $100,000. From the judge's description of the symptoms, I would conclude that Ms. Notenbomer's symptoms were more severe than those suffered by Mr. Taraviras.

[46] Mr. Ayoubee was a 34-year-old man at the time of his trial. He suffered a herniated disc, with associated pain in his leg. He suffered from constant pain in the six years between the time of the accident and the trial. He had deferred surgery on his back, but by the time of the trial, he had determined that he would likely undergo surgical repair of the badly herniated disc. His injury and symptoms are somewhat comparable to Mr. Taraviras'. He was also awarded $100,000.

[47] I am satisfied that both of these cases are appropriate judge alone comparators.

[48] I found the remaining cases cited by the appellant unhelpful for comparison purposes.

[49] The respondent cited only appellate review (not judge alone) cases in its factum: *Moskaleva*; *Alden v. Spooner*, 2002 BCCA 592, leave to appeal ref'd [2002] S.C.C.A No. 535; and *Bransford v. Yilmazcan*, 2010 BCCA 271.

[50] To assist me in determining if the jury's award of almost three times the upper end of the judge alone range requires appellate intervention, I have reviewed the appellate cases cited by the respondent.

[51] In *Moskaleva*, a 53-year-old plaintiff suffered a mild traumatic brain injury, headaches, fatigue, and depression. There was medical evidence that the injury caused permanent cognitive deficits. The plaintiff and her husband testified that the effects of her brain injury on her cognitive abilities precluded her from pursuing her

2011 BCCA 200 (CanLII)

vocation as a software designer. The jury awarded her $245,000 for non-pecuniary damages. This Court did not reduce the award on appeal.

[52] In *Alden,* a 17-year-old student was injured in four accidents. Prior to the accidents she was a good student, a competitive runner, and had hoped to pursue a career in sports medicine. The jury awarded her $200,000 for non-pecuniary damages. As a result of the accidents she developed chronic pain syndrome or fibromyalgia and she became depressed. Rowles J.A. noted that the "combined effect [of the four accidents] was physically and emotionally devastating to the plaintiff" (at para. 29). The jury award, though acknowledged to be high, was not reduced on appeal.

[53] In *Bransford,* a 26-year-old woman was injured in a motor vehicle accident. Both before and after the motor vehicle accident she worked as a flight attendant but her neck pain eventually led to her leaving a succession of jobs. By trial, she was unable to work and was on disability benefits. She was diagnosed with thoracic outlet syndrome. She underwent surgery but it did not alleviate her pain and disability. The jury awarded her $385,000 for non-pecuniary damages. The trial judge reduced the award to the upper limit of $327,000. On appeal this Court, per Hall J.A., found that the award was "sufficiently anomalous that it [called] for appellate intervention" and reduced the award to $225,000 (at para. 22).

[54] I also found the case *Knauf v. Chao*, 2009 BCCA 605, to be a helpful appellate-level comparator. In *Knauf*, the jury awarded $235,000 in non-pecuniary damages for a permanent soft-tissue injury. The plaintiff was age 35 at the time of the accident. Her injuries forced her to quit her part-time job as a server and to curtail her recreational activities. The court considered the plaintiff's injuries to be significantly less serious than those suffered by the plaintiff in *Moskaleva* (paras. 48-49). Having found that the award was wholly disproportionate, the court reduced it to $135,000, noting that improper comments made by plaintiff's counsel may have influenced the jury (paras. 57-58).

[55] Here, Mr. Taraviras testified that his life had, in almost all respects, been affected by this accident. He could no longer work in the same robust way he had

2011 BCCA 200 (CanLII)

worked previously. His renovation and property acquisition business was limited by his inability to do the heavy maintenance and renovation work. He could no longer participate in his previous active sporting life. His personal relationships were affected by his short temper and more sedentary lifestyle. He complained of constant pain in his leg and back. He could no longer enjoy his employment. Taking the plaintiff's case at its most favourable, I would conclude that Mr. Taraviras' injuries in this accident had a devastating effect on his previously active and energetic life. I must assume that the jury did not accept the proposition advanced by the defendants that his pre and post-accident injuries were causative.

2011 BCCA 200 (CanLII)

[56] Even accepting Mr. Taraviras' case as I have, I am of the view the award for non-pecuniary damages does require appellate intervention. This is one of those awards that is so out of all proportion to the circumstances of the case that it would shock the conscience of the court to leave it undisturbed. It is wholly out of proportion to the injuries suffered by Mr. Taraviras and must be set aside. In granting considerable deference to the jury and using the judge alone and appellate cases as some guidance, I would reduce the award from $300,000 to $200,000.

Loss of Future Earning Capacity

[57] I now turn to the verdict for loss of future earning capacity.

[58] At para. 82 of their factum, the appellants argue:

> In short, the evidence disclosed no substantial possibility that the Plaintiff's future ability to earn income would be impaired by the 2002 accident, and thus no foundation for the jury's award of $347,000 under this head. The fact that the Plaintiff is no longer able to perform his managerial work in exactly the same way as before the accident has not impaired his ability to earn an income from that work. And the fact that the Plaintiff may not be able to take certain physically strenuous jobs in the future is equally irrelevant, given that there was no credible evidence that the Plaintiff would realistically have wanted or been able to earn income from such jobs.

[59] The appellants also argue that the jury award is internally inconsistent. They note that the jury awarded the plaintiff only $10,000 for his past loss of income and that this is inconsistent with the award of $347,000 for loss of future earning capacity. They also argue that the jury award was evidently caused by two sources

of possible confusion. First, the "misleading closing submissions by Plaintiff's counsel about the sale of Top's Restaurant" and second, the "unsubstantiated opinion evidence by the Plaintiff's family doctor that the Plaintiff had suffered a concussion or even a mild traumatic brain injury". The appellants argue in their factum that neither source of confusion was properly clarified by the judge's charge.

[60] They argue first that plaintiff's counsel's reference to the pending sale of the restaurant may have confused or misled the jury. The appellants contend that the jury may have been misled into thinking that Mr. Taraviras and his family should be compensated for the loss of the restaurant.

[61] The judge said this about the effect of the evidence as to the sale of the restaurant:

> One aspect of the submissions of the plaintiff needs special attention from me. As I have described, should you find Mr. Taraviras has suffered from an impairment in his capacity to earn income resulting from the motor vehicle accident injuries, then compensation of an amount that you determine should be awarded.
>
> However, you should not consider that the accident injuries have caused him to lose the value of the restaurant. The claim for compensation as set out in the statement of claim relates only to loss of earnings, which includes loss of earning capacity as I have described it.
>
> During the course of the argument on the part of the plaintiff, there was perhaps -- I should add the word "perhaps" -- a suggestion that due to the accident injuries the plaintiff is now not going to receive the value of the restaurant which is being sold. I have been advised by plaintiff's counsel that there was no intention to suggest that an award ought to be made relating to the loss of the value of the restaurant. My understanding of plaintiff counsel's argument is that this was merely an example of how life has changed from a financial point of view for the plaintiff due to the accident. On the pleadings that the parties filed with the court, and on the evidence that you heard, it would not be proper to make an award based upon loss of the value of the restaurant. Therefore you are only to assess the award for the plaintiff's own loss of earning capacity, not for the loss of the value of the restaurant that the plaintiff suggested might have otherwise become his.
>
> Similarly, it is only the plaintiff's loss that you may assess compensation in respect of. To the extent that the plaintiff's injuries may have had an effect on the plaintiff's father or caused financial consequences for other members of the family, such considerations are not relevant and must not be considered by you. It is only the plaintiff's loss that is to be assessed.

2011 BCCA 200 (CanLII)

[62] In my view, this instruction should have thoroughly dispelled any confusion that the jury might have had regarding Mr. Taraviras' loss of future earning capacity. Mr. Taraviras' has worked at Top's Restaurant since he was 12 years old. Aside from his real estate business, his involvement in the family restaurant is the only work he has known. The pending sale of the restaurant was a contingency relevant to Mr. Taraviras' ability to earn income from that source in the future and something which it was appropriate for the jury to consider under this head of damage.

[63] At the conclusion of his charge, the judge asked both counsel if they had any corrections with respect to the charge. Both counsel indicated satisfaction and neither made any objections.

[64] The appellants argue that the second source of confusion for the jury arose from the evidence of the plaintiff's family doctor, Dr. Hii. The appellants argue that no such injury had been pleaded or testified to by the plaintiff at all. They argue that Dr. Hii left the jury with a clear impression that the plaintiff might have permanent "changes" in his brain and might be "maimed for life". The judge did give a mid-trial instruction with respect to Dr. Hii's evidence, instructing the jury that no proper notice had been given to the defendants about his opinion or conclusions. The appellants complain "that the judge did not however correct the misleading impression left by plaintiff's counsel's closing submission". They say, the cumulative effect of all of this was to suggest to the jury that the plaintiff's earning capacity was limited by a brain injury – a suggestion lacking any basis in the evidence.

[65] This argument about Dr. Hii's evidence is entirely speculative. Defence counsel listened to all the evidence including the submissions and the judge's charge and took no objection to it. I would not accede to the argument that the jury must have been, or was even likely to have been, confused by this evidence.

[66] As to whether the evidence could support the verdict for future loss of earning capacity, Mr. Taraviras testified that prior to the accident, his father planned to retire and give the business to him and his brother, but would continue to collect rent as the property's owner. He testified that since the accident, his father had not been able to retire as anticipated and that Top's Restaurant was currently listed for sale.

2011 BCCA 200 (CanLII)

He testified that upon the sale of the restaurant, he would have to find alternative employment. Mr. Taraviras Sr. testified that he had no plans to share the proceeds of sale with his son.

[67] Mr. Taraviras testified that in his current role as manager of the restaurant, he has the freedom to tailor his work to his day-to-day condition. He could sit and relax if he needed to. When his pain was acting up, he could focus on administrative work and rely on employees to do the more physically demanding tasks. He expressed doubt that he would be able to find another restaurant manager job that provided the same sort of accommodation.

[68] Mr. Taraviras also testified about the future of his real estate business. He said that his wages from managing the restaurant provide a “cushion of money” to cover expenses related to the property business. He testified that sometimes he needs to use his personal money to cover bills arising from the real estate business. He testified that he has no plans to buy any additional properties and that he has been limited in his ability to act as a property manager since the accident. Mr. Taraviras testified that, overall, he is worried about his future.

[69] In my view, it is also entirely speculative to assume that this jury was confused by the effect of the evidence of Mr. Taraviras Sr. as to his intention to sell the restaurant. The respondent testified that he had doubts about his future ability to work in his chosen occupation as a restaurant manager. He is a young man and there was evidence upon which the jury could have projected a loss of income for the balance or part of his working life and reach the verdict it did. On appeal, counsel advised that the jury award represents the net present value of $18,000 - $22,000 depending on retirement at age 60 or 65. Similarly, there was evidence to support Mr. Taraviras’ argument that he could no longer earn an income from renovating houses or apartments. On this evidence the jury could realistically have concluded the respondent would lose something in the order of $22,000 per annum as a consequence of his injuries. I would not accede to this ground of appeal.

2011 BCCA 200 (CanLII)

Conclusion

[70] I would allow the appeal from the jury award for non-pecuniary damages and substitute an award of $200,000.

[71] I would dismiss the appeal from the jury award for loss of future earning capacity.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Groberman"

2011 BCCA 200 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Thomas v. Foskett,*
2020 BCCA 322

Date: 20201120
Docket: CA45752

Between:

Renee Thomas

Appellant
(Plaintiff)

And

Eric Foskett and Toyota Credit Canada Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated September 12, 2018 (*Thomas v. Foskett*, Vancouver Docket M152607) and November 23, 2018 (*Thomas v. Foskett*, 2018 BCSC 2369, Vancouver Docket M152607).

Counsel for the Appellant:	A. Leoni
Counsel for the Respondents:	A.M. Gunn, Q.C. F. Lin
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2020
Place and Date of Judgment:	Vancouver, British Columbia November 20, 2020

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

2020 BCCA 322 (CanLII)

Summary:

The appellant was injured in a motor vehicle collision. Liability was admitted. A jury assessed damages. The appellant appeals the jury's verdict, alleging misdirection in the charge to the jury, unreasonable awards for special and non-pecuniary damages, and erroneous dismissal of her application for a retrial. Held: Appeal allowed. The awards for special and non-pecuniary damages are set aside. The special damages award reflected palpable error. The award for non-pecuniary loss was plainly unreasonable and unjust given the nature of the appellant's injuries and their impact. Rather than order a new trial, the Court exercises its discretion to substitute awards for special and non-pecuniary damages in the amounts of $2,045 and $60,000, respectively.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

2020 BCCA 322 (CanLII)

Introduction

[1] The appellant sustained injuries in a motor vehicle collision. She sued for damages. A jury awarded her an aggregate $53,239.

[2] The appellant seeks to overturn the jury's verdict and obtain a new trial. Alternatively, she asks that this Court set aside the awards for special and non-pecuniary damages and substitute awards for greater amounts.

[3] The appellant says her trial was unfair and the jury's assessment of damages was palpably flawed, resulting in a plainly unreasonable and unjust outcome.

[4] For the reasons that follow, I would allow the appeal, set aside the awards for special and non-pecuniary damages, and substitute awards for them in the amount of $2,045 and $60,000, respectively.

Background

[5] The collision occurred in April 2013 in Vancouver. The appellant was then 43 years old. She is a single mother of three children and worked two jobs: as a cashier and receptionist at a community centre and as a bookkeeper. Following the accident, the appellant developed neck pain, upper back pain and right shoulder pain. Over time, much of the soft tissue pain subsided. However, at the time of trial, the appellant continued to experience pain and dysfunction in her right shoulder. An MRI of the

shoulder in September 2015 showed a superior labral tear. There were also indications of tendinosis, bursitis and joint arthrosis.

[6] The appellant worked continuously from the date of the collision to trial, missing only two days of work. She changed jobs prior to trial and, in 2018, when the jury heard her claim, she was working full time as a bookkeeper. She also worked two evenings per week as a cashier at a community centre.

[7] The respondents admitted liability for the collision. Damages were determined following a seven-day trial in September 2018. A significant issue before the jury was whether the appellant's ongoing shoulder pain and related physical limitations were attributable to the collision. The respondents acknowledged that the appellant sustained soft tissue injuries in the collision; however, they said she had not proved that the labral tear to her shoulder arose from the collision. As such, to the extent that her ongoing pain resulted from that tear, responsibility did not lie with the respondents. If they were wrong about that, the respondents submitted that the appellant's injuries did not affect her as severely as she claimed. They challenged the credibility of her complaints about ongoing pain, as well as the extent of her disability. At trial, appellant's counsel told the judge that in light of the appellant's condition, non-pecuniary damages for her injuries would typically fall somewhere around $125,000. The respondents suggested that the appropriate range was more in the nature of $60,000 to $80,000.

[8] The jury awarded the appellant an aggregate $53,239 in damages: $15,000 for non-pecuniary damages; $200 in past income loss (an agreed-upon amount); $16,308 for loss of future income earning capacity; $20,336 for costs of future care; and $1,395 in special damages.

[9] Following the verdict, neither party moved for judgment. In October 2018, the appellant filed a notice of appeal to this Court. She subsequently appeared before the trial judge and applied for a retrial under R. 12-6(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on grounds that the damages awards were conflicting. The respondents opposed the application. In November 2018, the trial judge dismissed the application for a retrial and formally entered judgment on the terms set by the jury. The

2020 BCCA 322 (CanLII)

appellant filed a second notice of appeal. By consent, the second notice was amended to consolidate the relief sought in both appeals.

Issues on Appeal

[10] The appellant raises four issues. She says: (1) the trial was unfair; (2) the award for special damages reflects palpable error; (3) the award for non-pecuniary damages is inconsistent with the other awards, and, in any event, wholly disproportionate; and (4) the judge should have ordered a retrial because parts of the jury's verdict were clearly wrong.

Discussion

Was the Appellant's Trial Unfair?

[11] The appellant says the judge erred in his instructions to the jury. The respondents' trial counsel (not counsel on the appeal) also made unduly prejudicial comments to the jury. The appellant contends that the cumulative effect of these errors was an unfair trial.

[12] The alleged errors in the instructions are four-fold. First, counsel provided the judge with a witness list at the start of the trial. In his opening instructions, the judge told the jury of the anticipated witnesses. This included a physiotherapist, Louise Craig, who would opine on the appellant's functional capacity and future care. When referring to Ms. Craig's anticipated testimony, the judge said:

> There is also going to be a physiotherapist who is apparently going to give evidence about Ms. Thomas' present functional capacity, and the idea is that the case that she's going to make for you, or attempt to make for you, and it's for you to decide whether she succeeded or not. … And bearing in mind that you're not obligated to accept an expert's opinion hook, line and sinker, that's probably the kind of evidence that the witness is poised to give and you'll have to decide whether you buy it or not; okay?
>
> [Emphasis added.]

[13] The appellant says these instructions wrongly positioned Ms. Craig as an advocate for the appellant and their "pejorative" nature unfairly undercut the value of her testimony. Ms. Craig was a key witness for the appellant.

2020 BCCA 322 (CanLII)

[14] The second alleged error arises from the judge telling the jurors in his opening remarks that they were free to discuss the case with “whoever” they wanted:

> When you have the case, when I finish charging you, you'll be invited to retire and to begin your deliberations, as I said. … Bear in mind the jury deliberations are private. They're not for public consumption. You can talk about the evidence with whoever you like. What happens in this courtroom, by all means. But the confidentiality of the jury room is sacrosanct ….
>
> [Emphasis added.]

[15] The appellant says this instruction was clearly wrong at law. Jurors must decide the case based on the evidence in the courtroom, not information they gather elsewhere.

[16] On the day following the opening instructions, appellant’s trial counsel (not counsel on the appeal) applied for a mistrial based on these aspects of the judge’s remarks. The judge dismissed the application and declined to ask the jurors whether they had spoken to anyone about the case overnight. However, he agreed to provide corrective instructions. (The refusal to grant a mistrial is not under appeal.)

[17] Specific to Ms. Craig’s testimony, the judge told the jurors that if he had said something that caused them to “pre-judge” Ms. Craig’s evidence, that was not his intention:

> This is a professional expert witness who's going to come and testify. I haven't got the slightest idea what she's going to say, and it's entirely up to you to evaluate her evidence on precisely the same principles that I've already described for you, and you can accept all of her evidence, part of her evidence, or none of her evidence, but you're to approach her with the same sort of dispassion and objectivity that I'm asking you to accord to every witness.
>
> You'll decide. You'll hear the witness. You'll decide the extent to which you accept her evidence. And I want you to keep an open mind about it and to apply the same sort of principles to your evaluation of her evidence, as with any other witness.
>
> [Emphasis added.]

[18] The judge also clarified that the jury was obliged to “judge [the] case solely and only on the evidence [it heard] in [the] courtroom”. Furthermore, the jury’s deliberations were to “be kept totally confidential” and, during the trial, the jurors “should not discuss

2020 BCCA 322 (CanLII)

the evidence with anybody". If they had spoken with anyone about the trial overnight, they should "disabuse" their minds of that discussion:

> During the course of the trial, you should not discuss the trial with anyone who's not on the jury with you. You shouldn't write or speak to either party, any witness, or counsel at this trial outside of this courtroom. …
>
> To the extent that you may have discussed what you heard yesterday with anybody, and of course the trial has only just begun and we've heard a portion of the evidence of a general practitioner, but to the extent that you may have discussed the evidence so far with anybody, I direct you to disabuse your mind of any such discussion. I'll repeat what I said to you yesterday, that you're to decide this case only on the evidence that you hear in this courtroom, entirely uninfluenced by any external source of information or advice.
>
> [Emphasis added.]

[19] The third alleged misdirection arises out of the final instructions on special damages. The appellant's claim for special damages consisted of an agreed-upon amount of $650 for chiropractic and physiotherapy services, the cost of an MRI and its associated injection fee, and a gym membership. The judge explained the claim for special damages this way:

> So special damages, ladies and gentlemen. And these are referred to in tab 9 of Exhibit 1. You've seen that list. The parties here are agreed that the plaintiff is entitled to be compensated for all out-of-pocket expenses listed in that exhibit — or in that tab up to November 27th, 2013, an amount of $650. Counsel have agreed that expenses other than these came up before that date but they were settled by agreement.
>
> The defendant denies responsibility to pay for the other items on that list. In the case of the September 23rd, 2015 MRI cost, he denies that he caused the labrum tear revealed by the test, and even if he did, he says the evidence has not satisfactorily established that it is causing the plaintiff's ongoing debilitating [pain].
>
> In the case of the gym membership, he says that the evidence shows that this was an expense that the plaintiff would have incurred even without the accident. These are questions of fact for you to decide on the balance of probabilities.

[20] The appellant says the second passage of this instruction wrongly focused on the existence of a causal link between the labral tear, identified in the MRI, and the ongoing shoulder pain. Instead, the only question for the jury to answer in awarding the MRI expenses was whether the appellant's shoulder pain was related to the collision. The actual medical cause of that pain was irrelevant.

2020 BCCA 322 (CanLII)

[21] The fourth alleged misdirection centres on the judge's explanation about future loss of earning capacity. He told the jury that any amount awarded for this loss was intended to "provide a future stream of payments covering the gap between what the plaintiff earned before the accident and what she's likely to earn now that she's injured" (emphasis added). The appellant says this is wrong in law. The appellant was not required to prove on a balance of probabilities that she *would* have earned more money but for her injuries; only that there was a real and substantial possibility of one or more future events that would result in a loss.

[22] Under this first ground of appeal, the appellant also points to comments made by respondents' trial counsel in his closing submissions. More than once, he raised the absence of certain witnesses as a reason for finding that the appellant had not met her burden of proof to show ongoing disability. He suggested that not calling these witnesses left the appellant's case with "holes all the way through".

[23] The trial judge sought to rectify those comments in his final instructions, telling the jurors that the appellant "wasn't obliged to call every witness under the sun, only such of those witnesses whom [she] thought would be useful in assisting [the jury] in fulfilling [its] tasks". He also pointed out that the witnesses who *did* testify about the impact of the appellant's injuries on her daily life "weren't challenged with any great enthusiasm, and their evidence was not seriously contested". As a result, any alleged failure to call witnesses, as highlighted by the defence, was not "something that should detain [the jury] over much in [its] deliberations".

[24] The appellant says the judge's corrective instructions were insufficient. Citing *Buksh v. Miles*, 2008 BCCA 318 at para. 35, she submits it is not proper for jurors to draw an adverse inference from the failure to call witnesses unless the trial judge has first made a threshold determination on the propriety of that inference, after considering multiple factors and receiving submissions from counsel. No such threshold enquiry took place.

[25] Appellate intervention in a jury verdict on grounds of trial unfairness, whether real or apparent, is only available where a reasonable person, informed of what took place,

2020 BCCA 322 (CanLII)

would be apprehensive that the complaining party did not receive a fair hearing: *Mazur v. Lucas*, 2014 BCCA 19 at para. 85.

[26] Where a fairness complaint is grounded in alleged misdirection (an error of law), the appellate court is obliged to "consider the entire charge to the jury, the whole of the evidence, and the positions of counsel as taken from their addresses to the jury" before interfering on that basis: *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 25; *Mazur* at paras. 27, 31. Misdirection will not result in a new trial unless it has occasioned a substantial wrong: *Arland v. Taylor*, [1955] O.R. 131, [1955] 3 D.L.R. 358 (C.A.), cited with approval in *Mazur v. Lucas*, 2010 BCCA 473 at para. 42.

[27] After considering the appellant's fairness complaints, in the context of the totality of the record, I would not accede to this ground of appeal.

[28] First, the judge corrected the problematic comments in the opening instructions the next morning and he used strong language in doing so. He emphasized the importance of the jury keeping an "open mind" to the appellant's expert witnesses. He also made it clear that the jurors were not to discuss the case with third parties, and, if they had spoken to anyone overnight, they were to ignore that information. At this point, the appellant's first witness was still in the witness box, and Ms. Craig had not yet testified. Although the appellant had sought a mistrial, after the judge delivered the corrective remarks, the appellant did not seek additional clarification for the jury or redirection or make further complaint about these issues.

[29] The judge further ameliorated any related prejudice in his final instructions. There, he properly instructed the jury on expert evidence. This included telling the jury it was not bound to follow any opinion the judge may have expressed about the evidence of a particular expert (which would include Ms. Craig). Instead, it was up to the jurors to decide "how much or little [they believed] or [relied] upon the testimony of any witness", and, to the extent their views were different from views expressed by the judge, the jurors were to "stand by [their] own views and opinions and ignore [his]". The judge also reminded the jurors that their findings had to "be based only on the evidence which [they] heard in [the] courtroom and on no other source".

2020 BCCA 322 (CanLII)

[30] Coupled with the corrective remarks on the second day of evidence, I consider the final instructions to have effectively remedied the appellant's concerns.

[31] On the second of the fairness complaints, I do not interpret the impugned instructions on special damages the same way as the appellant. The judge told the jury the parties agreed that the appellant was entitled to all out-of-pocket expenses listed on the schedule of special damages up to November 27, 2013. For the remaining expenses, the MRI and gym membership, the judge said the respondents denied responsibility for those costs. The judge explained the asserted bases for the denial. First, the collision did not cause the labral tear in the appellant's shoulder, and, even if such was the case, that injury was not the cause of her ongoing pain (which is what led to the MRI). Second, the appellant would have incurred the gym expense "even without the accident". The thrust of the instruction is that both expenses were disputed on grounds that the appellant did not prove they arose from (or were related to) the collision.

[32] This instruction was consistent with the closing submissions of the parties. Trial counsel for the appellant told the jury that if it was "satisfied that the [MRI] expense was reasonable and related to the injuries caused by the car crash [it] should allow the expense" (emphasis added). The defence said there was "not enough evidence to show that [the MRI expense is] related to the accident or that the pain is coming from the tear itself" (emphasis added). Further in the defence submissions, counsel said: "Special damages …. It's relatively simple. Up to November it's around $700, I think it's 650, 700, something like that. That's fine. We reasonably dispute the MRI scan. There's just not enough there to show it relates to the accident" (emphasis added).

[33] The appellant says a proper instruction on special damages required the judge to make clear to the jurors that the appellant was entitled to the MRI expense if they were satisfied that it arose because of the tortious event. In my view, that is what the judge did, through his explanation of the defence position. His comments focused on a link between the collision, ongoing injury to the appellant's shoulder (whatever the medical cause might be), and the MRI. When the final charge is considered in the context of the

2020 BCCA 322 (CanLII)

record, including counsels' submissions, this jury would have understood that the appellant was entitled to her expenses for the MRI and gym membership if those expenses were reasonable and related to the collision.

[34] I note that after the judge delivered his instructions on special damages, trial counsel had an opportunity to raise issues for which further clarification might be required. The appellant did not complain about this aspect of the charge. A failure to object is a "significant consideration" in deciding whether an alleged impropriety warrants a new trial: *Brophy v. Hutchinson*, 2003 BCCA 21 at para. 50. It provides an indication of the prejudicial effect of the impugned remarks, as perceived and assessed by counsel intimately familiar with the case.

[35] Finally, as will be discussed later, I am satisfied that the special damages awarded by the jury included the MRI expense. As such, even if the judge's instruction on this aspect of the case was problematic, it did not give rise to a substantial wrong.

[36] That brings me to the third alleged misdirection, involving the instructions on future loss of earnings. Assessing a plaintiff's future earning capacity requires that a jury consider hypothetical events (such as a reduction in work hours necessitated by the injuries). A plaintiff is not required to prove those events on a balance of probabilities. Instead, they are to be considered as long as the plaintiff establishes that the future events are a real and substantial possibility. Where a plaintiff meets that threshold, the trier of fact must then proceed to determine the measure of damages by assessing the likelihood of the "real and substantial possibilities" occurring: *Grewal v. Naumann*, 2017 BCCA 158, per Goepel J.A. dissenting (not on this point) at para. 48. See also *Gao v. Dietrich*, 2018 BCCA 372 at paras. 36–37.

[37] I am satisfied that in the final instructions, the jury received the proper analytical tools for assessing the appellant's future loss of earning capacity. Before the judge delivered the impugned instruction (para. 21, above), appellant's trial counsel told the jury in his opening statement that he would call witnesses to testify that the appellant's injuries had not "completely healed" and that she would "continue to suffer from her injuries permanently or for some time into the future". He explained that if the jury

2020 BCCA 322 (CanLII)

accepted that evidence, the appellant was entitled to compensation for loss of future earning capacity. To obtain this compensation, the appellant "need only show that there's a real and substantial possibility of a future loss" (emphasis added).

[38] At the start of his instructions on future loss, the judge reiterated the point made by appellant's counsel, namely, that to succeed on this aspect of her claim, the appellant "must prove that there is a real and substantial possibility of a future event leading to an income loss" (emphasis added). He subsequently put the appellant's position before the jury, that "because of an accident-related decrease in [her] functional capacity, [the appellant] will suffer a loss". He explained that the defence disputed this aspect of the appellant's claim. The defence argued that the evidence (including the fact that the appellant only missed two shifts post-collision, worked continuously to trial, and experienced growth in her income) did not establish a "real and substantial possibility of a future event leading to an income loss" (emphasis added). The judge told the jurors it was "entirely for [them] to determine whether there's a real and substantial possibility of [that event] occurring" (emphasis added). He then explained that if they answered the question in the affirmative, the jurors had to "go on to assess the likelihood of its occurrence". If they found the likelihood of occurrence was 10, 50 or 90 percent, they were obliged to award the appellant 10, 50 or 90 percent of the compensation she would be entitled to "if it were certain that the loss would occur".

[39] In light of the many references to a "real and substantial possibility" (not all have been captured here), I am satisfied that the instructions on future loss of earning capacity, considered as a whole, accord with the proper legal test as confirmed in *Grewal*. Appellant's trial counsel did not raise concerns with this aspect of the charge after its delivery.

[40] Finally, I agree with the respondents that in his closing submissions, their trial counsel did not invite the jury to draw an adverse inference against the appellant based on a failure to call certain witnesses. Instead, as I read the relevant portions of the closing submissions, he simply argued that the appellant's evidence was not sufficient to make out all aspects of her claim. In any event, as noted, the judge provided the jury

2020 BCCA 322 (CanLII)

with a final instruction specific to this point, making it clear that the appellant was not obliged to “call every witness under the sun”. Importantly, he also drew the jurors’ attention to the fact that the witnesses who *did* testify about the impact of the injuries on the appellant were not “seriously contested”.

[41] There were aspects of this trial that did not reflect best practices. This included the inelegant language in the opening remarks, as well as the judge telling the jurors who was likely to testify and, in respect of those witnesses, the nature of their evidence. That is a matter best left to counsel in their opening statements. Counsel control the presentation of their cases, are better positioned to accurately summarize the anticipated evidence, and they may change their witness list for tactical reasons, or otherwise, as the trial unfolds. In this case, for example, the trial judge told the jury that he expected the respondent driver would testify. As it turned out, the defence did not call oral testimony; rather, its case consisted of two expert reports. Trial judges must be careful to avoid prejudicial effect arising from flagged evidence that is then not brought forward by one of the parties, or turns out to be different from the description provided by the judge.

[42] The judge also failed to mark a copy of the written final instructions as an exhibit. This Court has made it clear that written charges, as well as any drafts discussed with counsel, should be marked as exhibits: *R. v. Moir*, 2013 BCCA 36 at paras. 13–14. Depending on the circumstances, not doing so can prevent meaningful appellate review.

[43] However, for the reasons provided, I am not persuaded that a reasonable person, informed of the entirety of what took place at this trial, including the corrective instructions, would be apprehensive the appellant did not receive a fair hearing. The appellant has not established errors of law or procedure that occasioned a substantial wrong. When assessing trial fairness, the Court assumes that juries act judicially and responsibly and that the instructions provided to them have been followed unless it is clear from the record that such was not the case: *Paskall v. Scheithauer*, 2014 BCCA 26 at para. 37, citing *Hovianseian v. Hovianseian*, 2005 BCCA 61 at para. 25.

2020 BCCA 322 (CanLII)

[44] I would not accede to this ground of appeal.

Does the Award for Special Damages Reflect Palpable Error?

[45] Damages awards are case-specific and fact-intensive. As a result, they are subject to a deferential standard of review: *Pearson v. Savage*, 2020 BCCA 133 at para. 51; *Moskaleva v. Laurie*, 2009 BCCA 260 at paras. 125–128.

[46] Appellate courts cannot interfere with a damages award simply because they would have reached a different conclusion: *Pearson* at para. 51. Instead, to intervene, a court must be satisfied that the impugned award reflects a mistaken or wrong principle of law, there was no evidence on which the trier of fact could have reached a particular conclusion, or the result was a wholly erroneous estimate of damages: *Pearson* at para. 51, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435–436. See also *Paskall* at paras. 98–99.

[47] A jury's verdict on damages will "not be set aside unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it": *Lennox* at para. 21; *Desharnais v. Parkhurst and Romanowski*, 2013 BCCA 113 at para. 64; *Boota v. Dhaliwal*, 2009 BCCA 586 at para. 11. It is not enough to show that the impugned award was inordinately high or inordinately low; rather, appellate intervention will be justified only if the award was wholly out of all proportion: *Moskaleva* at para. 127.

[48] At trial, the parties reached an agreement on the appellant's entitlement to her chiropractic and physiotherapy expenses from April 2013 to November 2013. Those costs totalled $650.

[49] A schedule of special damages was put before the jury. It contained the chiropractic and physiotherapy costs. When the schedule was produced, the jury was told that special damages are "in the nature of out-of-pocket expenses". It was also told that the defence agreed the appellant's expenses up to and including November 27, 2013, were compensable, and, as a result, the only costs in issue involved the MRI and gym membership:

2020 BCCA 322 (CanLII)

> In other words, those expenses are not in issue and you don't have to worry about those.
>
> It seems that the out-of-pocket expenses or special damages being claimed, the only ones that are in issue are for the magnetic imaging, you heard evidence about how Ms. Thomas underwent a private MRI. That is referred to, I think, in item E. And then there's a gym membership referred to, and that's also in dispute. But none of the other expenses, I'm advised, are in dispute.
>
> [Emphasis added.]

[50] In his final instructions on special damages, the judge reminded the jury that the parties had "agreed that the [appellant] is entitled to be compensated for all out-of-pocket expenses listed in [the] exhibit … up to November 27th, 2013, an amount of $650". He then focused on the disputed amounts for the MRI and gym membership, saying those were "questions of fact for [the jury] to decide on the balance of probabilities".

[51] The MRI expenses amounted to $1,395. The gym membership cost $73.50. For special damages, the jury awarded $1,395—the precise cost of the MRI.

[52] In my view, it is obvious from the special damages award that the jury failed to appreciate that although the parties had agreed the appellant was entitled to $650 for her chiropractic and physiotherapy expenses, that amount had to form part of the verdict in order for the appellant to collect. The jury was told it did not have to "worry about" those expenses and that the "only ones that [were] in issue" were the costs of the MRI and gym membership (emphasis added). It was also told that the question to decide on special damages was whether the *latter* two sets of expenses related to the collision. Based on the information laid out for them, it is reasonable to infer that the jurors mistakenly thought the chiropractic and physiotherapy expenses were not something they needed to address. The question sheet provided to them for recording their verdict did not break down the "special damages" to distinguish between the claimed expenses.

[53] On appeal, the respondents "do not oppose a minor adjustment to the award of special damages" (respondents' factum at para. 6). This is a reasonable concession, in

2020 BCCA 322 (CanLII)

light of the record. Accordingly, I would accede to this ground of appeal on the basis that the special damages award reflects palpable error in not including the $650.

Is the Award for Non-Pecuniary Damages Plainly Unreasonable?

[54] The appellant says $15,000 for non-pecuniary damages makes no sense in light of the jury's awards for special damages, costs of future care and future loss of earning capacity.

[55] The jury granted the MRI expenses, which means it must have found that the appellant's struggles with her shoulder more than two years after the collision, necessitating the MRI, were attributable to the collision.

[56] The jury also awarded $20,336 for costs of future care, which the appellant says further evinces an accepted causal link between the collision and ongoing challenges with her shoulder. Louise Craig, who evaluated the appellant's functional capacity in 2018, found the appellant is "limited for sustained stooped/head forward posture and for work completed in low-level postures such as kneeling due to the demands for leaning forward unsupported and the strain that this position places on her neck, upper back and right shoulder" (emphasis added). She also found that the appellant is "limited for heavier activities and repetitive activities based on the presentation that [Ms. Craig] saw during the weakness of that shoulder and the restricted movement and the presentation of that injury" (emphasis added). The future care recommendations responded to those findings and the jury awarded the appellant her costs of future care, at least in part.

[57] The jury also awarded $16,308 for future loss of earning capacity. Ms. Craig opined that even with employer accommodation to facilitate her work as a bookkeeper or "accounting clerk", the appellant "will continue to experience pain increase that is functionally limiting to her performance and productivity and that may limit the number of work hours she can maintain. [She] is better suited to part-time work of this nature in the range of 25 to 30 hours per week". Ms. Craig further recommended that the appellant leave a part-time cashier position she holds two evenings per week to "allow for better overall management of her symptoms and limitations and to allow for greater participation in activities to help manage her symptoms …". The appellant says the

2020 BCCA 322 (CanLII)

award for loss of earning capacity reflects an acceptance by the jury of a real and substantial possibility of decreased functional capacity related to the shoulder injury.

[58] Given the evidentiary foundation underlying the awards for special damages, costs of future care and future loss of earning capacity, the appellant contends that the award for non-pecuniary damages is illogical and wholly disproportionate. The only reasonable inference to draw from the $15,000 award is that the jury insufficiently considered the chronic nature of the appellant's shoulder injury and its impact.

[59] Pointing to judge-alone trial-level decisions involving a shoulder injury, chronic pain and related functional limitations, the appellant contends that a proportionate range for non-pecuniary damages for someone in her position is $65,000 to $175,000.

[60] In opposing this ground of appeal, the respondents emphasize the deferential standard of review for damages awards. They say $15,000 is consistent with the jury having found that the collision did not cause the shoulder tear. Instead, the jury likely determined that as a result of the collision, the appellant sustained a "minor injury" to her shoulder that resulted in "modest earning capacity impairment and care needs" (respondents' factum at para. 4).

[61] According to the respondents, the appellant's comparable authorities do not provide a proper basis from which to infer that the $15,000 is plainly unreasonable and unjust, and thereby meets the test for appellate intervention. Those cases involved more serious non-pecuniary loss than this one. With one exception, they also included an objectively observable injury to the shoulder that was proved to have arisen from the tortious conduct. Here, the respondents denied that the collision caused the labral tear and they challenged the credibility of the appellant's complaints about her ongoing degree of debilitation.

[62] The respondents point out that the jury's awards for future care and future loss of earning capacity represent only a small fraction of the amounts requested by the appellant. In closing submissions, her trial counsel asked for $152,131 and $225,000 under those heads of damages, respectively. According to the respondents, it is

2020 BCCA 322 (CanLII)

reasonable to infer from the gap between the amounts sought and the amounts awarded that the jury found no causation between the collision and the labral tear. Even if wrong about that, the award for non-pecuniary damages reflects a finding that the appellant's injury to her shoulder and its impact are not as severe as claimed. The respondents say the jury's verdict is consistent with the position advanced in their closing submissions at trial:

> So we're admitting she did suffer injuries in this accident; she did. She deserves an award of non-pecuniary loss. And, again, it's not clear that the labral tear is related to the accident. It doesn't appear from the evidence there's enough to establish it on balance of probabilities. That's our position. But even if it was and if you thought that it was related, it doesn't appear to be a devastating injury that's radically altered her life.
>
> [Emphasis added.]

[63] I agree with the appellant that to award the MRI expenses, costs of future care, and damages for future loss of earning capacity, the members of the jury must have found that the appellant sustained an injury to her right shoulder consequential to the collision. Indeed, a June 2017 orthopaedic assessment commissioned by the *respondents* confirmed, at the very least, a "soft tissue strain" in the right shoulder "related to the date of [the] accident". The respondents' expert, Dr. Marks, diagnosed the appellant with "cervical strain and right shoulder strain".

[64] I also agree with the appellant that the awards for costs of future care and future loss of earning capacity reflect a determination, by the jury, that the appellant's shoulder pain subsisted at the time of trial, was detrimentally affecting her functional capacity, and will continue to do so into the future. By the time of trial, the appellant's other injuries had effectively resolved themselves. She confirmed that fact in cross-examination.

[65] That was also the evidence of the appellant's treating physician, Dr. Collette. Effective spring 2016, the appellant's "right shoulder had become her primary complaint". At the time of trial, the medical prognosis for injuries sustained to her neck and upper back was "good". She had "returned to [her] normal pre-subject accident condition". However, the right shoulder continued to present problems:

2020 BCCA 322 (CanLII)

> … it has become quite apparent that [the appellant] has been left with a chronic shoulder issue as she experiences chronic shoulder pain. …
>
> … she has been left with a chronic shoulder pain issue when the upper limb is forced to stay in prolonged positioning or is used repetitively in outstretched position.
>
> [Emphasis added.]

[66] The evidence of an orthopaedic surgeon called by the appellant, Dr. Chin, was to this same effect. He assessed the appellant in January 2017, noting that she:

> … initially sustained diffuse soft tissue pain within the mid-back, low back, and trapezial area including her neck immediately following the [collision]. Over time, much of the soft tissue pain subsided and has left her with residual trapezial pain on the right shoulder girdle area and right shoulder joint specific pain.
>
> [Emphasis added.]

[67] However, I do not agree with the appellant that this Court can also infer from the awards that the jury concluded the labral tear arose from the collision and that the appellant's functional capacity is substantially impaired because of that tear. In my view, that inference would be speculative. At trial, the defence vigorously contested causation between the collision and the labral tear, as well as any link between the tear and the appellant's ongoing shoulder pain. Resolution of those issues required the jury to make credibility findings about the medical evidence, as well as the appellant's testimony about her condition, pre- and post-collision, and the extent of her ongoing disability. In cases where credibility is a significant issue at trial, appellate courts must be particularly careful in the conclusions drawn from the *quantum* of damages awards, or disparity between them: *Hernandez v. Speevak*, 2002 BCCA 200.

[68] As explained in *Dilello v. Montgomery*, 2005 BCCA 56:

> [25] … non-pecuniary damages are influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience. Perhaps as important is the jury's subjective appreciation of the evidence describing the injuries, the plaintiff's pain, suffering, loss of amenities and disability, and the consequences of all those matters on the plaintiff's personal and economic future.

[69] As such, to assist in deciding whether the $15,000 awarded for non-pecuniary damages is plainly unreasonable, I consider it appropriate to compare that amount to

2020 BCCA 322 (CanLII)

cases where compensation has been awarded for non-observable injury to the shoulder. I do so recognizing that, as noted in *Dilello*:

> [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases.

[70] Turning to the appellant's comparators, I agree with the respondent that many of those cases involved more serious injuries and impairment of functional capacity than this one. *Murphy v. Hofer*, 2018 BCSC 869, for example, is at the upper end of the appellant's suggested range, with a $175,000 award for non-pecuniary damages. In that case, the judge made a definitive finding that a labral tear to the left shoulder, requiring surgery, was caused by the collision. The 43-year-old plaintiff also sustained a potential brain injury and developed psychological challenges from the collision. His life was "profoundly changed" by his injuries (at para. 128).

[71] *Beardwood v. Sheppard*, 2016 BCSC 100, falls in the middle of the appellant's suggested range. The 40-year-old plaintiff in that case underwent two neck surgeries because of the collision. After the surgeries, he continued to experience chronic radicular pain in his neck and hypersensitivity and numbness/tingling in both forearms and hands. The latter condition was likely to "persist indefinitely" (at para. 84). The collision also caused a labral tear to the plaintiff's right shoulder, again necessitating surgery. Although the plaintiff regained a normal range of motion as a result of the surgery and his remaining shoulder symptoms were likely to improve, he was at risk of developing significant osteoarthritis in the shoulder over the next 10–15 years (at para. 85). In awarding the plaintiff $120,000 for non-pecuniary damages, the court found that the plaintiff went "from a happy, forward-thinking person with a reasonable potential to succeed with his own glazing business, to an emotionally devastated and pain-ridden individual who finds it very difficult to function on a daily basis" (at para. 88).

[72] At the bottom of the appellant's suggested range is *Riley v. Ritsco*, 2017 BCSC 925. There, the collision completely disabled the 67-year-old plaintiff from work for approximately 14 months. He gradually returned to work full-time and then voluntarily

2020 BCCA 322 (CanLII)

retired. He experienced pain in his neck and mid- and lower back from injury to his spinal tissue, headaches, left shoulder pain and knee pain. The trial court found that due to his ongoing pain, the plaintiff would "probably continue to experience difficulty performing employment, recreational and household activities involving prolonged sitting, standing or walking, awkward spinal positioning, heavy or repetitive lifting, stooping, repetitive neck motion, repetitive reaching, climbing or jarring activities" (at para. 42). He received $65,000 in non-pecuniary damages.

[73] On appeal, the award for non-pecuniary damages in *Riley* was increased to $85,000. This Court found that the trial judge erred in principle by failing to accept the "emotional and mental manifestations of Mr. Riley's injuries as compensable": *Riley v. Ritsco*, 2018 BCCA 366 at para. 70.

[74] The respondents say functional losses of the kind alleged by the appellant typically attract a non-pecuniary range of $4,000 to $25,000, and, in that context, the $15,000 award is not wholly disproportionate. They have cited numerous trial level decisions in support of their position. I have reviewed those authorities. Generally, they are cases in which it was determined that the most serious of the injuries did not arise from the collision, the injuries were not chronic in nature, or the alleged severity of one or more of the injuries was not adequately supported by the medical evidence.

[75] As such, I find the respondents' authorities of little assistance. From the awards for costs of future care and future loss of earning capacity, it is clear that the jurors in this case did not conclude the appellant's shoulder injury was of short duration, had resolved itself by the time of trial, or that the evidence was too weak to support a finding of chronicity or functional incapacity.

[76] In the particular circumstances of this case, I am satisfied that the $15,000 for non-pecuniary damages is plainly unreasonable and one that no jury reviewing the evidence as a whole and acting judicially could have reached. It represents less than 20% of the amount awarded in *Riley* for chronic injuries that resulted in functional limitations not unlike the ones experienced by the appellant. This Court described the

2020 BCCA 322 (CanLII)

$65,000 awarded by the trial judge in *Riley* as "low, considering the serious harm suffered by Mr. Riley" (at para. 67, emphasis added).

[77] The respondents told the trial judge in this case that based on their assessment of the appellant's injuries, the appropriate range for non-pecuniary damages likely started at $60,000. That submission was advanced in the context of the respondents also disputing any link between the labral shoulder tear and the collision. I appreciate that the stated position was not binding. However, it is informative.

[78] In my view, a proportionate and just award for non-pecuniary damages in this case would be $60,000. Unlike *Riley*, the appellant's injuries did not necessitate that she be away from work for 14 months to recover from her injuries. That is a material difference. The appellant was able to manage through her injuries. Mr. Riley also experienced psychological and cognitive symptoms associated with his injuries, and felt he was unable to cope with his work, leading to his retirement. That is not an issue in this case.

[79] However, it is indisputable that at the time of trial, more than five years post-collision, the appellant continued to suffer from right shoulder pain. When testifying, she detailed how that injury has affected her daily life. If sitting, she must frequently move around and stretch out the shoulder to manage the pain, including possible headaches. She struggles with housekeeping and yard work. She has reduced her driving because of the need to grip the steering wheel and shift with her right arm. She cannot carry large or heavy items or pick many things up with her right arm. She cannot do some of the recreational activities she previously enjoyed.

[80] The appellant was not shaken on this evidence in cross-examination. The limitations she described were independently confirmed by her treating physician and by Ms. Craig. The appellant's son testified that his mother is "definitely a lot different" since the collision. "It's, like, she's struggling now rather than thriving."

[81] On this evidentiary foundation, and in light of the awards for costs of future care and loss of earning capacity, $15,000 to compensate for the appellant's pain, suffering

2020 BCCA 322 (CanLII)

and loss of amenities of life is plainly unreasonable and represents one of those rare instances when interference with the award on appeal is warranted. Accordingly, I would accede to this ground of appeal.

Was the Judge Wrong to Enter Judgment?

[82] After the jury's foreperson delivered the verdict, the jurors rose to confirm their unanimity and provided the verdict sheet with their damages awards to the court clerk. The judge thanked them for their service, discharged the jury, and then asked counsel whether there was anything further requiring his attention. He received a negative response and the case was adjourned. The transcript does not indicate that judgment was entered.

[83] Approximately two months after the trial, the appellant brought an application for a retrial under R. 12-6(7) of the *Supreme Court Civil Rules*. In the interim, she filed a notice of appeal to this Court. The appellant contended that the special damages award was clearly erroneous. She took the position that as judgment had not been entered, the judge should exercise his inherent jurisdiction to refuse to accept the verdict and order a retrial.

[84] The respondents opposed the application. Rule 12-6(6) specifies that an "application for judgment is not necessary" unless an enactment or the *Supreme Court Civil Rules* requires one. There was no such requirement applicable to this case. As such, the respondents said the damages awards automatically translated into a judgment and the trial judge had no jurisdiction to "go back in time and refuse to accept the verdict": *Thomas v. Foskett*, 2018 BCSC 2369 at para. 5 ("RFJ").

[85] The judge agreed, holding that the "decision by the [appellant] to file an appeal was likely the only avenue for the remedy sought, namely a new trial" (RFJ at para. 5). He went on to note that, in any event, he did not accept there was a "clear error or conflict" with the special damages award such that the jury's verdict could not provide a foundation for judgment:

> The jury's answer to this question is somewhat puzzling, and it may be that there was some kind of error or misunderstanding, but this alone constitutes no ground

2020 BCCA 322 (CanLII)

> for refusing to enter the jury's verdict, in whole or part. Whether the jury misapplied the law or made a mistake are matters for the Court of Appeal, not this court, and an error in respect of one head of damages does not taint, impugn, or establish a conflict with the others.
>
> [RFJ at para. 10.]

The judge considered himself "obliged to enter judgment for the [appellant] in accordance with the jury's verdict" and proceeded to do so (RFJ at para. 11).

[86] The appellant says the judge was wrong in law to enter judgment and not order a retrial. The special damages award was palpably erroneous (for the reasons discussed earlier). Moreover, the fact that the jury awarded the MRI expenses was impossible to reconcile with the award for non-pecuniary damages (again, for the reasons discussed earlier). From the appellant's perspective, the fact of irreconcilability meant the jury's verdict could not provide a proper foundation for a judgment.

[87] The respondents say it was reasonably open to the judge to decline the application for a retrial. The preconditions to R. 12-6(7) were not "triggered in this case" (respondents' factum at para. 88). The jury answered all of the questions directed to it, and the answers were not on their face conflicting.

[88] In *Harder v. Poettcker*, 2016 BCCA 477, this Court held that R. 12-6(7) "does not require a retrial in every case where there are conflicting answers, but only in those cases where, because of the conflicting answers, judgment cannot be pronounced on the findings" (at para. 37). The parties agree that the decision to order or decline a retrial involves an exercise of discretion.

[89] The discretionary nature of the decision means that rulings under R. 12-6(7) attract a deferential standard of review. *Harder* confirmed that such is the case, with explicit reference to para. 43 of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71. There, LeBel J. explained that an appellate court should only intervene with a discretionary decision "where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (as cited in *Harder* at para. 40).

2020 BCCA 322 (CanLII)

[90] See also *Creasey v. Sweny*, [1942] 3 W.W.R. 65 at 66, 57 B.C.R. 457 (C.A.), and *Taylor v. Vancouver General Hospital*, [1945] 3 W.W.R. 510, 62 B.C.R. 42 (C.A.), both of which are also cited in *Harder*. In the latter of these cases, intervention with a discretionary decision was said to require a "clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice" (at 517).

[91] In my view, it is not necessary to decide whether the trial judge had jurisdiction to order a retrial. The interplay between R. 12-6(6) and a post-trial request for a retrial based on allegedly conflicting answers is a matter best left for another day. In this case, the judge had already discharged the jury, the application for a retrial was brought two months post-trial, and the appellant had filed a notice of appeal. Even if there was jurisdiction to order a retrial, it cannot be said the trial judge wrongly exercised his discretion to refuse the request to a sufficient degree to displace the deference owed on appeal.

[92] In its essence, the application for a retrial took issue with the *quantum* of damages awarded by the jury. In *Balla v. I.C.B.C.*, 2001 BCCA 62*,* this Court held that when *quantum* or disparity between awards is the main complaint about a jury's verdict, the appropriate remedy is an appeal, rather than a pre-judgment order for a retrial (at para. 14). In dismissing the application for a retrial, the judge was alive to this principle, explicitly referring to *Balla* in his oral reasons for judgment. See also *Le v. Luz*, 2003 BCCA 640 at para. 16. I would not accede to this ground of appeal.

Disposition

[93] For the reasons provided, I would allow the appeal from the jury's verdict on two bases: (1) the award for special damages reflects palpable error, namely, a failure to include the agreed-upon amount of $650; and (2) the award for non-pecuniary damages is plainly unreasonable and unjust.

[94] The parties accept that in this case, it is open to the Court to engage in its own assessment of special and non-pecuniary damages rather than order a new trial and put

2020 BCCA 322 (CanLII)

the parties through that expense (s. 9(1) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77).

[95] Given the amounts involved and the interest in finality, I agree it would be appropriate to exercise that discretion. Accordingly, I would set aside the awards for special and non-pecuniary damages. I would substitute awards for $2,045 and $60,000 under those heads of damages, respectively, bringing the appellant's aggregate damages to $98,889. The remainder of the jury's verdict would remain intact.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"

2020 BCCA 322 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Toor v. Toor,***
2007 BCCA 354

Date: 20060629
Docket: CA034045

Between:

Harbans Toor

Appellant
Respondent on Cross Appeal
(Plaintiff)

And

Attar Singh Toor, Kajwant Singh Toor and Harbinder Singh Brar

Respondents
Appellants on Cross Appeal
(Defendants)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

R.D. Gibbens — Counsel for the Appellant

P. Abrioux — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
May 23, 2007

Place and Date of Judgment: Vancouver, British Columbia
June 29, 2007

Written Reasons by:
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

2007 BCCA 354 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Prowse:

NATURE OF APPEAL

[1] Mrs. Toor is appealing from an order made April 12, 2006 following a nine day trial before a Supreme Court judge and jury, awarding her damages for injuries she suffered in a motor vehicle accident on June 1, 2002. Liability for the accident was not in issue. The damages awarded were as follows:

Non-pecuniary damages	$10,000
Cost of future care	$33,000
Cost of past care	$ 2,000
Special damages	$ 865

for a total award of $45,865, plus costs.

[2] The respondents are cross-appealing from the order of costs based on an offer to settle made by them on February 9, 2006.

GROUNDS OF APPEAL AND CROSS-APPEAL

[3] Counsel for Mrs. Toor submits that the awards of damage for non-pecuniary loss, cost of future care and cost of past care are inordinately low, internally inconsistent, inconsistent with the judge's view of the evidence, and based on improper cross-examination by counsel then acting for the respondents. Counsel does not take exception to the trial judge's charge to the jury.

2007 BCCA 354 (CanLII)

[4] In their cross-appeal, the respondents submit that the trial judge erred in failing to give effect to their offer to settle which is in substantially the same terms as an offer to settle upheld by this Court in ***Anderson v. Routbard***, 2007 BCCA 193.

2007 BCCA 354 (CanLII)

RESULT

[5] For the reasons which follow, I conclude that the award of non-pecuniary damages was inordinately low. Given the role that credibility played in the assessment of damages, I conclude that it would be inappropriate for this Court to substitute its assessment of damages for that of the jury. I would, therefore, allow the appeal, and remit the assessment of damages to the Supreme Court. I would dismiss the cross-appeal as moot.

GENERAL BACKGROUND

[6] Mrs. Toor (who was 70 at the time of the accident) was injured when the vehicle driven by her husband, in which she was a front-seat passenger, was struck by another vehicle in an intersection. As a result of the accident, the Toor vehicle was a write-off. Shortly after the accident, Mrs. Toor's son arrived and took her to see her family doctor, Dr. Gill, who made a preliminary diagnosis of soft tissue injuries to Mrs. Toor's neck and back.

[7] In an early medical report, dated December 19, 2002, Dr. Gill stated that he anticipated Mrs. Toor "should make a complete recovery and no long-standing disability should remain". At trial, however, there was a considerable body of evidence led on behalf of Mrs. Toor with a view to establishing that she continued to

suffer from ongoing problems arising from the accident, and that the quality of her life had diminished dramatically following the accident. The evidence in that regard was referred to by the trial judge in the following extract from his charge to the jury:

> You heard evidence describing the physical pain and discomfort [Mrs. Toor] experienced as a result of the accident, as reflected in the medical reports. This came primarily in the form of headaches and pain in her neck, back, hip and shoulders. There is conflicting expert evidence as to whether she suffered a concussion and whether that concussion is the cause of her reduced memory ability and loss of concentration. There is also conflicting expert evidence as to whether she suffers from severe chronic clinical depression to a moderate level. This is intermingled with ongoing insomnia problems. There is expert evidence that the plaintiff suffers from Chronic Pain Syndrome. There is conflicting expert evidence as to whether she also suffers from Post Traumatic Stress Disorder.
>
> You heard evidence describing the impact of these conditions on the life of the plaintiff. As well, you have reports from expert health care providers. This evidence compared the quality of life of the plaintiff before and after the accident. The evidence is to the effect that this relatively vital person went from a robust contributing member of the family, both physically and emotionally, to a person who has become mostly a liability in her family. Prior [to] the accident, her only health issues were high blood pressure and occasional dehydration from stomach flu. There is evidence that she has lost most of what provided her with self esteem and her identity as a person. She cannot pursue most of the activities she enjoyed prior to the accident. All these witnesses were cross-examined on these claims and you should keep that in mind in deciding what weight you choose to give this evidence. I pause to mention that there is evidence that the frequency of visits for medical care by the plaintiff is not much different pre and post accident. The only slight relevance of that evidence is that the plaintiff is less inconvenienced that [sic] someone who did not have to attend for medical care with as much frequency before being injured. Keep in mind that there is some evidence that there would have been more frequent medical visits after the accident had there been individuals more available to transport her.

[8] The trial judge's summary of the theory of Mrs. Toor's case includes the following description of Mrs. Toor's life before and after the accident:

2007 BCCA 354 (CanLII)

> [Mrs. Toor's counsel] said to you that you are assessing a 72 year old lady whose life has been ruined by this car accident. Before the accident she was the matriarch of her family and played an important role, cooking and sewing and helping to look after her grandchildren and teaching them religious stories at bedtime. The Plaintiff was an active lady and routinely walked to her temple every day when the weather permitted where she prayed and visited socially with her friends. She had a good life and was a positive influence on her family. Following the accident, the Plaintiff has been totally incapacitated by a combination of chronic pain and depression. Where previously she had been a positive influence for the family, now she is a negative burden on the family and she is greatly depressed by that. The family has done their best to care for her but the family is greatly stressed by this burden and requires outside help to properly care for the Plaintiff.

[9] In his address to the jury, counsel for Mrs. Toor suggested that an award for future care should be in the range of one million dollars, a substantial part of which was attributable to a caregiver for ten hours a day at a cost of approximately $83,000 per year.

[10] The respondents' position at trial was that Mrs. Toor was not nearly as seriously affected by the accident as she claimed, that she had grossly exaggerated the nature of her injuries and their impact on her quality of life, and that, to the extent the medical evidence relied on Mrs. Toor's self-reporting, it should be viewed with caution. The respondents referred to evidence which cast doubt on Mrs. Toor's claim of a closed head injury and post-concussion syndrome. In particular, counsel noted that Mrs. Toor had initially told Dr. Gill that she did not know if she had lost consciousness at the time of the accident, but later reported to other medical advisers that she had lost consciousness for anywhere between two and six minutes. This evidence was inconsistent with that of an independent witness who

2007 BCCA 354 (CanLII)

stated that he observed Mrs. Toor getting out of her vehicle approximately 45 seconds after the accident.

[11] The respondents also referred to conflicting evidence regarding Mrs. Toor's claim that she was suffering from severe depression as a result of the accident and suggested that, to the extent Mrs. Toor was suffering from depression as of the date of trial, it was more likely attributable to the fact that her husband had suffered a serious heart attack in August 2004. The respondents also alleged that Mrs. Toor had not taken adequate steps to mitigate her damages in that she failed to follow the advice of her health care providers who had recommended counselling and a reactivation program.

[12] With this background in mind, I turn to the issues before the Court.

DISCUSSION

[13] As earlier stated, I am satisfied that the award of the jury for non-pecuniary damages is so inordinately low that it constitutes a wholly erroneous estimate of damage. (See ***Nance v. British Columbia Electric Railway***, [1951] 3 D.L.R. 705 at 713 (P.C.).) This Court has held that, to be wholly erroneous, an award must be inconsistent both with the facts of the case and in comparison to awards made in comparable cases. (See ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.) at para. 8.) In making this determination, the Court must show considerable deference to jury awards, and will only interfere where the award made by the jury is significantly outside the range of awards in comparable cases. (See ***Dilello v. Montgomery***

2007 BCCA 354 (CanLII)

(2005), 37 B.C.L.R. (4th) 72 at para. 39 and ***Unger v. Singh*** (2000), 72 B.C.L.R. (3d) 353 (C.A.) at paras. 24-26.)

[14] At the outset of this discussion, it is important to observe that it is apparent from its verdict that this jury was not persuaded that Mrs. Toor had suffered anything resembling the degree of injury or consequential impact on quality of life claimed by her. The awards under all heads of damage are relatively modest and cannot be reconciled with the evidence called on her behalf.

[15] In my view, it is implicit in the jury's awards that it rejected Mrs. Toor's claims that she had suffered a significant head injury or post-concussion syndrome in the accident. Similarly, it is implicit in its awards that it rejected the evidence that Mrs. Toor suffered from a debilitating depression arising from the accident which affected all aspects of her life such that she would require the services of a daily caregiver for the rest of her life. In rejecting those claims, the jury must be taken to have had significant reservations about the evidence of Mrs. Toor and her family, and to have accepted the respondents' view that the medical evidence which relied upon that evidence should be approached with caution.

[16] It is apparent from its award of damages for cost of future care, however, that the jury was satisfied that Mrs. Toor had suffered injuries in the accident which continued to affect her as of the date of trial (four years post-accident) and that her injuries would continue to affect her in the future. In other words, it is apparent that the jury did not regard her injuries as falling into the category of a relatively minor whiplash which had resolved by the time of trial. Based on the award of $33,000 for the cost of future care, it is also reasonable to assume that the jury considered that

2007 BCCA 354 (CanLII)

Mrs. Toor would require some level of care for at least a couple of years post-trial. The question is whether, accepting that view of the evidence, the award of $10,000 for non-pecuniary damages was inordinately low.

[17] Based on decisions of this Court, including ***Cory***, this Court must endeavour to compare the award of $10,000 in this case with awards in similar cases. This is a less than scientific task given the fact that the Court must struggle with a verdict which is unsupported by reasons in circumstances where credibility was in issue.

[18] Counsel for Mrs. Toor suggested that the award of non-pecuniary damages in this case should have been “at least $80,000”. Counsel for the respondents suggested the range was between $20,000-$22,000 and that an award of $10,000 in relation to that range cannot be said to be inordinately low.

[19] The two cases relied upon by the respondents are ***Manering v. Imanian***, 2006 BCSC 323, and ***Xu v. Insurance Corporation of British Columbia***, 2001 BCSC 830.

[20] In ***Manering***, the 73 year old plaintiff suffered soft tissue injuries in an accident which exacerbated prior injuries, and which were still affecting her to some degree two years after the accident. She was awarded $22,000 in non-pecuniary damages and $3,000 for cost of future care.

[21] In ***Xu***, the 60 year old plaintiff suffered soft tissue injuries which continued to affect him to some extent three years following the accident. He was awarded $20,000 in non-pecuniary damages, but no award was made for the cost of future care because of a failure to mitigate.

2007 BCCA 354 (CanLII)

[22] In my view, ***Manering*** and ***Xu*** are sufficiently distinguishable to be of little assistance in setting the low end of the range in this case. As earlier stated, the jury found that Mrs. Toor was suffering from her injuries four years after the accident and that she would continue to do so. They gave effect to that finding by a relatively significant award for cost of future care.

[23] Two other cases which involve soft-tissue injuries of longer duration are ***Rota v. Ross***, 2002 BCSC 1761, and ***Williams v. Nicholson***, 2005 BCSC 910.

[24] In ***Rota***, a 52 year old plaintiff suffered soft-tissue injuries which were symptomatic four years after the accident. She was awarded $30,000 for non-pecuniary damages, $10,000 for loss of future housekeeping ability and $1,000 for the cost of future care.

[25] In ***Williams***, a 75 year old plaintiff suffered soft-tissue injuries and had ongoing neck pain as of trial which the trial judge found may permanently affect some of his recreational activities. He was awarded $30,000 for non-pecuniary damages with no award for cost of future care.

[26] In my view, the latter two cases reflect injuries of a nature and duration which are more in keeping with the jury's finding in this case. For that reason, and acknowledging the difficulty of finding true comparables where there are no findings of fact to provide guidance, I find that the low end of the range in this case is closer to $30,000 than the $20-22,000 suggested by counsel for the respondents. In comparison, an award of $10,000 must be seen as so far below the low end of the range that it can only be described as inordinately low.

2007 BCCA 354 (CanLII)

[27] Since I have concluded that the award of non-pecuniary damages is inordinately low, and given the credibility issues which are germane to all heads of damage (except special damages, which were agreed to by the parties), I am satisfied that the only appropriate order in this case is to set aside the order under appeal and remit the assessment of damages to the trial court.

[28] I note that counsel for Mrs. Toor suggested that, rather than remit the assessment of damages to the trial court, this Court should remit the assessment to the trial judge. In support of that submission, he relied on the decision of this Court in ***Johnson v. Laing*** (2004), 30 B.C.L.R. (4th) 103. There, a jury awarded non-pecuniary damages of $2,250 six years after an accident in which the plaintiff suffered injuries when hit by a car while riding his bike. This Court found that such an award could only have been justified if the jury concluded that the plaintiff's injuries were "trivial and transitory" and that the evidence did not support such a conclusion. In the result, the Court remitted the case to the trial judge for an assessment of damages. In so doing, Madam Justice Southin, speaking for the Court, stated (at paras. 157-58):

> I have concluded, although not without some hesitation, that s. 9(1)(c) [of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77] does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.
>
> Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven

2007 BCCA 354 (CanLII)

> years since the accident and five years since this action was brought and the sooner it is ended the better.

[29] ***Johnson*** was distinguished in a case relied upon by counsel for the respondent, ***Fast v. Moss*** (2005), 47 B.C.L.R. (4th) 44 where this Court remitted the assessment of damages to the trial court. In so doing, Mr. Justice Lowry, speaking for the Court, stated (at para. 16):

> There is no doubt much to be said for the pragmatic approach this Court took in the circumstances of the *Johnson* case. The cost of litigation and the time required to retry cases of this kind are certainly of great consequence, but the right to a jury's assessment cannot be lightly compromised in favour of expediency. As long as there continues to be a legal right to have a jury empanelled in civil cases in this province, the consequences of unsupportable verdicts must continue to be accepted. Generally, a litigant who wishes to exercise that right should not lose it simply because the jury empanelled renders a verdict that is not legally supportable. It cannot be a matter of a litigant having only one kick at the can so to speak before having to accept an assessment made by a judge.

[30] In that case, the plaintiff was not seeking to have all issues remitted to the trial judge, but only certain questions. This Court did not consider that to be an appropriate disposition of the matter since it raised the spectre of two different fact-finders assessing issues of credibility and potentially coming to different conclusions.

[31] In this case, a further reason for remitting this matter to the trial court rather than to the trial judge, apart from those referred to by Mr. Justice Lowry in ***Fast***, is that, following the trial, the trial judge was made aware of an offer to settle made by the respondents.

[32] In the alternative, counsel for Mrs. Toor submitted that, if this Court remitted the assessment of damages to the trial court, rather than to the trial judge, it should

2007 BCCA 354 (CanLII)

direct that the trial be heard by judge alone, rather than by judge and jury. He submits that the cross-examination of some of the witnesses called by Mrs. Toor was improper and tainted the proceedings to the extent that, not only was Mrs. Toor deprived of a fair trial, but the respondents should be taken to have forfeited their right to a trial by jury.

[33] The impugned cross-examination consisted of questions unnecessarily emphasizing that the accident was the fault of Mrs. Toor's husband (where liability had been admitted), that family members could, and should, assist with her care, and that she had suffered health problems requiring regular medical care before the accident. Concerns about the nature of this cross-examination were raised by counsel for Mrs. Toor early in the trial and were focussed primarily on the cross-examination of Mrs. Toor's son during the first day of trial. The trial judge stated that he would deal with these concerns in his charge to the jury and he did so. Counsel for Mrs. Toor did not seek a mistrial; nor did he object to the charge or suggest that it was deficient in any way.

[34] In my view, the cross-examination to which counsel for Mrs. Toor took exception was inappropriate and a proper cause for concern. I am not persuaded, however, that the nature or extent of this line of cross-examination would have justified the judge taking the case away from the jury, even if he had been requested to do so (which he was not). Nor am I persuaded that the impugned cross-examination justifies an order in this Court that the trial on damages be heard by judge alone. There is no reason to expect that the type of cross-examination which gave rise for concern in this trial will be repeated.

2007 BCCA 354 (CanLII)

[35] In the result, I would allow the appeal, set aside the order under appeal, and remit the assessment of damages to the Supreme Court.

[36] Since there is to be a new trial, the cross-appeal, which relates to the offer to settle made by the respondents prior to trial, is moot. Thus, the fact that the trial judge's decision relating to the offer to settle is inconsistent with the decision of this Court in ***Anderson v. Routbard*** is of no moment. I would, therefore, dismiss the cross-appeal.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Low"

2007 BCCA 354 (CanLII)

Citation: Tsoukas v. Segura
2001 BCCA 664

Date: 20011120
Docket: CA027037
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

2001 BCCA 664 (CanLII)

BETWEEN:

OURANIA TSOUKAS

PLAINTIFF
(APPELLANT)

AND:

JUAN ROBERTO SEGURA
and
JUAN SERGIO SEGURA

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

D.J. Renaud — Counsel for the Appellant

J.D. Baker, Q.C. — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
October 5, 2001

Place and Date of Judgment: Vancouver, British Columbia
November 20, 2001

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] The plaintiff appeals from the judgment entered in her favour following a trial by judge and jury on her claim for damages for personal injuries and consequential losses arising from a motor vehicle accident on 11 November 1997. The plaintiff claims the trial was unfair because the learned trial judge erred in admitting the oral opinion evidence of a psychiatrist called by the defence. She further claims the learned trial judge erred in allowing counsel for the defendant to adduce evidence of an allegation of shoplifting by the plaintiff in cross-examination of the plaintiff, and through other witnesses, without any limiting instruction by the judge as to the use to be made of such evidence by the jury.

[2] The plaintiff does not assert that the jury's awards of $5,000 for non-pecuniary damages, $14,000 for past loss of income and $1,500 for special damages are inordinately low. She says rather than the admission of the impugned evidence, and the absence of corrective instruction, rendered the trial so unfair as to amount to a miscarriage of justice. She seeks a new trial.

2001 BCCA 664 (CanLII)

II. The Evidence

[3] The case was tried over the course of nine days in February and March of 2000 and the jury heard and received a substantial body of evidence led by both parties.

[4] The plaintiff was born 25 April 1968, and was 29 years of age at the time of the accident. She was driving a car through an intersection in Vancouver, protected by stop signs for her direction of travel, when her vehicle was struck on the passenger door by a vehicle driven by the defendant Juan Roberto Segura, who failed to stop before entering the intersection. The defendants admitted liability for the accident.

[5] The plaintiff's main complaints after the accident were of pain in her back and legs, and headaches. She had an extensive pre-accident history of complaints in these areas. The plaintiff described her pain after the accident as so severe as to be disabling, such that she was prevented from engaging in the ordinary activities of daily living. She required the assistance of others to attend to matters of personal hygiene, was unable to get out of bed to attend to the needs of her children, and drove a vehicle only infrequently. She had to have special appliances installed in

2001 BCCA 664 (CanLII)

her bath tub, a special stool for her feet, and a pole placed beside her bed so she could get in and out.

[6] In May of 1998, the plaintiff had an operation on her back to remove a bulging disc at the L5-S1 level. It appears that no doctor attending the plaintiff recommended that she undergo this surgery and indeed, Dr. Lee who performed the operation, recommended against it. Another of the plaintiff's doctors, Dr. Chan, also recommended against the surgery. The plaintiff used a wheelchair for about five months in 1998 both before and after the operation.

[7] The plaintiff received a large quantity of pain-killing medication from several doctors. One of her family physicians, Dr. N.H. Hwang, testified that a check with Pharmanet showed that the plaintiff had been prescribed a substantial amount of Domperidone by five different doctors in the months of February and March 1998.

[8] The plaintiff was 31 years of age at the time of trial. She had had three unsuccessful marriages, and three children, one from each union. She left school in grade 10. She said she had worked as a waitress most of her life. Her parents were restaurant owners and operators, and it appeared that she worked for them most of the time.

2001 BCCA 664 (CanLII)

[9] At the time of the accident, the plaintiff was on social assistance, and she had not returned to work at the time of trial. She claimed that her injuries and their consequences disabled her from returning to work. Counsel on her behalf presented the jury with a very substantial claim for past loss of income, and for loss of future income earning capacity.

[10] As in most cases of this sort, the plaintiff's credibility was a critical issue for the jury. A fundamental question of fact was the extent to which the accident had caused or contributed to the plaintiff's injuries and complaints. Her credibility, and the question of causation, were closely linked.

[11] Counsel for the defendant attacked the plaintiff's credibility in a number of ways. The plaintiff admitted to having been untruthful on her application for welfare. She admitted collecting welfare from British Columbia and Alberta simultaneously. She failed to produce any documents to show her income from working as a waitress. Her income tax returns for the years 1993 to 1997 showed income from employment between nil to $1,500 per year. She admitted that some of the information on her tax returns was false; she testified that she had earned more than she had declared and said she had not declared all of her tips each year.

2001 BCCA 664 (CanLII)

[12] The defence also called evidence to contradict the plaintiff's claim that she was disabled from engaging in the normal activities of day-to-day life. This included the evidence of a former sister-in-law, a police officer, and a private investigator, all of whom testified to observing the plaintiff at various forms of activity.

[13] The defence also led the evidence of J.R. Vriend, a "loss prevention officer", or store detective, for the Overwaitea Food Group, whose evidence will be referred to in more detail in connection with the allegation of shoplifting.

III. The Defendant's Psychiatric Opinion Evidence

[14] The defence arranged for an independent medical examination of the plaintiff in April, 1999 by Dr. Vincent Sweeney, a neurologist. He provided counsel for the defence with a report dated 28 April 1999. He recommended that the defence obtain a psychiatric assessment of the plaintiff. Dr. Sweeney's report was, according to counsel, served on counsel for the plaintiff shortly after its receipt by counsel for the defendant, although the date of such service does not appear in the record.

[15] The plaintiff was then examined by Dr. K.D. Craig, a psychologist, to whom she was referred for an opinion in

2001 BCCA 664 (CanLII)

support of her case. Dr. Craig interviewed the plaintiff on 16 December 1999, and prepared a report which plaintiff's counsel served on counsel for the defence on 30 December 1999. The trial was scheduled to commence on 28 February 2000.

[16] After counsel for the defence received Dr. Craig's report, they sought to have the plaintiff examined by a psychiatrist. Defence counsel applied for an order compelling the plaintiff to attend for psychiatric assessment. On 11 January 2000, the court granted an order requiring the plaintiff to attend for an appointment with Dr. Roy O'Shaughnessy on 12 January 2000.

[17] Dr. O'Shaughnessy sent his report to defence counsel on 15 February 2000. Defence counsel faxed the report to plaintiff's counsel the same day. The trial commenced on 28 February 2000, as scheduled.

[18] At trial, counsel for the plaintiff objected to the admission of Dr. O'Shaughnessy's report. Counsel contended that it was served too late to comply with the time requirements of Rule 40A. He also objected that the report commented inappropriately on the plaintiff's credibility, was inflammatory, offended the ultimate issue rule, and evaluated other conflicting evidence.

2001 BCCA 664 (CanLII)

[19] The learned trial judge held that Dr. O'Shaughnessy's report was not admissible. She said:

> THE COURT: Now, just before you call Dr. Craig, I should let you know my intention with respect to Dr. O'Shaughnessy's report. In my view it is not admissible. I am not precluding Dr. O'Shaughnessy being called, perhaps in rebuttal, but certainly his report is not admissible. So I don't know if that's going to affect the way you see your case unfolding.
>
> Now, I understand that the jury has also selected a foreperson, so we'll bring the jury in and they can inform us who that is.
>
> MS. ARMSTRONG: My lady, I wonder, just before the jury --
>
> THE COURT: Yes?
>
> MS. ARMSTRONG: You've indicated that Dr. O'Shaughnessy's report is inadmissible but that he may be called for rebuttal. Could you just elaborate on why it is not admissible so that if we call him for rebuttal, we won't go over into areas that your finding --
>
> THE COURT: Oh, okay. I haven't done up a formal ruling and I don't think it's particularly necessary, but --
>
> MS. ARMSTRONG: Is it a time factor?
>
> THE COURT: It is a time factor and, as well, there are problems in terms of his report itself. The report would have had to have been edited even if I had admitted it, in my view, because it does violate some of the principles

2001 BCCA 664 (CanLII)

> that were referred to by counsel in argument.

[20] She later held however, that Dr. O'Shaughnessy could testify orally. She said:

> THE COURT: Well, in my view Dr. O'Shaughnessy is entitled to give an opinion to this court in rebuttal with respect to Dr. Craig's diagnosis in this matter and the fact that that opinion may mirror or ghost his report that I have ruled as not admissible, is simply unavoidable. And I would say that the opinion of Dr. O'Shaughnessy is necessary in this case in the interests of justice and fairness.

[21] I will briefly set out the context in which that decision was made.

[22] Dr. K.D. Craig was a Registered Psychologist. His written psychological assessment of the plaintiff, dated 16 December 1999 was admitted in evidence. He also testified orally.

[23] His written report included this:

> … She is in great distress and there is effort to convince the interviewer of the gravity of her situation and the reality of her pain, but this is quite usual when patients are in extreme distress and when the question of their credibility has been raised. She appears to be suffering high levels of anxiety and moderate depression, reflecting loss of

2001 BCCA 664 (CanLII)

quality of life and preoccupation with her personal dilemma. There is little doubt that there has been a dramatic transformation in her personal life style relating to the motor vehicle accident in November 1997. It has affected virtually all spheres of her personal, family, vocational, and social well-being relating to a dramatic loss in personal life style. Ms. Tsoukas' life was not easy prior to the MVA, given evidence of marital distress, ongoing conflict with former husbands, her son disappearing, and a history of difficult to diagnose medical problems. The high levels of stress she was experiencing at the time of the MVA would be expected to add to and intensify the emotional distress and pain that resulted from the MVA.

High levels of personal pain are clearly evident. Pain is a subjective experience with sensory and emotional components. It can be measured through use of self-report and nonverbal expression. Both sources of information are consistent with very high levels of personal pain and suffering. Management of pain and disability has been questionable since the motor vehicle accident. The surgery confirmed Ms. Tsoukas' conviction there was a substantial organic basis for her problems and reinforced fear she has experienced since the accident itself. Extensive use of opioids without an apparent careful plan and Ms. Tsoukas' heavy dependence upon emergency facilities to provide relief is a further expression of the severity of distress and disability she is experiencing. Conservative pain management has been used since the MVA, despite minimal prospects that it would have a substantial salutary impact. Despite physician's recommendations that Ms. Tsoukas receive the benefit of multidisciplinary and comprehensive pain treatment she has been denied this care, without explanation in the available record. Ms. Tsoukas apparently would voluntarily, if not eagerly, participate in such a treatment program. I would add make recommendation to those of others that she should be supported in this.

2001 BCCA 664 (CanLII)

[24] He testified that she suffered from a pain disorder with psychological features. He believed she was "credible" and that her reports of distress were "legitimate". He agreed he did not have all information relevant to a diagnosis of her condition. However, his diagnosis of pain disorder, together with his other evidence, provided a basis upon which the jury could find a causal connection between the accident and her continuing physical and psychological complaints.

[25] Defence counsel cross-examined Dr. Craig, in part, on the basis of the opinion provided by Dr. O'Shaughnessy. It was suggested to Dr. Craig in cross-examination that the plaintiff's pattern of complaints was consistent with a "somatization disorder", that is the presence of symptoms for which there is no diagnosable general medical condition to fully account for the symptoms. Dr. Craig testified that although he thought chronic pain disorder was the appropriate diagnosis, he agreed that the plaintiff met all of the diagnostic criteria for a somatization disorder.

[26] Pursuant to the trial judge's ruling, quoted above, the defence called Dr. O'Shaughnessy to testify orally to "rebut" Dr. Craig's opinion that the correct diagnosis of the plaintiff's condition was chronic pain disorder. Dr. O'Shaughnessy said the plaintiff met the criteria for

2001 BCCA 664 (CanLII)

somatization or psychosomatic disorder "meaning basically that individuals present with symptoms that appear to be of physical pathology, but are not explained by that, in fact appear to be psychologically caused." He said such a disorder "never arises from a traumatic event."

[27] Plaintiff's counsel cross-examined Dr. O'Shaughnessy at some length on his opinion, but he did not resile from the opinions expressed in chief.

IV. The Admissibility of Dr. O'Shaughnessy's Evidence

[28] Rule 40A provides in part as follows:

> (2) A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.
>
> (3) An expert may give oral opinion evidence if a written statement of the opinion has been delivered to every party of record at least 60 days before the expert testifies.
>
> . . .
>
> (15) At trial, the court may dispense with the requirement of delivery of a statement.
>
> . . .
>
> (17) Before or at trial, the court may extend or abridge the time limits set out in this rule.

2001 BCCA 664 (CanLII)

[29] Those provisions are derived in general from ss.10 and 11 of the ***Evidence Act*** R.S.B.C. 1979, c.116, which first permitted opinion evidence to be adduced in written form, and imposed the requirement for giving notice of a party's intention to do so. The original notice period was 14 days.

[30] The provisions of the ***Evidence Act*** were interpreted in ***Pedersen v. Degelder*** (1985), 62 B.C.L.R. 253 (S.C.). On the question of whether the notice requirements applied in all circumstances, Mr. Justice Bouck said:

> … Strict compliance with these statutory sections in this area could cause confusion and interminable delays in the trial process. Hence, they do not apply to expert evidence called by a defendant to reply to the expert evidence given by a plaintiff, nor do they apply to a plaintiff who calls an expert to rebut expert evidence given by an expert of the defendant.

[31] The provisions governing the admissibility of expert opinion evidence in the ***Evidence Act*** were effectively replaced by Rule 40A which came into force on 30 August 1993.

[32] The notice requirement has been enlarged from 14 to 60 days but the interpretation of the ***Evidence Act*** in ***Pedersen*** appears to have been generally adopted as applicable to Rule 40A: ***Kroll v. Eli Lilly Canada Inc.*** (1995), 5 B.C.L.R. (3d) 7 (S.C.) and ***Sterritt v. McLeod***, 2000 BCCA 318.

2001 BCCA 664 (CanLII)

[33] As is evident, the rule provides the trial judge with a broad discretion to abridge or otherwise vary the length of notice required. In the exercise of that discretion, and applying the provisions of s-s.16, judges have sought to strike a balance between permitting the trier of fact to have all of the relevant evidence on issues which a lay person would otherwise have difficulty deciding, and preventing the adverse party from being taken by surprise so that the trial becomes unfair.

[34] The way in which the discretion will be exercised in any particular case must, of necessity, depend on the nature of the case and of the evidence in issue, seen in the context of the case as a whole, and the issues that are presented to the trier of fact.

[35] Here, counsel for the plaintiff says that admission of Dr. O'Shaughnessy's evidence rendered the trial unfair. He says trial counsel was taken by surprise by the late service of Dr. O'Shaughnessy's report, could not adequately prepare to cross-examine him when he was permitted to testify orally, and did not have an opportunity to retain a psychiatrist on the plaintiff's behalf to assess her and to advise him. He argues that Dr. O'Shaughnessy's opinion evidence was not responsive to the plaintiff's case, because to meet that test it would

2001 BCCA 664 (CanLII)

have had to be an answer to evidence called by the plaintiff which the defence could not have foreseen. The plaintiff's counsel says that in this case, the somatization disorder diagnosis was the cornerstone of the defendant's defence, and was known to the defence long before the plaintiff called her evidence at trial.

[36] I am unable to accept the plaintiff's allegation of surprise, and of an unfair trial. The defendants specifically pleaded that none of the plaintiff's injuries were caused by the accident. Counsel for the plaintiff must have known from at least the time they were served with Dr. Sweeney's report that the plaintiff's psychiatric condition was likely to be a live issue. Given the plaintiff's particular pattern of complaints, it should have been reasonably clear to counsel that the causation of the plaintiff's complaints might well be challenged by the defence on the basis that there was some explanation for them, other than the accident. Finally, counsel for the plaintiff knew beyond doubt, when defence counsel sought and obtained an order for the plaintiff's assessment by Dr. O'Shaughnessy, that psychiatric opinion evidence might well be adduced.

[37] Nor can I agree with the suggestion of plaintiff's counsel that evidence cannot be considered responsive if the

2001 BCCA 664 (CanLII)

need for calling it was anticipated in advance. I do not detect such an interpretation in any of the case law cited. That interpretation would unnecessarily restrict the discretion of the judge to see that a fair trial is conducted, and also restrict the opportunity of the party calling the evidence to make a full answer to the plaintiff's case, or, in the case of rebuttal evidence, to answer unanticipated evidence put forward by the defence.

[38] In these circumstances, I do not think it can be said that the learned trial judge erred in exercising her discretion to admit the oral testimony of Dr. O'Shaughnessy. I would not give effect to this ground of appeal.

V. The Allegation of Shoplifting

[39] This issue first arose towards the end of the plaintiff's cross-examination by defence counsel, in this way:

> Q Now, Ms. Tsoukas, you also testified that around the time of the wedding you are unable to participate in a lot of the festivities with regards to your sister's wedding?
> A Within the week of the wedding, yes, from the Thursday to the following week.
> Q And that you said that you were out -- you did go out shopping a couple of times?
> A I went out to the pharmacy twice, yes.
> Q Okay. And you were out shopping for cosmetics?
> A Yes, I did purchase some cosmetics.
> Q Okay. And you neglected to pay for these cosmetics?
> A No, I didn't neglect to pay for the cosmetics.

2001 BCCA 664 (CanLII)

Q So, you didn't leave the store without paying for the cosmetics?
A I had the money on me to pay for the cosmetics. I paid at one counter walked out the door, totally forgot I was holding the other ones.
Q Oh, I see, so the security followed you out of the store and stopped you as you were getting into your vehicle with the cosmetics?
A The bell rang at the door, yes, and they followed me out.
Q Oh, I see. And you were charged with shoplifting.
A No. I was not charged.
Q You weren't?
A No.
Q Okay. What happened after you were caught shoplifting, or after you were taking the cosmetics without -- I'm sorry, I apologize, after you were stopped outside the store without paying for the cosmetics?
A They brought me back in and they spoke to me. There was no charges laid. I have not been charged with anything.
MS. MARTIN: Okay, thank you. I have no further questions.

[40] Counsel for the plaintiff did not object to these questions at the time.

[41] The shoplifting issue was raised again in the defendant's cross-examination of the plaintiff's psychologist, Dr. Craig. This was the exchange:

Q And in fact didn't she tell you that she in fact does use cosmetics. She buys cosmetics and in fact on occasion doesn't pay for them; there's been evidence from the plaintiff about that.
MR. RENAUD: My lady, I am loathe to rise and interrupt my friend's cross-examination, but what is being suggested here is criminal

2001 BCCA 664 (CanLII)

activity on the part of my client and that -- if during the direct examination of my client, they had wanted actually to put a conviction to her or something like that, that would have been one thing, but she wasn't even charged and the circumstances were well put forward. It is just mudslinging at this stage of the game.

THE COURT: Perhaps you could modify your question to conform strictly with the evidence.

MS. ARMSTRONG: I attempted to do that, my lady, by suggesting that she forgot to pay, which I believe were the exact words that Ms. Tsoukas used on the stand.

THE COURT: So your question to the doctor is would you be surprised if on occasion she was seen to be buying cosmetics and left without paying for them because she forgot?

THE WITNESS: Is that really a question that you think I should try to answer?

THE COURT: Well, I guess this goes back to legitimate cross-examination about cosmetics in your report; can you answer it or can you not answer it?

THE WITNESS: I would believe that she would try to use cosmetics on occasion, yes.

[42] The matter came up for a third time when counsel for the defence was leading the evidence of the loss prevention officer, Mr. Vriend, in chief. The following was said:

Q Mr. Vriend, what is your occupation?

A I am a loss prevention officer for the Overwaitea Food Group.

Q Sorry, for the --

A Overwaitea Food Group.

Q Overwaitea Food Group. And how long have you been in this position?

A I've been employed by Overwaitea for approximately one year.

Q As a loss prevention officer?

A Over all, approximately two and a half years.

Q And where do you work on a daily basis?

2001 BCCA 664 (CanLII)

A We rotate between Save-On-Foods stores in the lower mainland.
Q And what do your duties entail?
A It's to observe customers, watch them steal products or obtain them fraudulently.
Q And where were you working on May 14, 1999?
A I was at Save-On-Foods at Metrotown at 6100 McKay Avenue in Burnaby.
Q Now --
MR. RENAUD: My lady, I rise to object. My client's not on trial for theft, and any answers she may have given under cross-examination, the defendant would be bound by those answers, I would imagine, and it's not an issue of substance that this witness could possibly testify to.
THE COURT: Okay. I'm not -- I'm sorry, I am dealing in as big a vacuum as you, members of the jury, so I am going to excuse you until I figure out what's going on here.
(JURY OUT AT 10:09 A.M.)
MS. MARTIN: My lady, we agree, the plaintiff is not on trial for theft here. However, Mr. Vriend, this witness, had an opportunity to observe the plaintiff out and about in the community, shopping, and his testimony is solely tendered for the purposes of his observations of her physical movements, what she was doing that day.
Coincidental to his observations, she was in a store. He was working as a loss prevention officer. And yes, his duties are to observe that, but that's not why this witness is being tended -- tendered, sorry.
THE COURT: You certainly can't object to that.
MR. RENAUD: No, I can't object to that, my lady, and as long as she's prepared to confine her questions to that and not start straying otherwise, everything will be fine.

[43] When the jury returned, Mr. Vriend's evidence continued as follows:

2001 BCCA 664 (CanLII)

Q Now, Mr. Vriend, are you familiar with the plaintiff, Ms. Tsoukas?
A Yes, I am.
Q And when did you first meet Ms. Tsoukas?
A On May the 14th, 1999.
Q And where was that?
A In Save-On Foods.
Q And what did you observe her doing that day?
A I observed her place her purse in the basket, walk around the store and select various items that she put in the basket, and she then went down an aisle and looked around and quickly concealed most of those items in her purse.
Q She was shopping?
A Yeah.
Q And approximately what time was this?
A I began observing her at approximately 17:30 hours.
Q That's 5:30?
A Yeah.
Q And who was she with?
A Nobody.
Q Approximately how long did you observe her shopping for?
A Approximately half an hour.
Q And did you observe her the whole time?
A Yes.
Q Could you please describe her physical movements as she shopped?
A She moved easily. She was unaided by a cane or a wheelchair or another person. She appeared to function physically normal.
Q Did you observe any difficulties with her physical movements as she moved around, about the store?
A No.
Q And was there any other time while you were in the store that -- or, rather, while she was in the store and you were in the store that you observed her?
A I don't understand the question.
Q After her shopping did you observe Ms. Tsoukas any other place besides in the store?
A Yes. I observed her in the parking lot.
Q Okay. And how -- could you describe what her physical movements were at that point?

2001 BCCA 664 (CanLII)

A Upon exiting the store, she walked briskly out to what I believe was a maroon or brown minivan and there was a couple customers -- customers in my way, and by the time I got outside, I had to run to catch up to her, as she was at her van already.
Q Now, at this point was there anyone with her at her vehicle?
A No.
Q And what was she doing at this time?
A She was opening the driver's door.
Q And what happened after that?
A I identified myself as the loss prevention for (sic) Save-On-Foods.
Q And where did you go after that?
A I escorted her to our security office inside the store.
Q Okay. Now, while you were in the office, can you describe what her physical movements were like?
A I asked her to sit in a chair and she did that without complaint.
Q And for about how long did this take place?
A Approximately 20 minutes to half an hour.
Q And what kind of chair was she sitting in?
A Just a standard, hard plastic bottom and back.
Q Now, was she sitting throughout the whole time she was in the office?
A Yes.
Q And what was the result of your discussions with Ms. Tsoukas?
A In regards to what?
Q While you were in the office?
A I ran her name through the police information system and she was not wanted or on probation for any crimes, so I released her with a notice of summons.
Q And she sat throughout that whole period?
A Yes.
MS. MARTIN: I have no further questions. Please answer the questions of my friend.
THE COURT: Cross-examination?
CROSS- EXAMINATION BY MR. RENAUD:
Q You brought notes with you today?
A Yes.
Q Do they go into the incident?
A They are my statement.

2001 BCCA 664 (CanLII)

Q Can I have a look at them, please?
A Yes. As well, my subpoena is in there.
Q Is there any other correspondence that passed between yourself and the defendants in this action? Did you prepare any other statements?
A I prepared a report to Crown counsel for the Burnaby RCMP.
Q And that's all?
A Yes.
Q Okay. And it was not your role through all of this to observe her -- her physical movements, was it? It was your role to detect people who were shoplifting in the store; isn't that right?
A In the process, we watch them physically.
MR. RENAUD: Okay. Thank you. I have no further questions.

[44] Before charging the jury, the learned trial judge discussed with counsel the question as to whether she should give some special instruction to the jury concerning the "shoplifting" evidence. The exchange was as follows:

THE COURT: And the other thing is this shoplifting business. I think there was a third one, but I can't remember now.
Is there a reason that you think that there should be a limiting instruction or should I even bother with these two matters?
MR. RENAUD: A limiting instruction?
THE COURT: To the jury about the use that they can make of certain evidence. That -- all that succeeds in doing is highlighting it.
MR. RENAUD: I think that there should be some limiting on -- on both of -- both of those points.
THE COURT: Dr. Grosch and the shoplifting?
MR. RENAUD: Yes.
THE COURT: And the shoplifting is simply an example of her being out and about and

2001 BCCA 664 (CanLII)

functioning normally. And Dr. Grosch, they cannot conclude that -- it's hearsay. His version was what happened is hearsay. I don't want to start with hearsay, but -- they cannot use his evidence -- no, I'll just say "as proof of the truth of anything". Okay.

Is there anything else like that? I know there was one other matter and it's just completely gone from my mind. If -- you think about it and let me know because I think there was one other thing like that that bothered me a little bit. Okay.

MS. ARMSTRONG: The wedding, perhaps, my lady?

THE COURT: I don't think so. I don't think it was the wedding, actually. In any event, it may come back to me.

MR. RENAUD: Not from my side, my lady.

MS. MARTIN: Well, you're not talking or making reference to the vandalism of the car? It's similar to the shoplifting, that she was out and about. She was --

THE COURT: That actually forms part of a video, too. So no, I don't have any trouble with that. It's just that this suggestion that she's dishonest doesn't need to come from the shoplifting incident. The sole purpose of that evidence was simply to show her functioning normally in the community.

MR. MOUZOURAKIS: Notwithstanding the inflammatory nature of it.

THE COURT: The which?

MR. MOUSOURAKIS: Notwithstanding the inflammatory nature of it.

THE COURT: Right.

MR. MOUSOURAKIS: Somehow you have to --

THE COURT: I want to defuse that.

MR. MOUSOURAKIS: Yeah. There has to be a --

THE COURT: I want to defuse that and say that part's irrelevant for their consideration, that they treat this evidence solely as an example of her ability to function. Okay.

MR. RENAUD: At the same time, simply mentioning the shoplifting thing again is going to bring it back to the jury's attention.

THE COURT: Exactly.

MR. RENAUD: That's the problem. To balance that, I suppose, is to make reference to the

2001 BCCA 664 (CanLII)

shoplifting testimony but without making reference to her activities and movements at the time, just say that the --

THE COURT: You can't do that. When you're giving a limiting instruction, you have to tell them the limited purpose for which they can use the evidence. If you don't want me to touch that, I won't touch it. You can't do it just one way.

MR. MOUSOURAKIS: Or do we get the agreement from the other side?

MR. RENAUD: Are you prepared to leave it alone in submissions?

THE COURT: It would be improper for you to --

MS. MARTIN: Well, I'm not going to mention that she was out and about shoplifting. I'm going to say that she was out and about shopping.

I think, for the purposes of our argument, she was out and about shopping at a lot of places, not just at Save-On-Foods, and I certainly wouldn't say that, you know, that's -- I wouldn't bring that up as being indicative of anything except for the fact that she was able to go out in the community. She was at malls. There was plenty of testimony that she was shopping at malls. I won't be bringing up that she --

MS. ARMSTRONG: That she needed make-up.

MS. MARTIN: For the wedding.

THE COURT: Okay. Do you want me to mention this shoplifting allegation at all or just leave it?

MR. RENAUD: No, just leave it --

THE COURT: Okay. Dr. Grosch is the only one that I'm gong to make some reference to.

MR. MOUSOURAKIS: If my friend will confine herself to shopping.

[45] In the result, the learned trial judge said nothing to the jury about the impugned evidence.

[46] Plaintiff's counsel did not apply for a mistrial.

2001 BCCA 664 (CanLII)

VI. Admissibility of the Shoplifting Evidence, and the Trial Judge's Failure to Charge on Same

[47] The plaintiff's fundamental objection to the evidence concerning the allegation of shoplifting is that it was an inadmissible attack on her character. The admissibility of character evidence in civil cases is an issue which does not arise with the same frequency as in criminal cases.

[48] Generally, all relevant evidence is admissible unless it falls within an exclusionary rule. With respect to character evidence in civil cases Sopinka in The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) says:

> [10.27] While the courts appear to exclude character evidence in civil cases on the basis of irrelevance, the real rationale is the policy to restrain civil proceedings within manageable limits and to prevent unfairness to civil litigants. Without previous notice, such litigants cannot be expected to be prepared to protect themselves against imputations which may range over their whole career.
>
> [10.28] On cross-examination, subject to the discretion of the trial judge to disallow any question which is vexatious or oppressive, a witness can be asked literally anything as a test of his credibility. This broader rule is subject to the qualification, however, that if the question is irrelevant to the facts in issue, but is asked purely for the purpose of testing credibility, the cross-examiner is bound by the answer. He cannot lead evidence to contradict the witness.

2001 BCCA 664 (CanLII)

[49] The latter paragraph was applied by Lacourciere J.A. for the Ontario Court of Appeal in ***Deep v. Wood*** (1983), 143 D.L.R. (3d) 246. The issue was whether the plaintiff, a medical doctor, was improperly cross-examined with respect to an earlier ruling by the College of Physicians and Surgeons concerning professional misconduct on his part.

[50] Lacourciere J.A. for the court upheld the trial judge's decision to allow cross-examination on the professional misconduct:

> In his ruling in the present case the learned trial judge was merely saying that a finding of dishonest billing …, because it involves moral turpitude, was the subject-matter upon which the plaintiff could be cross-examined. In my opinion, the ruling did not disclose any bias or any reasonable apprehension of bias, nor did it involve any pre-determination of credibility.
>
> Evidence of good character in a civil action is ordinarily inadmissible since it is irrelevant in the determination of most issues arising in those cases. Nevertheless, cross-examination relating to general reputation for untruthfulness or to prior criminal convictions or to findings of professional misconduct involving dishonesty may be used to diminish the credibility of a witness.

[51] Lacourciere J.A. specifically ruled that cross-examination on general credibility was permissible, but did qualify his ruling somewhat by saying that the ruling might have been different if the action had been tried before a jury

2001 BCCA 664 (CanLII)

"because of the difficulty of adequately restricting the prejudicial effect of the cross-examination."

[52] The scope of admissibility of character evidence in civil trials was also usefully discussed in two earlier cases. The first case was ***Brownell v. Brownell*** (1909), 42 S.C.R. 368, in which the trial judge refused to compel the defendant to give the name of his 'bigamous wife' in a divorce trial. Other evidence solely related to credibility was admitted, but the trial judge was held to have the discretion to "protect a witness against questions which are purely vexatious." The court went on to hold that

> [no] doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issues of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issues raised in the pleadings is no more admissible in cross-examination than in examination in chief (at 374).

[53] In the context of the case, the final sentence quoted above is not saying that evidence that relates exclusively to character is not admissible, but rather that evidence of details like a third party's name, which would serve no purpose in assessment of credibility or anything else, are completely irrelevant and therefore inadmissible.

2001 BCCA 664 (CanLII)

[54] The second case was ***S. v. S.*** [1954] 2 D.L.R. 765 (Man.C.A.) reversed on other grounds [1955] S.C.R. 658. This was a divorce case, which had involved cross-examination of the plaintiff on whether she was an "unfaithful wife" or "loose". The court ruled that the questions were permissible, since "with a view to impeaching the character or credit of a witness, he may be asked on cross-examination questions with regard to crime or other improper conduct on his part." It was also ruled, however, that where the questions are not directly related to the matter at issue, the defendant was bound by the answers the plaintiff had given. In that case, it was ruled that evidence by the defendant contradicting the plaintiff's answers was inadmissible.

[55] As mentioned at paragraph 10 of these reasons, the plaintiff's credibility was a critical issue for the jury because it bore heavily on the question of causation. Evidence as to her credibility was therefore relevant, and would be admissible, subject to fairness or undue prejudice to her case, and subject to the collateral evidence rule.

[56] I have considered the impugned passage in the plaintiff's cross-examination, set out paragraph 39 above, against this test. The thrust of the evidence adduced on cross-examination was that the plaintiff took some cosmetics from a pharmacy

2001 BCCA 664 (CanLII)

without paying for them, was apprehended outside the shop by a loss prevention officer, brought back into the store and questioned, but that no charges were laid. That was evidence from which the jury might have inferred that the plaintiff was a less than honest person, and that her other evidence should therefore be regarded with suspicion. I have no doubt that it was relevant to her credibility.

[57] It does not appear to me that the line of questioning objected to was oppressive or vexatious, or that it called on the plaintiff to answer for events long past. The questions related to a period of time about which the plaintiff had already testified, namely her sister's wedding, and it related to an incident she was likely to recall because she said she had been able to shop infrequently, and because she had the exchange with the store's loss prevention officer.

[58] One might think that the questions could have been more artfully phrased. But I do not think the use of the word "shoplifting" gave rise to any unfairness. In common parlance, that simply means taking something from a store without paying for it. That is in essence what the plaintiff admitted to in her evidence.

[59] Counsel for the plaintiff did not object to that evidence when it was given. If the trial judge had been required to

2001 BCCA 664 (CanLII)

rule on the admissibility of the evidence she would, in my view, have been fully justified in concluding that its probative value outweighed any unfair prejudicial effect it might have had.

[60] Having obtained the evidence she did on cross-examination of the plaintiff, counsel for the defence was thereafter prohibited by the collateral evidence rule from leading evidence to contradict her. The question is whether this rule was offended by the evidence the defendants led from Dr. Craig in cross-examination (para.41) and from Mr. Vriend in chief (paras.42 and 43).

[61] Counsel did improperly start down this road in her cross-examination of Dr. Craig when she suggested that the plaintiff bought cosmetics "and in fact on occasion doesn't pay for them". However, counsel for the plaintiff properly objected and that line of questioning was effectively discontinued. The only unfairness that could have occurred is from counsel's improper question. As the plaintiff had already admitted the facts of the incident, I am unable to see that any real prejudice could have arisen from the question.

[62] Finally, there is the evidence adduced from Mr. Vriend, the store's loss prevention officer. The questions and

2001 BCCA 664 (CanLII)

answers which appear to have precipitated the objection were (as quoted above at para.42):

> Q And what do your duties entail?
>
> A It's to observe customers, watch them steal products or obtain them fraudulently.

[63] I do not consider that it was improper for counsel to ask Mr. Vriend what his duties were. The jury were entitled to know what Mr. Vriend was doing, and why he made the observations he did, when he did. His answer, unfortunately, went further than was necessary, and in the context of the other evidence could only serve to reinforce the plaintiff's admission of taking cosmetics without paying for them. When the jury came back following counsel's discussion with the judge, his evidence included statements that:

> … she then went down an aisle and looked around and quickly concealed most of those items in her purse.

and that that Mr. Vriend:

> Ran her name through the police information system …

[64] This evidence offends the collateral evidence rule because it touches on the same issues on which the plaintiff

2001 BCCA 664 (CanLII)

was cross-examined, and the defence was bound by the answers she gave at that time.

[65] I note that the inadmissible evidence was not elicited by questions designed for that purpose. The questions are innocuous. The impugned evidence was given in answers which went further than necessary to be responsive. Even so, counsel has a responsibility to see that witnesses she called stay within the bounds of the admissible, by proper instructions from counsel to the witness in preparation to testify.

[66] It is also to be noted that counsel for the plaintiff did not renew his objection in this part of Mr. Vriend's examination in chief. Indeed he pursued the issue further on cross-examination by suggesting to Mr. Vriend that:

> It was your role to detect people who were shoplifting in the store …, and not to observe physical movements of customers.

[67] In sum, I do not think any improper questions were asked, or answers given, on the plaintiff's cross-examination. One improper question was asked of Dr. Craig by counsel for the defence, but no prejudicial answers were given. No question that could be described as improper was asked of Mr. Vriend in

2001 BCCA 664 (CanLII)

direct examination, but some of his answers offended the collateral evidence rule.

[68] I will consider whether this inadmissible evidence was of sufficient importance to justify ordering a re-trial in the next part of these reasons.

[69] Counsel for the appellant asserts that the learned trial judge erred in failing to give a curative charge on the inadmissible evidence by instructing the jury as to the limited purpose to which the evidence could be put. I do not think this ground of appeal can be sustained. Plaintiff's counsel at trial argued that it would do more harm than good for the judge to remind the jury about the shoplifting incident. At the end of the discussion between the trial judge and counsel on this subject before the jury was charged, counsel for the plaintiff asked the trial judge not to raise the matter again. Counsel did not ask for a mistrial to be declared.

[70] I would not give effect to the assertion of non-direction.

2001 BCCA 664 (CanLII)

VII. Does the Reception of the Inadmissible Evidence Require a New Trial?

[71] Canadian courts have shown a strong reluctance to ordering re-trials in civil cases. In ***Caswell v. Toronto Railway Co.*** (1911), 24 O.L.R. 339 (Ont.) Meredith J.A. stated:

> A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take from anyone that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests and may fairly be described as necessary evils, when necessary …
>
> A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases, where an injustice has been done to one of the parties at the trial a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.
>
> It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising discretion of its own, grants a new trial, but seldom, and only when the interests of justice plainly require it.

[72] ***Caswell*** was relied upon by the Ontario Court of Appeal in ***Kralj v. Murray*** [1954] O.W.N. 58, 1 D.L.R. 781 (Ont.C.A.) and has been approved by the British Columbia Court of Appeal in ***Rendall v. Ewert*** (1989), 38 B.C.L.R. (2d) 1 at 10, ***Boudrealt***

2001 BCCA 664 (CanLII)

v. Redpath, [1993] B.C.J. No. 517 at para.29, ***Kennedy v. Mandarin Enterprisers Ltd.***, [1993] B.C.J. No. 2116, and ***Atherton v. Maurice***, [1998] B.C.J. No. 575, among others.

[73] The test for ordering a new trial on the basis of error in the exclusion of relevant evidence was considered by this court in ***Anderson (Guardian ad litem of) v. Maple Ridge (District)***, (1992) 71 B.C.L.R. (2nd) 68. There, Wood J.A. for the court said at 77:

> Putting the matter into language which, although more often found in the context of criminal cases, seems apropos to the test enunciated by Bull J.A., this is not a case where I can say with certainty that a properly instructed jury acting reasonably would necessarily have reached the same result in the face of such evidence.

[74] This test has been consistently applied in similar fact evidence cases in British Columbia. For example, in ***Colter v. Nagel***, [1996] B.C.J. No. 195 (C.A.), the trial judge erred in failing to admit an expert's oral evidence. After considering the ***Anderson***, *supra*, test, a new trial was not ordered. In ***Johnson v. Bugera***, [1999] B.C.J. No. 621 (C.A.), the trial judge erred in not admitting similar fact evidence and a new trial was ordered.

2001 BCCA 664 (CanLII)

[75] In my view, there is no principled reason for distinguishing between a case where relevant evidence was excluded, and the case where inadmissible evidence has been admitted. In either case, the appropriate test is whether a properly instructed jury acting reasonably would necessarily have reached the same conclusion if the evidentiary error had not occurred. In other words, the question is whether there has been a miscarriage of justice.

[76] When one considers the body of evidence adduced that reflected poorly on the plaintiff's credibility, against the evidence adduced through Mr. Vriend which should not have been admitted, I am satisfied that a properly instructed jury acting reasonably would have reached the same conclusion even without Mr. Vriend's evidence. In the criminal context, it is said that an appellant is entitled to an adequately instructed jury, not a perfectly instructed jury: ***R. v. Jacquard***, [1997] 1 S.C.R. 314 per Lamer C.J. In the civil context, I would say that both parties are entitled to a trial that is fair, not one that is free from all imperfections. I have not been persuaded that this trial was unfair.

2001 BCCA 664 (CanLII)

[77] I would dismiss the appeal.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Madam Justice Newbury"

2001 BCCA 664 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***White v. Gait,***
2004 BCCA 517

Date: 20041008
Docket: CA031016

Between:

Robert Carl White

Plaintiff
(Respondent)

And

Edward Gait and G.W.G. Rentals Ltd.

Defendants
(Appellants)

2004 BCCA 517 (CanLII)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

A.L. Murray and K.E. Jamieson	Counsel for the Appellant
G.R. Jackson and D.D. McKnight	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 16 June 2004
Place and Date of Judgment:	Vancouver, British Columbia 8 October 2004

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Levine

Dissenting Reasons by:
The Honourable Mr. Justice Thackray (p. 14, paragraph 34)

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] This is an appeal from the judgment of Mr. Justice Lowry, then of the Supreme Court, pronounced 13 June 2003 in accordance with the verdict of a jury, ordering that the appellants pay $197,000 in non-pecuniary damages for injuries the respondent sustained in a motor vehicle collision. The appellants admitted fault for the collision. The respondent cross appeals from the award of $24,000 for loss of future earning capacity. Both parties ask us to substitute appropriate awards for those assessed by the jury.

[2] The accident occurred on 26 March 1999, when the appellant Edward Gait drove a flat-deck truck owned by the appellant G.W.G. Rentals Ltd. into the rear of a pickup truck in which the respondent was a passenger.

[3] The impact of the collision propelled the thirty-three-year-old respondent’s head through the rear window of the cab of the truck. At trial, the respondent claimed that this blow caused him to suffer a mild traumatic brain injury. As well, he claimed that he suffered soft-tissue injury to his neck and his upper and lower back. He claimed that, as a result of his injuries, he suffered considerable pain, muscle and body stiffness, severe migraine headaches over an extended period of time, impaired balance, ringing in his ears, some

2004 BCCA 517 (CanLII)

impairment of his memory, and depression. He claimed further that he experienced a period of being unable to work at all, followed by a period in which he was able to work only part time. He said that the injuries disrupted his relationships with family and friends and resulted in the loss of a long-term relationship with his girlfriend, and that his inability to participate in activities at his pre-injury level produced frustration and unhappiness. He presented evidence that he was still suffering from his injuries at the time of trial and would continue to do so in the future, and that his capacity to earn income has been and will continue to be compromised.

[4] The respondent was a golf course superintendent. He was unable to work for a time as a result of his injuries, but was able to return full time approximately three months after the accident, although he said he had great difficulty performing to his previous standard as a result of the effects of his injuries. Subsequently, he established and operated a business building and repairing surfboards while continuing with his full-time job.

[5] The appellants contended at trial that the respondent overstated his injuries, and in particular, disputed that he suffered any brain injury of significance. They also questioned whether the accident was the cause of all of the

2004 BCCA 517 (CanLII)

symptoms of which he complained. Further, they argued that any effect of the injuries on his earning capacity was spent.

[6] The parties agreed that the respondent had suffered a past wage loss of $5,000 attributable to his injuries. The trial judge refused to leave a claim for cost of future care with the jury on the basis that the respondent had led no evidence at all as to the cost of such future treatment. He instructed the jury to consider awards for non-pecuniary damages, special damages, and loss of future earning capacity.

[7] The jury assessed non-pecuniary damages at $197,000; past loss of income at $5,000; loss of capacity to earn income in future at $24,000; and special damages at $4,000.

[8] The appellants submit that the jury erred in its assessment of non-pecuniary damages, alleging that the award of $197,000 is inordinately high, is not supported by the evidence, and amounts to a wholly erroneous estimate of the damages. On the cross appeal, the respondent submits that the award of $24,000 for loss of future earning capacity is so inordinately low that it requires correction.

[9] I will deal first with the appeal of the award of non-pecuniary damages.

2004 BCCA 517 (CanLII)

[10] This Court's approach to the review of awards of non-pecuniary damages is canvassed in ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146 at paras. 5-13, 41, 42. I will reproduce only this passage:

> [13] In *Foreman v. Foste*r (2001), 84 B.C.L.R. (3d) 184, 2001 BCCA 26, Lambert J.A., speaking for the majority, said:
>
> > [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1985), 58 B.C.L.R. 273 (B.C.C.A.).
>
> [Emphasis added]

2004 BCCA 517 (CanLII)

[11] In my view, this is one of those rare cases.

[12] The critical issue is whether the respondent suffered a mild brain injury and, if so, what its consequences were. The appellants have identified evidence from which the jury might have concluded that no brain injury occurred. However, there was evidence before them to the contrary as well, and we are required to view the respondent's case in the most favourable light reasonably possible.

[13] The reasons the trial judge gave on the last day of trial for his ruling that the claim for damages for loss of future earning capacity could go to the jury are most helpful on this question. He had the benefit of hearing the evidence unfold over the course of the five days of trial and of forming his own impressions of the reliability and credibility of the testimony heard by the jury. This is what he said:

> [4] ...[T]here is, on the evidence of the plaintiff in particular, some basis upon which an award could be made. He testifies to the continuing compromise of his well-being. He claims that he is depressed, he suffers severe headaches, his back hurts, he suffers from anxiety, and his memory is impaired.
>
> [5] Further, there is expert evidence that his cognitive functioning has been more broadly affected. There is evidence that he can expect only a slow progression to a full recovery, which may not be realized in the foreseeable future.
>
> [6] While he appears to be working as much or more than he did before the accident now, it is not

2004 BCCA 517 (CanLII)

> inconceivable that the condition he describes may in the future prove to compromise his earning capacity.
>
> [7] Whether there is any reasonable possibility of that, as there must be to justify an award, is a jury question. I consider there is some case, however weak it may be, to be put to the jury.

[14] I would add that the trial judge's comments on the evidence find support in the transcript.

[15] It is clear from their award that the jury was favourably impressed by the respondent and accepted his testimony as to the effects upon him of his injuries. It is apparent, as well, that the jury accepted the evidence that he suffered soft tissue injury to his neck and back and a mild traumatic brain injury, that he was left at trial with ongoing pain and cognitive deficits, and that this condition could continue beyond the foreseeable future.

[16] The appellants referred to the following cases in support of their submission that the appropriate range for comparative purposes is $40,000 to $75,000: ***Unger v. Singh*** (2000), 72 B.C.L.R. (3d) 353, 2000 BCCA 94; ***Baas v. Jellema*** (1998), 48 B.C.L.R. (3d) 310 (C.A.); ***Tompkins v. Barden***, [1998] B.C.J. No. 2799 (Q.L.)(S.C.); ***Siemens v. Damien***, 2002 BCSC 1065; and ***Cybulski v. Bertrand***, 2000 BCSC 415.

2004 BCCA 517 (CanLII)

[17] In ***Unger v. Singh***, *supra*, the plaintiff was a 36-year-old mother and retail store manager. She suffered soft-tissue injuries to her neck, shoulders, lower back, and left knee in an automobile collision. Within six or seven months of the accident, her neck, shoulder, and back pain had substantially resolved and she had returned to most of her former activities. She suffered, as well, from mild depression and psychological injury that resolved within a year or so. At that time, she was involved in a second accident that resulted in minor aggravation of her previous injuries but not to the extent that they began to interfere with her employment or with the majority of her activities. A jury assessed non-pecuniary damages at $187,000. This Court substituted what it characterized as a "fair award" of $90,000.

[18] In ***Baas v. Jellema***, *supra*, this Court reduced a jury's award of non-pecuniary damages from $125,000 to $40,000. The plaintiff suffered moderate soft-tissue injuries to her back and a consequent depression. She had substantially recovered by the date of trial and her prognosis for full recovery was good. I do not find this case to be a helpful comparator to the instant case, which is distinguished by the respondent's brain injury, his ongoing symptoms and cognitive deficits, and his markedly less favourable prognosis.

2004 BCCA 517 (CanLII)

[19] The award in ***Tompkins v. Barden***, *supra* is more useful. There, a young mother was awarded $75,000 to compensate for the consequences of various injuries, the most important of which was a mild cognitive deficit. It appears that the trial judge accepted that the deficit was psychologically based and that, with ongoing psychological counselling, she would overcome it in a relatively brief time. The effects of the injury were somewhat similar to those of the respondent's injury. However, the respondent's prognosis is not as favourable and I would consider his injuries to be more serious.

[20] The trial judge in ***Tompkins v. Barden*** referred to ***Mosher v. Sedens Estate***, [1998] B.C.J. No. 2095 (Q.L.)(S.C.). The plaintiff in that case suffered a mild traumatic brain injury in addition to other less serious injuries. His symptoms were very similar to those of the respondent. However, in contrast to the respondent, he was unable to return to his previous employment and it was unlikely that his cognitive deficits would improve greatly. Thus, his situation was more serious than that of the respondent here. He was awarded $100,000.

[21] In ***Siemens v. Damien***, *supra*, the plaintiff, a nineteen-year-old male, suffered a mild traumatic head injury that resulted in post-traumatic stress disorder. He had other

2004 BCCA 517 (CanLII)

physical injuries that were more serious than those suffered by the respondent, but he had all but recovered from their effects by the time of trial. The effects of the post-traumatic stress disorder were expected to subside over time. He was awarded $75,000 in non-pecuniary damages.

[22] The plaintiff in ***Cybulski v. Bertrand****, supra* was a mother and registered nurse, aged forty-six. She suffered a head injury with psychological consequences, including depression, concentration problems, and severe mood swings. Her difficulties had diminished by the time of trial and were likely to continue to abate. The trial judge considered that the case was very similar to ***Tompkins v. Barden****, supra* and awarded $75,000 in non-pecuniary damages.

[23] While the respondent referred to several decisions in his submissions, he mentioned only ***Unger v. Singh****, supra* in the context of a comparative analysis.

[24] The effects of inflation on these comparable awards must be taken into account.

[25] In my view, a trial judge assessing non-pecuniary damages on the basis of the facts as they must have been found by the jury would likely have made an award somewhere in the range of $80,000 to $100,000. On that basis, the award of $197,000 is

2004 BCCA 517 (CanLII)

so inordinately high that it is wholly out of proportion to a reasonable award.

[26] However, as I understand him, the respondent submits that we should uphold the award in any event. In his submission, juries have demonstrated by their awards that the range set by trial judges for “catastrophic or near catastrophic” injuries is too low to satisfy contemporary community standards. He referred to ***Alden v. Spooner*** (2002), 6 B.C.L.R. (4th) 308, 2002 BCCA 592, leave to appeal to S.C.C. refused, [2002] S.C.C.A. 535 (Q.L.); ***Lee v. Dawson*** (2003), 17 B.C.L.R. (4th) 80, 2003 BCSC 1012; ***Bob v. Bellerose*** (2003), 16 B.C.L.R. (4th) 56, 2003 BCCA 371; and ***Way v. Frigon***, 2001 BCSC 573 in this regard.

[27] I cannot agree. The injuries in this case cannot by any stretch of the imagination be characterized as “catastrophic or near catastrophic” and, if there is any merit in the respondent’s submission, it cannot be given effect in this appeal.

[28] Further, the respondent submits that the award should be upheld for policy reasons. In his submission, as I understand it, to reduce this award will encourage the Insurance Corporation of British Columbia to seek jury trials in this type of case for tactical reasons and will result in an

2004 BCCA 517 (CanLII)

increase in the number of appeals from jury verdicts with which the Corporation is dissatisfied. Thus, he argues, a variation of this award will tend to facilitate the Corporation's "strategy" and, because of the Corporation's superior financial resources, will work injustice generally against persons injured in automobile collisions.

[29] There is no basis in the record for this submission and I would reject it. We must decide this appeal according to law, and the principles upon which we must act are clear.

[30] This is a manifestly unreasonable verdict. In my view, we must set it aside and substitute an award that acknowledges the jury's very favourable view of the plaintiff and his case, and yet is not so inordinately high that it would justify appellate interference. I would substitute an award of $115,000 for non-pecuniary damages.

[31] The respondent contends, on his cross appeal, that the award of $24,000 for loss of future earning capacity is so low that it demands correction by this Court. He submits that the jury must have set its award at one-half his annual income and that this figure does not reflect the extent of his loss.

[32] I cannot agree with the respondent's characterization of the award. We do not know how the jury arrived at its

2004 BCCA 517 (CanLII)

assessment of this loss and to suggest that they calculated it in the manner suggested by the respondent is pure speculation. It is obvious from the observations of the trial judge in his ruling on the question of future loss of earning capacity that he considered this claim to be a weak one. While the respondent stresses the aspects of the evidence that might support a more substantial award, it was open to the jury to take a far more sanguine view of his prospects. I am not persuaded that it was unreasonable of them to do so. I would dismiss the cross appeal.

[33] In summary, I would allow the appeal and set aside the award of $197,000 in non-pecuniary damages. I would substitute an award of $115,000. As well, I would dismiss the cross appeal.

_____
The Honourable Mr. Justice Smith

I agree:

_____
The Honourable Madam Justice Levine

2004 BCCA 517 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[34] I have had the privilege of reading the draft reasons of Mr. Justice Smith. I agree with his conclusion that the jury award of $197,000 for non-pecuniary damages was “a manifestly unreasonable verdict” and must be set aside.

[35] Where I respectfully disagree is that this Court, on the basis of “comparable cases” and, on the basis that a trial judge would have awarded “somewhere in the range of $80,000 to $100,000”, should substitute its figure for that of the jury.

[36] Appeals of civil jury awards are frequently heard by this Court. There is no issue that this Court has the jurisdiction to vary a jury award: ***Vaillancourt v. Molnar Estate*** (2002), 8 B.C.L.R. (4th) 260, 2002 BCCA 685. Nor is there any question that a common method of setting the award on appeal is to use “comparable” cases emanating from judge-made decisions: ***Lam v. Main***, [2003] B.C.J. No. 2290(Q.L.), 2003 BCCA 517.

[37] In ***Ferguson v. Lush*** (2003), 20 B.C.L.R. (4th) 228, 2003 BCCA 579, I summarized this Court’s history of analyzing jury awards by the comparative method. So as to make these reasons self-contained I will, to a limited extent, repeat that history.

2004 BCCA 517 (CanLII)

[38] In ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (C.A.), [1993] B.C.J. No. 189 (Q.L.), a jury awarded non-pecuniary damages of $71,250 and $94,000 to the plaintiffs. On appeal Chief Justice McEachern, for the majority, noted that the test for appellate review of damage awards was based upon cases commencing with ***McLean v. McCannell***, [1937] S.C.R. 341, [1937] 2 D.L.R. 639 [cited to D.L.R.], wherein Chief Justice Duff said, at page 649, that an appellate court should not interfere with a jury verdict unless it is "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it."

[39] Chief Justice McEachern also referred to ***Davies v. Powell Duffryn Associated Collieries Ltd.***, [1942] A.C. 601 (H.L.), wherein Lord Wright said, at page 616, that a jury award "will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case."

[40] Chief Justice McEachern cited ***Nance v. British Columbia Electric Railway***, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665 (P.C.) as the "*locus classicus*" on this issue. Viscount Simon said that an assessment by a trial judge should not be interfered with unless the appellate court is "satisfied

2004 BCCA 517 (CanLII)

either that the judge ... applied a wrong principle of law ... or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage." There was no suggestion in ***Nance***, *supra* or in ***Davies***, *supra* that the test should be based upon precedent cases arising out of judge-made decisions.

[41] Ormerod L.J. in ***Scott v. Musial***, [1959] 2 Q.B. 429, [1959] 3 All E.R. 193 (C.A.) said that in deciding when a verdict was out of all proportion to the facts the court "has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind."

[42] In ***Ward v. James,*** [1965] 1 All E.R. 563 (C.A.) Lord Denning said "the only standard which this court can apply is to take the conventional figure awarded in comparable cases and see how far the award is above or below it."

[43] In ***Cory***, *supra,* Chief Justice McEachern said, at para. 8, that appellate review required consideration "in relation to both the circumstances of the case and to other cases." As I said in ***Ferguson*** at para. 41, the words of Chief Justice McEachern became the "lynchpin in comparing jury awards to those of judges' decisions." Chief Justice McEachern reviewed cases in which there were injuries "analogous" to the injuries

2004 BCCA 517 (CanLII)

suffered by the Corys. From those he established “a range for the kind of non-pecuniary damages suffered by these plaintiffs.” [para. 14] He then considered whether there were any circumstances why the Corys' damages should be “assessed so far above the range established by the cases.” [para. 15]

I EXAMPLES OF CASES IN WHICH THIS COURT VARIED JURY AWARDS

a) On the basis that the award was excessively high or low

[44] It is not possible to accurately tabulate all of the cases that have come to this Court wherein jury awards have been considered. I have concentrated on the years 2000 to date but will note a few cases before that time. A good starting point is ***Cory,*** *supra* where Chief Justice McEachern could not find any circumstances justifying the jury awards and reduced them from $71,250 to $40,000 and from $94,000 to $50,000.

[45] In ***Cody v. Leonard*** (1995), 15 B.C.L.R. (3d) 117, [1995] B.C.J. No. 2472 (C.A.) (Q.L.), a jury awarded $202,500 for non-pecuniary damages. In his reasons for judgment Mr. Justice Legg, for a unanimous Court, commented at length on ***Cory*** and noted that this Court was bound by the decision in ***Cory.*** Mr. Justice Legg noted that in ***Anderson v. Carmichael,*** [1988] B.C.W.L.D. 1958, 1987 Carswell BC 1038 (eC), Macfarlane

2004 BCCA 517 (CanLII)

J.A. compared a jury award with judge-made awards and in spite of the fact that the cases were not entirely comparable concluded that the jury award was inordinately high. Mr. Justice Legg said:

> [17] ... While all cases are different and it is impossible to find cases with completely comparable facts and circumstances, it is much easier today than it was at the time of ***Nance*** in 1951 to ascertain the range of damages for various kinds of cases. Because there are so many more cases it is easier to determine whether a particular award is inordinately or disproportionately high or low.

The non-pecuniary award was reduced to $72,000. This embedded in this Court the practice of determining the appropriateness of a jury award by comparing it to awards in analogous cases decided by judges.

[46] In ***Stewart v. Shimpei*** (1995), 65 B.C.A.C. 113, [1995] B.C.J. No. 2198 (Q.L.), the Court substituted a figure of $10,000 for the jury award of $2,000 non-pecuniary damages for George Stewart. In applying the "***Nance*** principle" Madam Justice Prowse said that the jury verdict was "wholly out of proportion" to the injuries.

[47] In ***Baas v. Jellema*** (1998), 158 D.L.R. (4th) 633, [1995] B.C.J. No. 918 (Q.L.), this Court reduced the non-pecuniary award of a jury from $125,000 to $40,000. This was done after

2004 BCCA 517 (CanLII)

an extensive review of comparable cases and with reference to the reasons in ***Cory****, supra*. Madam Justice Rowles stated that she determined the appropriate range of damages from the cases decided by trial judges.

[48] In ***Unger v. Singh*** (2000), 72 B.C.L.R. (3d) 353, 2000 BCCA 94, a jury set the non-pecuniary damage award at $187,000. Madam Justice Proudfoot said that it is never possible to find "cases dealing with totally similar circumstances" but that it is nevertheless "useful to examine a range of awards in a similar class of cases." [para. 26] She applied the ***Nance*** principle and concluded that the non-pecuniary award was "out of proportion" and that an award of the magnitude of $187,000 is usually reserved for cases involving serious head injuries, permanent cognitive damage and paralysis. The award was reduced to $90,000.

[49] A jury in ***Dhillon v. Mischki***, [2000] B.C.J. No. 260 (Q.L.), 2000 BCCA 95, awarded $10,000 non-pecuniary damages and $3,800 for loss of household services from the plaintiff's wife (who was killed) and three children. On appeal the non-pecuniary damages were increased to $15,000 and the loss of household service claim was increased to $75,000.

[50] This Court, in ***Strazza v. Stupich***, [2000] B.C.J. No. 360 (Q.L.), 2000 BCCA 108, reduced non-pecuniary damages from

2004 BCCA 517 (CanLII)

$135,000 to $75,000. Madam Justice Southin noted that the "classic expression" of the appeal procedure was to be found in ***Cory***. She added:

> [6] Counsel for the respondent puts to us the proposition that if this court is of the view that an award is inordinate, the proper function of this court is not to substitute the award that the court would have made had it been the court of original jurisdiction, but to substitute that award which if it had been attacked in this court we would say it might be high but we cannot say it is inordinate. I do not understand counsel for the appellant to really dispute that that is the proper way for us to approach the issue.
>
> [7] Having heard a great deal about the evidence and having read a great deal of the evidence in this matter, I am of the view that this award indeed was inordinate. It is far beyond what is within the range of cases for the kind of injuries which this respondent has suffered.

[51] A jury in ***Herbert v. Charles***, [2002] B.C.J. No. 279 (Q.L.), 2002 BCCA 88, awarded $900 non-pecuniary damages for injuries sustained by the plaintiff in a motor vehicle accident. This Court increased the award to $12,000.

[52] In ***Vaillancourt,*** the jury awarded a figure in excess of the upper limit but the trial judge reduced it to the upper limit of $281,000. On appeal the award was reduced to $125,000.

2004 BCCA 517 (CanLII)

[53] A jury awarded $500,000 non-pecuniary damages in ***Bob v. Belrose*** (2003), 16 B.C.L.R. (4th) 56, 2003 BCCA 371. The trial judge reduced that award to the rough upper limit of $281,000. This Court found the injuries more serious than in the cases cited. Madam Justice Huddart said, at para. 22, that "taking account of the comparable awards to which we were referred", the range was between $150,000 and $200,000. Non-pecuniary damages were awarded of $200,000.

[54] ***Lam v. Main*** (2003), 187 B.C.A.C. 238, 2003 BCCA 517, resulted in a jury award for pain and suffering of $3,500. On appeal Madam Justice Southin said that one of the most difficult problems for an appellate court is in appeals from jury awards where plaintiffs have suffered "very severe" injuries. She said, at para. 5, that the jury award did not "accord with the requirement upon juries to act judicially." She set the figure at $25,000. Mr. Justice Smith noted that this Court is obliged by ***Cory*** "to measure the jury award against the range established by awards made by trial judges." [para. 8]

[55] In ***Le v. Luz*** (2003), 20 B.C.L.R. (4th) 238, 2003 BCCA 640, a jury awarded $200 for non-pecuniary damages. The award was found to fall below even the broadest range of damages for an injury of this nature. Damages of $2,000 were awarded

2004 BCCA 517 (CanLII)

which, in the words of Mr. Justice Donald, “approaches the range of awards given by judges.” [para. 3]

[56] A jury awarded $5,500 non-pecuniary damages *in* ***Dubach v. Nahal***, [2003] B.C.J. No. 2292 (Q.L.), 2003 BCCA 526. Mr. Justice Esson said, at para. 10, that the award was inordinately low being appropriate only for “a minor whiplash which clears up in a relatively short time.” He also noted that many cases had been cited and that appellant’s counsel suggested the range was between $50,000 and $100,000. Mr. Justice Esson said:

> Doing the best I can in a somewhat unsatisfactory situation, it is my view that an appropriate award would be $35,000.” [para. 13]

b) On the basis that the awards were internally inconsistent

[57] Jury awards have been set aside and new trials ordered because the non-pecuniary award was internally inconsistent with the award under some other head of damage. In ***White v. Nuraney*** (2000), 80 B.C.L.R. (3d) 307, 2000 BCCA 536, Mr. Justice Braidwood, for the Court, said:

> [53] It is open to an appellate court to interfere with a jury award for damages if that award is internally inconsistent or contradictory: ***James v. McLennan, McFeeley & Prior Ltd***. (1941), 56 B.C.R. 1 at 6 (C.A.); ***Cairns v. Emsley*** (1995), 56 B.C.A.C.

2004 BCCA 517 (CanLII)

147; ***Graham v. Hodgkinson*** (1983), 40 O.R. (2d) 697 (C.A.).

[58] In **Novak v. Lane** (2000), 139 B.C.A.C 155, 2000 BCCA 267, this Court found the non-pecuniary award to be low when compared with the award for cost of care. Chief Justice McEachern, in remarks that I will refer to in more detail later, ordered a new trial in preference to setting an award.

[59] In ***Binnie v. Marsollier*** (2001), 158 B.C.A.C. 201, 2001 BCCA 543, this Court ordered a new trial on the basis that there was an irreconcilable inconsistency in the jury verdict that awarded $7,000 special damages but nil non-pecuniary damages.

c) On the basis that a nil award for non-pecuniary damages was not open to the jury

[60] Another category is that in which, in spite of an injury having been proven, the jury made no award for non-pecuniary damages. For instance, ***Stewart v. Shimpei*** (1995), 65 B.C.A.C 113, [1995] B.C.J. No. 2198 (Q.L.), wherein this Court substituted a figure of $1,000 non-pecuniary damages for the nil award made by the jury to Ann Stewart.

[61] However, in ***Banks v. Shrigley*** (2001), 154 B.C.A.C. 214, 2001 BCCA 232, the court declined to substitute its figure for

2004 BCCA 517 (CanLII)

non-pecuniary damages for that of the nil jury award in spite of the appellant's request that it do so. Because of a credibility issue the Court, citing ***Balla v. Insurance Corporation of British Columbia*** (2001), 85 B.C.L.R. (3d) 70, 2001 BCCA 62, "rejected such a course" and ordered a new trial.

d) On the basis of judicial errors

[62] There are innumerable cases in this category but I will only list a few without comment in that they do not bear upon the issue in the case at bar: ***Dudek v. Li*** (2000), 74 B.C.L.R. (3d) 341, 2000 BCCA 321; ***Crosby v. Joyce***, [2000] B.C.J. No. 2138 (Q.L.), 2000 BCCA 541; ***Whitehorn v. Wallden*** (2001), 90 B.C.L.R. (3d) 275, 2001 BCCA 419; ***Homolka v. Harris*** (2002), 100 B.C.L.R. (3d) 218, 2002 BCCA 262; ***Brisson v. Brisson*** (2002), 168 B.C.A.C. 255, 2002 BCCA 279; ***Prentice v. Dharamshi*** (2002), 6 B.C.L.R. (4th) 39, 2002 BCCA 490; ***Hoskin v. Han*** (2003), 12 B.C.L.R. (4th) 21, 2003 BCCA 220.

[63] In the case at bar Mr. Justice Smith reflected upon his reasons in ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146, wherein he quoted Mr. Justice Lambert in ***Foreman v. Foster*** (2001), 84 B.C.L.R. (3d) 184, 2001 BCCA 26:

> [32]... the fact that the award may seem to this Court to be very much too high or very much too low

2004 BCCA 517 (CanLII)

> will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases.

[64] What I have tried to illustrate is that this Court, once it determines that the award is outside of the range established by trial judges or for reasons of inconsistency, jury error in making no award, or judicial error, is not reluctant to set aside a jury award and substitute its figure for non-pecuniary damages or order a new trial. I find it difficult to accept that this is done only in the "rare case" and that the case at bar "is one of those rare cases" where a jury award is successfully appealed.

DISCUSSION

[65] Juries are the finders of fact and it is well established that the determination of the amount of an award is a matter of fact. In ***Mechanical & General Inventions Co. & Leywess v. Austin & the Austin Motor Co.***, [1935] A.C. 346 at 369 (H.L.) it was said that once it has been decided that a case is to be tried by a jury, "that tribunal and that tribunal alone is the judge of fact; and no appellate Court can substitute its own finding ... ". In ***Hill v. Church of Scientology of Toronto***,

2004 BCCA 517 (CanLII)

[1995] 2 S.C.R. 1130, [1995] S.C.J. No. 84, at para. 158, it was said that juries "are uniquely qualified to assess the damages suffered by the plaintiff." Mr. Justice Cory, for the majority, continued:

> ... an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

[66] Trial judges inform juries that the facts are the responsibility of the jury. That principle is enshrined in s.6 of the ***Negligence Act***, R.S.B.C. 1996, c. 333: "In every action the amount of damages or loss, the fault, if any, and the degrees of fault are questions of fact."

[67] Juries are not aware of the "appropriate range" in that they are not instructed as to precedent cases nor are counsel or trial judges allowed to inform them as to a range of damages. There is good reason for this as explained in ***Brisson v. Brisson***, *supra* in which the following comment from Mr. Justice Bouck in ***Force v. Gibbons*** (1978), 9 B.C.L.R. 144, 93 D.L.R. (3d) 626 (S.C.) was quoted with approval:

> In this province a civil jury is given no particular guidance as to what dollar value of general damages it ought to award to an injured plaintiff. The matter is at large. Neither the judge nor counsel are permitted to suggest a figure. The reason for this is to prevent a bidding war between the

2004 BCCA 517 (CanLII)

> parties. Better to let the jury decide in its collective wisdom what is the right amount than to have an auction process.

[68] In ***Cory*** Mr. Justice Gibbs observed that there is "obvious inutility" in using comparable cases in arriving at an appellate figure. He said using comparable cases does not take into account factors "unique to the circumstances" of the plaintiff. [para. 51] Furthermore, he said, they,

> [52] ... suffer from two other shortcomings. Firstly, reliance by a trial judge on awards made by other trial judges of co-ordinate jurisdiction tends to perpetuate an element of circularity. Secondly, imposing trial judge awards as an appropriate measure of reasonableness negates the very purpose of a jury, to bring into the courtroom the standards and the common sense of the community.

[69] Mr. Justice K. Smith in ***Way v. Frigon,*** 2001 BCSC 573, [2001] B.C.J. No. 1629 (Q.L.), picked up on what Mr. Justice Gibbs, dissenting, said in ***Cory*** and added:

> [32] Mr. Justice Gibbs ... remarked perceptively at para. 52 that the assessment of damages by trial judges by reliance on awards made by other trial judges is really a circular exercise.

[70] This Court has repeatedly said that using judgments written by judges as precedents for setting quantum on appeal has limited value. I will repeat what I said on this subject in ***Laycock v. Longo*** (2002), 169 B.C.A.C. 164, 2002 BCCA 186:

2004 BCCA 517 (CanLII)

> [18] As a recent departee from the trial bench I can say that "precedent" cases are of limited value to trial judges in assessing damage awards. That being the case I doubt that such cases are of any greater value to this Court. Counsel for the appellant, citing ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, said that "comparables should be no more than a rough guide." My comment on this is that comparables might be, at the most, a rough guide.
>
> ...
>
> [20] In ***Cody v. Leonard*** (1995), 15 B.C.L.R. (3d) 117 (C.A.) Mr. Justice Legg at 124, on behalf of the Court, said as follows:
>
> > This Court must recognize that a jury award is not necessarily wrong if it does not conform with damage awards made by judges when considering whether a jury award is out of all proportion to the circumstances of the case.
>
> [21] This statement brings into question the relevance of considering "comparable" cases if they do not set the standard to be met.
>
> [22] There is a lack of logic in citing what are suggested to be comparable cases of judge-made awards with the award under review. A jury is generally not supplied with guidelines as to a range of damages. The jury in the case at bar did not have before it the allegedly comparable cases cited to us by counsel for the appellant. Yet this Court is asked to find that the jury made an award "outside of the range." That is to say, the Court is asked to find that the jury was in error. This is illogical, unfair to the jury and unfair to the civil jury system.

[71] In ***Boyd,*** *supra* Mr. Justice Smith referred to the remarks of Mr. Justice Cory in ***Hill,*** *supra* wherein he said that jurors, having been drawn from the community, are uniquely qualified to assess damages and that an appellate court is not

2004 BCCA 517 (CanLII)

entitled to substitute its own judgment as to the award "merely because it would have arrived at a different figure". [***Hill***, para. 158]

[72] Mr. Justice Smith went on to say:

> [11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.

[73] Mr. Justice Smith also said that the "difficult problem" is how to define the permissible deviation from the conventional range of awards. He made the point that using comparables "is fraught with subjective judgments" and that:

> [12] ... absent an objective basis for measurement of deviations from normative awards, we are left with a vague, adjectival standard that carries with it a risk of arbitrariness: what is the acceptable range and what is an excessive deviation from the range in a given case are questions on which there may be reasonable differences of judicial opinion.
>
> ...
>
> [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

2004 BCCA 517 (CanLII)

[74] In the case at bar the errors alleged are that the non-pecuniary award "is inordinately high, not supported by the evidence, and amounts to a wholly erroneous estimate of damages." I agree with all of these contentions.

[75] The basis upon which this Court has jurisdiction to "correct" a jury award is that it represents an error of law and no jury acting judicially could have come to the award in question. This is the first required step in any appeal of a jury award.

[76] In the case at bar I am in agreement with Mr. Justice Smith that the award cannot be allowed to stand. I come to that conclusion on the basis that the award of $197,000 bears no logical relationship to the injuries (i.e. not supported by the evidence), is a wholly erroneous estimate of damages, and is inordinately high.

[77] I am in agreement with what was said by my colleague, Mr. Justice Smith, both in his role as a trial judge in ***Way****, supra* and as an appellate judge in ***Boyd****, supra*. That is, that setting aside jury awards because they do not conform to judge-made awards is something that this Court should strive to avoid. Mr. Justice Smith has come to the conclusion that the award is inordinately high and cannot stand on the basis of the observation in ***Unger v. Singh*** "that an award in the

2004 BCCA 517 (CanLII)

magnitude of $187,000 for non-pecuniary damages is usually reserved for cases involving serious head injuries." [para. 32] While I do not disagree with this, I suggest that the "pre-Cory" principle enunciated in ***Nance*** is preferable. That is, the award was "so inordinately high that it must be a wholly erroneous estimate of the damage."

[78] The next step in this appeal is to determine the remedy. Learned authors and judges repeatedly say that juries are uniquely qualified to assess damages. Statutorily a jury's verdict is a finding of fact. It is inconsistent with both of these factors to substitute a figure arrived at by appeal judges based upon speculation as to what a trial judge would have awarded or on the basis that the award is not in keeping with judge-made awards in roughly comparable cases. As pointed out by Mr. Justice Gibbs in ***Cory*** and endorsed by Mr. Justice Smith in ***Way*** this is circular reasoning.

[79] Speaking generally, I suggest that it is a better practice for this Court, where it determines that an award cannot be upheld, to return the case to the trial court for re-trial. This avoids changing the forum that is, trial by jury, to trial by judges alone. This leaves it to the parties to again choose their forum. This also diminishes the concept that diverse and not truly comparable judge-made decisions

2004 BCCA 517 (CanLII)

have an elevated stature compared to diverse and not truly comparable cases decided by juries.

[80] As repeatedly stated by this Court, appellate courts are not to retry cases. When an appellate court substitutes its own figure for that of the jury it does exactly what Mr. Justice Cory said in ***Hill*** it is not supposed to do. That is, substitute its own judgment as to the award merely because it would have arrived at a different figure.

[81] The procedure of always returning inappropriate jury awards to the trial court for rehearing was considered by the Law Reform Commission of British Columbia in its 1983 Review of Civil Jury Awards, Working Paper No.44, at page 58. It said “there is a certain logical attraction to preventing reviews of jury awards other than by a new trial. For one reason, it is consistent with the initial right to trial by jury.”

[82] However, the Commission, in its final report in 1984, at page 40, concluded that “having the matter retried before another jury is probably the most expensive and time-consuming method of arriving at a satisfactory verdict.” The Commission further noted that there was “no guarantee that the second jury will arrive at a reasonable verdict”.

2004 BCCA 517 (CanLII)

[83] There is one other avenue open in the case at bar as illustrated in ***Johnson v. Laing,*** 2004 BCCA 364, [2004] B.C.J. No. 1313 (Q.L.). In that case the plaintiff suffered injuries when thrown off his bicycle when struck by a car. The plaintiff asserted a serious injury to his spine but the jury awarded only $2,250 non-pecuniary damages. The trial judge did not consider the injuries to be trivial and transitory and his charge to the jury reflected this. On appeal no exception was taken to the charge. Madam Justice Southin, writing for a unanimous Court, held that the trial judge did not have the jurisdiction to substitute his decision for that of the jury. She asked as follows, at para. 17:

> ...
>
> 2. On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court:
>
> a. remedy the apparent error by substitution of an assessment of damages for the jury's verdict;
>
> b. remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or
>
> c. order a new trial on a limited issue (for example, assessment of damages)?

2004 BCCA 517 (CanLII)

[84] Madam Justice Southin, at para. 152, concluded that the jury's verdict, apparently being that there was no permanent spine damage caused by the accident, "was unreasonable." This being so she concluded that the jury's verdict was "legally unreasonable" that is, an error of law.

[85] Madam Justice Southin then noted (at para. 153 and following) that the parties agreed that this Court could assess the damages but that they disagreed as to whether the case could be remitted to the trial judge to assess the damages. Her conclusion was as follows:

> [157] I have concluded, although not without some hesitation, that s.9(1)(c) does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.
>
> [158] Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.

[86] My research indicates that generally this Court remits matters to the trial court without any directions. However,

2004 BCCA 517 (CanLII)

that is but a general practice and should not be taken as suggesting that the procedure followed in ***Johnson*** was in any way incorrect. There are many situations in which it would be inappropriate to do other than return the case to the particular judge. Such a direction was made in ***Webster v. Ernst & Young*** (2000), 75 B.C.L.R. (3d) 169; 2000 BCCA 229. Madam Justice Newbury, with whom Chief Justice Finch concurred, said:

> [24] The plaintiffs asked that this court assess their damages rather than send the matter back to the trial judge should the appeal succeed. This might be possible in a different kind of case (for example, one where there is a range of usual awards for a personal injury) or in a simpler case; but given the quantity and the complexity of the evidence in this instance, I believe we must leave it to the trial judge to complete her findings and assess the damages accordingly.

[87] In a case where a trial judge has dismissed a plaintiff's case on liability and not assessed damages, even though the evidence was heard, and the appeal is successful on liability, the only realistic procedure is to remit the case to the particular judge. In spite of some misgivings, I might have contemplated such a procedure in the case at bar but that is forestalled by the fact that the judge, Mr. Justice Lowry, is no longer a judge of the trial court.

2004 BCCA 517 (CanLII)

[88] The debate as to the justification for having civil juries assess damages for personal injuries has strong arguments both ways. In ***Cory****, supra* Chief Justice McEachern cited ***Bisson v. Powell River (District)*** (1967), 62 W.W.R. 707 (B.C.C.A.) wherein the Court adopted the following statement by Morris L.J. in ***Scott v. Musial****,* [1959] 2 Q.B. 429, [1959] 3 WLR 437, [1959] All ER 193 (C.A.):

> If, however, an award of a jury does not conform to such pattern, [judges' conventional awards] that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges.

[89] In ***Way*** Mr. Justice Smith developed this further:

> [32]... It has often been said in our courts that juries are the conscience of the community and, in fact, trial judges often tell juries that they bring an educational value to trials in that they let the trial judges know what members of the community are thinking. ...
>
> [33] I think that juries have been telling trial judges for the past few years that trial judges have been awarding too much money in non-pecuniary damages for minor soft tissue injuries. The many recent reported cases in which juries have awarded damages for medical expenses and for loss of income, but nothing for non-pecuniary loss, support that impression. It is not for me to say whether there is an injustice in this, but the discrepancy that has given rise to situation where the Insurance Corporation routinely takes jury trials in these types of cases anticipating, in my view, smaller verdicts, can be resolved by judges paying attention to what the community tells us through juries

2004 BCCA 517 (CanLII)

> selected from the community. I intend to do that in this case.

[90] Mr. Justice Smith expanded on this when, sitting in this Court, he said as follows in ***Boyd***:

> [7] Civil juries make a valuable contribution to the efficiency and effectiveness of the judicial system, as the findings of the Ontario Law Reform Commission's 1996 **Report of the Use of Jury Trials in Civil Cases** demonstrates. ...
>
> [8] Although the Commission found no empirical evidence to prove that unpredictability of result was a clear cause of the enhanced settlement rates it discovered, it noted that "a number of lawyers and judges" interviewed in the study believed a causal connection to exist.
>
> [9] While some argue that predictability of outcome enhances settlement prospects, I think the finding of the Commission support the contrary view. Because juries are not made aware of the range of awards that trial judges have established in previous cases, common sense and collective values must guide their deliberations. As a result, jury verdicts are unpredictable or, at least, less predictable than those of trial judges. ... Appellate interference with jury awards, unless circumscribed, will tend to remove from the system this incentive to settle cases.
>
> [10] Further, juries bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and its opinions of what would be fair, just and reasonable in the circumstances.

[91] In its Working Paper to its 1984 report, at page 58, the Law Reform Commission noted that it has been said that civil

2004 BCCA 517 (CanLII)

jury trials represent a “cumbersome, expensive and often inefficient process”. The unpredictability of jury awards is often commented upon by legal writers and is seen, as in the case at bar, in the cases that come to this Court.

[92] In British Columbia it is frequently the Insurance Corporation of British Columbia, representing defendants in civil cases, that applies for trial by jury. It would appear that trial by jury has been advantageous to the Corporation that advertises that it is the policy holders that bear the brunt of excessive awards for injured victims of motor vehicle accidents. Since most jurors are policy-holders, this raises the question as to whether the scales are evenly balanced.

[93] The history of the demise of jury trials in England in personal injury actions is narrated by Mr. Justice Bouck of the Supreme Court of British Columbia in articles ((2002), 81 C.B.R. 493 at 500-501) and speeches. He noted that Lord Denning M.R. in ***Sims v. William Howard and Son Ltd.,*** [1964] 2 Q.B. 409 at 415-416, argued for uniformity of awards. He urged trial judges to apply a “scale” of damages. He advanced this further in ***Ward v. James***, [1966] 1 Q.B. 273 at 301, (C.A.) when he spoke of the frustration of the Court of Appeal in dealing with civil jury verdicts, citing them “as inscrutable as the sphinx.” He conceded that it would be

2004 BCCA 517 (CanLII)

inappropriate for counsel or judges to bring awards in other cases to the attention of juries. He said that if a range was to be given to a jury there was no need for a jury. In his opinion personal injury damage assessments should be by judge-alone trials. The Court said that it would not, in future cases, hesitate to reverse orders allowing trial by jury in personal injury cases.

[94] Mr. Justice Bouck reported that this "effectively ended English trial by jury in personal injury actions."

[95] I will leave this subject with the words of Madam Justice Satanove in ***McArthur v. De Boer***, [2001] B.C.J. No. 2921 (Q.L.), 2001 BCSC 1842:

> [8] We should be looking at the question whether personal injury actions should be decided by a jury in the first place. That to me is the fundamental question that needs to be looked at, but that will have to wait for another day, another court or perhaps legislation.

III CONCLUSIONS

[96] I am in agreement with Mr. Justice Smith that the jury award was wholly out of proportion to the injuries suffered by Mr. White and must be set aside. With respect to my colleague's suggestion that a trial judge would have awarded "somewhere in the range of $80,000 to $100,000", I can only

2004 BCCA 517 (CanLII)

respectfully disagree. He noted that the award illustrated that the jury was of the opinion that the injuries were significant and that this must influence the appellate award. Consequently, he chose a figure of $115,000.

[97] If I was of the opinion that this Court should substitute its figure for that of the jury, I would find that the evidence does not support more than a modest award for non-pecuniary damages. The only injury that could lead to any substantial award would be if brain damage of some significance and of a continuing nature was proven. It was not.

[98] While I am of the opinion that generally successful assessment appeals should be returned to the trial court, I concede that there are cases where it would be preferable for this Court to substitute its figure for that of the trial court. I see those situations as being where all parties explicitly ask that this be done and where the award is found to be incorrect but not so much so that it indicates a gross misunderstanding of the evidence.

[99] However, in many situations, even when requested to set a figure, an appellate court is on sound footing in sending the case back for re-trial. For instance, in cases such as ***Webster****, supra*, where, in spite of a request by counsel to

2004 BCCA 517 (CanLII)

have a figure set, the Court sent the matter back because of the "quantity and complexity of the evidence." [para. 24] Also in cases such as ***Banks*** where, once again over the request of counsel to set a figure, this Court returned the case for re-trial because of an issue respecting credibility.

[100] In the case at bar the jury award was "a manifestly unreasonable verdict". That is, it was not a verdict that was simply questionable or somewhat out of line with reality or, if need be, with comparable cases. It was perverse. This, to me, is another situation mitigating against the remedy of substituting this Court's figure for that of the jury. In the circumstances to do so would be a retrying of the case. I agree with what said by Chief Justice McEachern in ***Baxter v. Brown*** (1997), 28 B.C.L.R. (3d) 351 (C.A.), [1997] B.C.J. No. 551 (Q.L.):

> [6] Mr. McMurchy on behalf of the appellant has struggled valiantly to persuade us that we should interfere with the award on the basis that there was evidence that should have led the jury to award considerably more than the amounts I have mentioned. This Court has held over and over again that these kinds of cases must be won at trial and that we have no authority to, and we cannot, retry the case. [emphasis added]

2004 BCCA 517 (CanLII)

[101] I also adopt what was said by Chief Justice McEachern in ***Novak*** that the proper figure could not be ascertained, therefore:

> [10]... I am hesitant to substitute my views for those of the jury ... although I recognize this is awkward and possibly expensive to the parties, I feel constrained to direct that there should be a new trial.

I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Thackray"

Correction: 26 November 2004

In para. 79, page 31-31 the last sentence was changed to read "This also diminishes the concept that diverse and not truly comparable judge-made decisions . . ."

2004 BCCA 517 (CanLII)

Daphne Whiten *Appellant/Respondent on cross-appeal*

v.

Pilot Insurance Company *Respondent/ Appellant on cross-appeal*

and

The Insurance Council of Canada and the Ontario Trial Lawyers Association *Interveners*

Indexed as: Whiten *v.* Pilot Insurance Co.

Neutral citation: 2002 SCC 18.

File No.: 27229.

2000: December 14; 2002: February 22.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance — Insurer's duty of good faith and fair dealing — Insurer contesting fire insurance claim in bad faith — Whether policy holder entitled to award of punitive damages — Whether jury charge adequate — Whether jury award of $1 million in punitive damages should be restored.

Damages — Punitive damages — Insurer's duty of good faith and fair dealing — Insurer contesting fire insurance claim in bad faith — Whether policy holder entitled to award of punitive damages — Whether jury award of $1 million in punitive damages should be restored.

The appellant and her husband discovered a fire in the addition to their house just after midnight in January 1994. They and their daughter fled the house wearing only their night clothes. It was minus 18 degrees Celsius.

Daphne Whiten *Appelante/Intimée au pourvoi incident*

c.

Pilot Insurance Company *Intimée/Appelante au pourvoi incident*

et

Le Conseil d'assurances du Canada et l'Ontario Trial Lawyers Association *Intervenants*

Répertorié : Whiten *c.* Pilot Insurance Co.

Référence neutre : 2002 CSC 18.

N° du greffe : 27229.

2000 : 14 décembre; 2002 : 22 février.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Assurance — Obligation de l'assureur d'agir de bonne foi et équitablement — L'assureur a contesté de mauvaise foi une demande d'indemnité présentée en vertu d'une police d'assurance-incendie — La titulaire de la police a-t-elle droit à des dommages-intérêts punitifs? — Les directives au jury étaient-elles adéquates? — Y a-t-il lieu de rétablir la décision du jury accordant des dommages-intérêts punitifs de un million de dollars?

Dommages-intérêts — Dommages-intérêts punitifs — Obligation de l'assureur d'agir de bonne foi et équitablement — L'assureur a contesté de mauvaise foi une demande d'indemnité présentée en vertu d'une police d'assurance-incendie — La titulaire de la police a-t-elle droit à des dommages-intérêts punitifs? — Y a-t-il lieu de rétablir la décision du jury accordant des dommages-intérêts punitifs de un million de dollars?

Tout juste après minuit, en janvier 1994, l'appelante et son mari ont constaté qu'un incendie s'était déclaré dans une annexe à l'arrière de leur maison. Accompagnés de leur fille, ils sont sortis précipitamment de la maison,

2002 SCC 18 (CanLII)

The husband gave his slippers to his daughter to go for help and suffered serious frostbite to his feet. The fire totally destroyed the home and its contents, including three cats. The appellant was able to rent a small winterized cottage nearby for $650 per month. The respondent insurer made a single $5,000 payment for living expenses and covered the rent for a couple of months or so, then cut off the rent without telling the family, and thereafter pursued a confrontational policy. The appellant's family was in very poor financial shape. Ultimately this confrontation led to a protracted trial based on the respondent's allegation that the family had torched its own home, even though the local fire chief, the respondent's own expert investigator, and its initial expert all said there was no evidence whatsoever of arson. The respondent's position was wholly discredited at trial and its appellate counsel conceded that there was no air of reality to the allegation of arson. The jury awarded compensatory damages and $1 million in punitive damages. A majority of the Court of Appeal allowed the appeal in part and reduced the punitive damages award to $100,000.

Held (LeBel J. dissenting on the appeal): The appeal should be allowed and the jury award of $1 million in punitive damages restored. The respondent's cross-appeal against the award of any punitive damages should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.: The jury's award of punitive damages, though high, was within rational limits. The respondent insurer's conduct towards the appellant was exceptionally reprehensible. It forced her to put at risk her only remaining asset (the $345,000 insurance claim) plus $320,000 in costs that she did not have. The denial of the claim was designed to force her to make an unfair settlement for less than she was entitled to. The conduct was planned and deliberate and continued for over two years, while the financial situation of the appellant grew increasingly desperate. The jury evidently believed that the respondent knew from the outset that its arson defence was contrived and unsustainable. Insurance contracts are sold by the insurance industry and purchased by members of the public for peace of mind. The more devastating the loss, the more the insured may be at the financial mercy of the insurer, and the

en vêtements de nuit. Il faisait moins 18 degrés Celsius. Ayant donné ses pantoufles à sa fille pour qu'elle aille demander de l'aide, le mari a subi de graves engelures aux pieds. L'incendie a complètement détruit la maison et son contenu, y compris trois chats. L'appelante a pu louer, non loin de chez elle, un chalet toutes saisons pour 650 $ par mois. L'intimée a effectué un seul versement de 5 000 $ au titre des frais de subsistance puis, après avoir payé le loyer pendant quelques mois, elle a cessé de le faire, sans aviser la famille de cette décision. Par la suite, elle adopté une attitude empreinte d'antagonisme. La famille de l'appelante était dans une situation financière très précaire. Le conflit a finalement mené à un long procès fondé sur la prétention de l'intimée que la famille avait elle-même incendié la maison, et ce malgré le fait que le chef du service d'incendie local, le propre enquêteur de l'intimée et l'expert auquel elle avait initialement fait appel avaient tous affirmé qu'il n'existait pas la moindre preuve d'incendie criminel. La thèse de l'intimée a été entièrement rejetée au procès et, en appel, l'avocat de l'intimée a concédé que l'allégation d'incendie criminel n'avait aucune vraisemblance. Le jury a accordé des dommages-intérêts compensatoires ainsi que des dommages-intérêts punitifs de un million de dollars. Les juges majoritaires de la Cour d'appel ont accueilli l'appel en partie et réduit les dommages-intérêts punitifs à 100 000 $.

Arrêt (le juge LeBel est dissident quant au pourvoi principal) : Le pourvoi principal est accueilli et la somme de un million de dollars accordée par le jury au titre des dommages-intérêts punitifs est rétablie. Le pourvoi incident de l'intimée contestant l'attribution de toute somme au titre des dommages-intérêts punitifs est rejeté.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour : Bien qu'élevée, la somme accordée par le jury au titre des dommages-intérêts punitifs se situait dans des limites rationnelles. La société d'assurance intimée a eu une conduite exceptionnellement répréhensible à l'endroit de l'appelante. Elle a forcé l'appelante à risquer son dernier élément d'actif (son indemnité d'assurance de 345 000 $) et à s'endetter de 320 000 $ en frais de justice. Le rejet de la demande d'indemnité visait à contraindre cette dernière à accepter un règlement inéquitable, une somme inférieure à celle à laquelle elle avait droit. L'intimée s'est livrée, avec préméditation et de propos délibéré, à la conduite reprochée pendant plus de deux ans, tandis que la situation financière de l'appelante devenait de plus en plus désespérée. Le jury a de toute évidence estimé que l'intimée savait dès le départ que la défense d'incendie criminel était une fiction insoutenable. La tranquillité d'esprit est l'argument qu'invoquent

2002 SCC 18 (CanLII)

more difficult it may be to challenge a wrongful refusal to pay the claim.

The jury decided a powerful message of denunciation, retribution and deterrence had to be sent to the respondent and they sent it. The obligation of good faith dealing means that the appellant's peace of mind should have been the respondent's objective, and her vulnerability ought not to have been aggravated as a negotiating tactic. It is this relationship of reliance and vulnerability that was outrageously exploited by the respondent in this case.

An award of punitive damages in a contract case, though rare, is obtainable. It requires an "actionable wrong" in addition to the breach sued upon. Here, in addition to the contractual obligation to pay the claim, the respondent was under a distinct and separate obligation to deal with its policyholders in good faith. A breach of the contractual duty of good faith was thus independent of and in addition to the breach of contractual duty to pay the loss. The plaintiff specifically asked for punitive damages in her statement of claim and if the respondent was in any doubt about the facts giving rise to the claim, it ought to have applied for particulars.

The trial judge's charge to the jury with respect to punitive damages should include words to convey an understanding of the following points: (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert

les assureurs pour vendre leurs contrats d'assurance et la raison qui incite les membres du public à les acheter. Plus la perte est catastrophique, plus l'assuré risque de se trouver financièrement à la merci de l'assureur et plus il peut lui être difficile de contester un refus illégitime de verser l'indemnité demandée.

Le jury a décidé qu'un vigoureux message de châtiment, de dissuasion et de dénonciation s'imposait, et il a donné ce message. En raison de l'obligation qu'avait l'intimée d'agir de bonne foi, la tranquillité d'esprit de l'appelante aurait dû être l'objectif de l'intimée, qui n'aurait pas dû accroître la vulnérabilité de l'appelante comme tactique de négociation. C'est cette situation de dépendance et de vulnérabilité que l'intimée a exploitée de façon inacceptable en l'espèce.

Quoique des dommages-intérêts punitifs soient rarement accordés en matière contractuelle, il est néanmoins possible d'en obtenir. Il doit exister une « faute donnant ouverture à action » en plus du manquement à l'obligation contractuelle faisant l'objet de l'action. En l'espèce, en plus de l'obligation contractuelle qu'elle avait de verser l'indemnité réclamée, l'intimée était tenue à une obligation distincte, soit celle d'agir de bonne foi à l'égard des personnes titulaires de ses polices d'assurance. Le manquement à l'obligation contractuelle d'agir de bonne foi est indépendant du manquement à l'obligation d'indemniser l'assuré de sa perte et il s'y ajoute. La demanderesse a expressément demandé des dommages-intérêts punitifs dans sa déclaration et si l'intimée entretenait le moindre doute au sujet des faits qui fondaient les conclusions de la demanderesse, elle pouvait demander des précisions.

Dans son exposé au jury au sujet des dommages-intérêts punitifs, le juge du procès doit leur expliquer les points suivants. (1) Les dommages-intérêts punitifs sont vraiment l'exception et non la règle. (2) Ils sont accordés seulement si le défendeur a eu une conduite malveillante, arbitraire ou extrêmement répréhensible, qui déroge nettement aux normes ordinaires de bonne conduite. (3) Lorsqu'ils sont accordés, leur quantum doit être raisonnablement proportionné, eu égard à des facteurs comme le préjudice causé, la gravité de la conduite répréhensible, la vulnérabilité relative du demandeur et les avantages ou bénéfices tirés par le défendeur, (4) ainsi qu'aux autres amendes ou sanctions infligées à ce dernier par suite de la conduite répréhensible en cause. (5) En règle générale, des dommages-intérêts punitifs sont accordés seulement lorsque la conduite répréhensible resterait autrement impunie ou lorsque les autres sanctions ne permettent pas ou ne permettraient probablement pas de réaliser les objectifs de châtiment, dissuasion et dénonciation. (6) L'objectif de ces dommages-intérêts

2002 SCC 18 (CanLII)

(retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) The jury should be told that while normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. While the jury charge in this case was skeletal, it was upheld by the Court of Appeal (unanimous on this point) and, with hesitation, this Court should not allow the appeal on that ground.

As to quantum, the award of $1 million in punitive damages was more than this Court would have awarded, but was still within the high end of the range where juries are free to make their assessment.

Per LeBel J. (dissenting on the appeal): While the respondent's bad faith in its handling of the claim, up to and during the trial, amply justifies awarding punitive damages, an award of $1 million — three times the compensation for loss of property — goes well beyond a rational and appropriate use of this kind of remedy. This case started as litigation based on a home insurance contract. The appellant suffered a loss and encountered obduracy and bad faith on the part of the respondent. There was no evidence that such conduct was a regular incident of the respondent's way of running its business. Nor is such behaviour widespread in the Canadian insurance industry. The need for general deterrence here is far from clear. Concerns about industry practices should mainly be addressed through the appropriate regulatory and penal regimes, rather than through haphazard punitive damages awards.

The award fails the rationality test because its sole purpose is to punish bad faith and unfair dealing by the

n'est pas d'indemniser le demandeur, mais (7) de punir le défendeur comme il le mérite (châtiment), de le décourager — lui et autrui — d'agir ainsi à l'avenir (dissuasion) et d'exprimer la condamnation de l'ensemble de la collectivité à l'égard des événements (dénonciation). (8) Ils sont accordés seulement lorsque les dommages-intérêts compensatoires, qui ont dans une certaine mesure un caractère punitif, ne permettent pas de réaliser ces objectifs. (9) Leur quantum ne doit pas dépasser la somme nécessaire pour réaliser rationnellement l'objectif visé. (10) Bien que l'État soit généralement le bénéficiaire des amendes ou sanctions infligées pour cause de conduite répréhensible, les dommages-intérêts punitifs constituent pour le demandeur un « profit inattendu » qui s'ajoute aux dommages-intérêts compensatoires. (11) Dans notre système de justice, les juges et les jurys estiment que des dommages-intérêts punitifs modérés sont généralement suffisants, puisqu'ils entraînent inévitablement une stigmatisation sociale. Bien que l'exposé fait au jury en l'espèce fût sommaire, la Cour d'appel en a confirmé la validité (son opinion étant unanime sur ce point), et, non sans certaines hésitations, notre Cour ne saurait retenir ce moyen d'appel.

Pour ce qui est du quantum, la somme de un million de dollars accordée au titre des dommages-intérêts punitifs est plus élevée que celle qu'aurait accordée notre Cour, mais elle reste en deçà de la limite supérieure de la fourchette à l'intérieur de laquelle les jurés sont libres d'agir.

Le juge LeBel (dissident quant au pourvoi principal) : Bien que la mauvaise foi dont l'intimée a fait preuve dans le traitement de la demande d'indemnité jusqu'au procès et durant celui-ci justifie amplement d'accorder des dommages-intérêts punitifs, une somme de un million de dollars — qui correspond environ au triple du montant de l'indemnité accordée pour la perte de la propriété — dépasse de beaucoup les limites rationnelles et appropriées de ce type de sanction. À l'origine, la présente affaire était un litige fondé sur un contrat d'assurance-habitation. L'appelante, qui a subi une perte, s'est heurtée à l'entêtement et à la mauvaise foi de l'intimée. On n'a toutefois produit aucune preuve indiquant que cette conduite survient régulièrement dans le cours des activités de l'intimée. Un tel comportement n'est pas non plus monnaie courante dans le secteur canadien de l'assurance. Le besoin de dissuasion générale est loin d'être évident en l'espèce. Les solutions aux pratiques inquiétantes observées dans un secteur d'activités donné devraient être apportées par le truchement des régimes de réglementation ou régimes pénaux applicables et non en accordant au hasard des dommages-intérêts punitifs.

La décision d'accorder la somme contestée ne satisfait pas au critère de la rationalité, étant donné qu'elle

2002 SCC 18 (CanLII)

respondent. The award also fails the proportionality test because the punishment far exceeds whatever property or economic losses may have been caused by the non-performance of the contract. The Court of Appeal properly set the amount of punitive damages at a sum that is consistent with the nature and purpose of punitive damages in the law of torts. The amount appears reasonable and proportionate. It imposed significant punishment for the bad faith of the respondent without upsetting the proper balance between the compensatory and punitive functions of tort law. Predictability and consistency should be factored into situations where the nature of the damages suffered makes it difficult for a jury to determine a proper quantum. Setting punitive damages at amounts that do not significantly exceed the real economic loss would leave them in their proper place within the scheme of the law of torts. Where trials are held with a judge and jury, instructions on the range of awards would be useful. The jury should be instructed clearly that an award of general damages may also amount to all the punishment that is necessary in a given case.

Cases Cited

By Binnie J.

Applied: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; **referred to:** *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Cassell & Co. v. Broome*, [1972] A.C. 1027, aff'g [1971] 2 Q.B. 354; *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (1997); *Wilkes v. Wood* (1763), Lofft. 1, 98 E.R. 489; *Huckle v. Money* (1763), 2 Wils. K.B. 206, 95 E.R. 768; *Collette v. Lasnier* (1886), 13 S.C.R. 563; *Rookes v. Barnard*, [1964] A.C. 1129; *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2001] 3 All E.R. 193; *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118; *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81; *Conway v. Irish National Teachers' Organisation* (1991), 11 I.L.R.M. 497; *John v. MGN Ltd.*, [1997] Q.B. 586; *Thompson v. Commissioner of Police of the Metropolis*, [1997] 2 All E.R. 762; *Lamb v. Cotogno* (1987), 164 C.L.R. 1; *XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd.* (1985), 155 C.L.R. 448; *Australian Consolidated Press Ltd. v. Uren* (1966), 117 C.L.R. 185; *Whitfeld v. De Lauret & Co.* (1920), 29

a pour seule fin de punir la mauvaise foi et le traitement inéquitable dont s'est rendue coupable l'intimée. Elle ne satisfait pas non plus au critère de la proportionnalité parce que la punition excède de beaucoup les pertes économiques ou matérielles susceptibles d'avoir été causées par l'inexécution du contrat. La Cour d'appel a à juste titre fixé les dommages-intérêts punitifs à une somme compatible avec la nature et l'objet de cette sanction en droit de la responsabilité civile délictuelle. La somme paraît raisonnable et proportionnée. Elle sanctionne de façon non négligeable la mauvaise foi de l'intimée sans compromettre le juste équilibre entre les fonctions compensatoire et punitive du droit de la responsabilité civile délictuelle. Il faut incorporer un certain degré de prévisibilité et de cohérence à l'analyse lorsque, en raison de la nature des dommages subis, il est difficile pour le jury d'établir le quantum approprié. Le fait d'accorder, au titre des dommages-intérêts punitifs, une somme qui n'excède pas de façon substantielle la perte économique réelle, conserve à cette forme de dommages-intérêts la place qui lui revient au sein du droit de la responsabilité civile délictuelle. Dans les procès devant juge et jury, il serait utile de renseigner les jurys sur la fourchette des sommes déjà accordées au titre des dommages-intérêts. Il faut préciser clairement aux jurés que, dans une affaire donnée, des dommages-intérêts généraux peuvent également constituer une sanction suffisante.

Jurisprudence

Citée par le juge Binnie

Arrêt appliqué : *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; **arrêts mentionnés :** *Vorvis c. Insurance Corp. of British Columbia*, [1989] 1 R.C.S. 1085; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *Cassell & Co. c. Broome*, [1972] A.C. 1027, conf. [1971] 2 Q.B. 354; *BMW of North America, Inc. c. Gore*, 517 U.S. 559 (1996); *BMW of North America, Inc. c. Gore*, 701 So.2d 507 (1997); *Wilkes c. Wood* (1763), Lofft. 1, 98 E.R. 489; *Huckle c. Money* (1763), 2 Wils. K.B. 206, 95 E.R. 768; *Collette c. Lasnier* (1886), 13 R.C.S. 563; *Rookes c. Barnard*, [1964] A.C. 1129; *Kuddus c. Chief Constable of Leicestershire Constabulary*, [2001] 3 All E.R. 193; *Uren c. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118; *Taylor c. Beere*, [1982] 1 N.Z.L.R. 81; *Conway c. Irish National Teachers' Organisation* (1991), 11 I.L.R.M. 497; *John c. MGN Ltd.*, [1997] Q.B. 586; *Thompson c. Commissioner of Police of the Metropolis*, [1997] 2 All E.R. 762; *Lamb c. Cotogno* (1987), 164 C.L.R. 1; *XL Petroleum (N.S.W.) Pty. Ltd. c. Caltex Oil (Australia) Pty. Ltd.* (1985), 155 C.L.R. 448; *Australian Consolidated Press Ltd. c. Uren* (1966),

2002 SCC 18 (CanLII)

C.L.R. 71; *Gray v. Motor Accident Commission* (1998), 196 C.L.R. 1; *M'Comb v. Low* (1873), 1 N.Z. Jur. 49; *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97; *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22; *Cook v. Evatt (No. 2)*, [1992] 1 N.Z.L.R. 676; *McLaren Transport Ltd. v. Somerville*, [1996] 3 N.Z.L.R. 424; *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299; *Coloca v. B.P. Australia Ltd.*, [1992] 2 V.R. 441; *L. v. Robinson*, [2000] 3 N.Z.L.R. 499; *Ellison v. L.*, [1998] 1 N.Z.L.R. 416; *Auckland City Council v. Blundell*, [1986] 1 N.Z.L.R. 732; *Green v. Matheson*, [1989] 3 N.Z.L.R. 564; *McKenzie v. Attorney-General*, [1992] 2 N.Z.L.R. 14; *Dunlea v. Attorney-General*, [2000] 3 N.Z.L.R. 136; *W. v. W.*, [1999] 2 N.Z.L.R. 1; *Cooper v. O'Connell*, No. 85/90-96, 1997 Ireland S.C. Lexis; *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851); *Fay v. Parker*, 53 N.H. 342 (1872); *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309; *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001); *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Denison v. Fawcett*, [1958] O.R. 312; *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228; *Buxbaum (Litigation guardian of) v. Buxbaum*, [1997] O.J. No. 5166 (QL); *Glendale v. Drozdzik* (1993), 77 B.C.L.R. (2d) 106; *Pollard v. Gibson* (1986), 1 Y.R. 167; *Joanisse v. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224; *Canada v. Lukasik* (1985), 18 D.L.R. (4th) 245; *Wittig v. Wittig* (1986), 53 Sask. R. 138; *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1; *Edwards v. Harris-Intertype (Canada) Ltd.* (1983), 40 O.R. (2d) 558, aff'd (1984), 9 D.L.R. (4th) 319; *Grenn v. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9; *Starkman v. Delhi Court Ltd.* (1960), 24 D.L.R. (2d) 152, aff'd (1961), 28 D.L.R. (2d) 269; *Gastebled v. Stuyck* (1973), 12 C.P.R. (2d) 102, aff'd (1974), 15 C.P.R. (2d) 137; *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156; *Rieger v. Burgess*, [1988] 4 W.W.R. 577; *Lauscher v. Berryere* (1999), 172 D.L.R. (4th) 439; *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104; *Patenaude v. Roy* (1994), 123 D.L.R. (4th) 78; *Recovery Production Equipment Ltd. v. McKinney Machine Co.* (1998), 223 A.R. 24; *Mustaji v. Tjin* (1996), 30 C.C.L.T. (2d) 53; *Québec (Curateur public) v. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1; *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL); *Gerula v. Flores* (1995), 126 D.L.R. (4th) 506; *Walker v. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367; *United*

117 C.L.R. 185; *Whitfeld c. De Lauret & Co.* (1920), 29 C.L.R. 71; *Gray c. Motor Accident Commission* (1998), 196 C.L.R. 1; *M'Comb c. Low* (1873), 1 N.Z. Jur. 49; *Donselaar c. Donselaar*, [1982] 1 N.Z.L.R. 97; *Daniels c. Thompson*, [1998] 3 N.Z.L.R. 22; *Cook c. Evatt (No. 2)*, [1992] 1 N.Z.L.R. 676; *McLaren Transport Ltd. c. Somerville*, [1996] 3 N.Z.L.R. 424; *Aquaculture Corp. c. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299; *Coloca c. B.P. Australia Ltd.*, [1992] 2 V.R. 441; *L. c. Robinson*, [2000] 3 N.Z.L.R. 499; *Ellison c. L.*, [1998] 1 N.Z.L.R. 416; *Auckland City Council c. Blundell*, [1986] 1 N.Z.L.R. 732; *Green c. Matheson*, [1989] 3 N.Z.L.R. 564; *McKenzie c. Attorney-General*, [1992] 2 N.Z.L.R. 14; *Dunlea c. Attorney-General*, [2000] 3 N.Z.L.R. 136; *W. c. W.*, [1999] 2 N.Z.L.R. 1; *Cooper c. O'Connell*, No. 85/90-96, 1997 Ireland S.C. Lexis; *Day c. Woodworth*, 54 U.S. (13 How.) 363 (1851); *Fay c. Parker*, 53 N.H. 342 (1872); *Liebeck c. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309; *Pacific Mutual Life Insurance Co. c. Haslip*, 499 U.S. 1 (1991); *Honda Motor Co. c. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. c. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Cooper Industries, Inc. c. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001); *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Denison c. Fawcett*, [1958] O.R. 312; *Robitaille c. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228; *Buxbaum (Litigation guardian of) c. Buxbaum*, [1997] O.J. No. 5166 (QL); *Glendale c. Drozdzik* (1993), 77 B.C.L.R. (2d) 106; *Pollard c. Gibson* (1986), 1 Y.R. 167; *Joanisse c. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224; *Canada c. Lukasik* (1985), 18 D.L.R. (4th) 245; *Wittig c. Wittig* (1986), 53 Sask. R. 138; *Banque Royale du Canada c. W. Got & Associates Electric Ltd.*, [1999] 3 R.C.S. 408; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Andrusiw c. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1; *Edwards c. Harris-Intertype (Canada) Ltd.* (1983), 40 O.R. (2d) 558, conf. par (1984), 9 D.L.R. (4th) 319; *Grenn c. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9; *Starkman c. Delhi Court Ltd.* (1960), 24 D.L.R. (2d) 152, conf. par (1961), 28 D.L.R. (2d) 269; *Gastebled c. Stuyck* (1973), 12 C.P.R. (2d) 102, conf. par (1974), 15 C.P.R. (2d) 137; *Paragon Properties Ltd. c. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156; *Rieger c. Burgess*, [1988] 4 W.W.R. 577; *Lauscher c. Berryere* (1999), 172 D.L.R. (4th) 439; *Walker c. CFTO Ltd.* (1987), 59 O.R. (2d) 104; *Patenaude c. Roy* (1994), 123 D.L.R. (4th) 78; *Recovery Production Equipment Ltd. c. McKinney Machine Co.* (1998), 223 A.R. 24; *Mustaji c. Tjin* (1996), 30 C.C.L.T. (2d) 53; *Québec (Curateur public) c. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1; *Matusiak c. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL); *Gerula c. Flores* (1995),

2002 SCC 18 (CanLII)

Services Funds (Trustees) v. Hennessey, [1994] O.J. No. 1391 (QL); *Williams v. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76; *Procor Ltd. v. U.S.W.A.* (1990), 71 O.R. (2d) 410; *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65; *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42; *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322; *Muir v. Alberta*, [1996] 4 W.W.R. 177; *R. (L.) v. Nyp* (1995), 25 C.C.L.T. (2d) 309; *Weinstein v. Bucar*, [1990] 6 W.W.R. 615; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Nantel v. Parisien* (1981), 18 C.C.L.T. 79; *Lubrizol Corp. v. Imperial Oil Ltd.* (1994), 84 F.T.R. 197, rev'd [1996] 3 F.C. 40; *Westbank Band of Indians v. Tomat*, [1989] B.C.J. No. 1638 (QL).

By LeBel J. (dissenting on the appeal)

Ratych v. Bloomer, [1990] 1 S.C.R. 940; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (1928); *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Cassell & Co. v. Broome*, [1972] A.C. 1027; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674; *Caron v. Chodan Estate* (1992), 58 O.A.C. 173; *Gray v. Alanco Developments Ltd.*, [1967] 1 O.R. 597; *Howes v. Crosby* (1984), 45 O.R. (2d) 449.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 118.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 25.06(9).

Authors Cited

Chapman, Bruce, and Michael Trebilcock. "Punitive Damages: Divergence in Search of a Rationale" (1989), 40 *Ala. L. Rev.* 741.

Feldthusen, Bruce. "Punitive Damages: Hard Choices and High Stakes", [1998] *N.Z. L. Rev.* 741.

126 D.L.R. (4th) 506; *Walker c. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367; *United Services Funds (Trustees) c. Hennessey*, [1994] O.J. No. 1391 (QL); *Williams c. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76; *Procor Ltd. c. U.S.W.A.* (1990), 71 O.R. (2d) 410; *Claiborne Industries Ltd. c. National Bank of Canada* (1989), 69 O.R. (2d) 65; *Horseshoe Bay Retirement Society c. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42; *Kates c. Hall* (1991), 53 B.C.L.R. (2d) 322; *Muir c. Alberta*, [1996] 4 W.W.R. 177; *R. (L.) c. Nyp* (1995), 25 C.C.L.T. (2d) 309; *Weinstein c. Bucar*, [1990] 6 W.W.R. 615; *Norberg c. Wynrib*, [1992] 2 R.C.S. 226; *Nantel c. Parisien* (1981), 18 C.C.L.T. 79; *Lubrizol Corp. c. Imperial Oil Ltd.* (1994), 84 F.T.R. 197, inf. par [1996] 3 C.F. 40; *Westbank Band of Indians c. Tomat*, [1989] B.C.J. No. 1638 (QL).

Citée par le juge LeBel (dissident quant au pourvoi principal)

Ratych c. Bloomer, [1990] 1 R.C.S. 940; *Jacobi c. Griffiths*, [1999] 2 R.C.S. 570; *Vorvis c. Insurance Corp. of British Columbia*, [1989] 1 R.C.S. 1085; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *Edwards c. Barreau du Haut-Canada*, [2001] 3 R.C.S. 562, 2001 CSC 80; *Cooper c. Hobart*, [2001] 3 R.C.S. 537, 2001 CSC 79; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Palsgraf c. Long Island R. Co.*, 162 N.E. 99 (1928); *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *Cassell & Co. c. Broome*, [1972] A.C. 1027; *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *Thornton c. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 R.C.S. 267; *Arnold c. Teno*, [1978] 2 R.C.S. 287; *ter Neuzen c. Korn*, [1995] 3 R.C.S. 674; *Caron c. Chodan Estate* (1992), 58 O.A.C. 173; *Gray c. Alanco Developments Ltd.*, [1967] 1 O.R. 597; *Howes c. Crosby* (1984), 45 O.R. (2d) 449.

Lois et règlements cités

Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 118.

Règles de procédure civile, R.R.O. 1990, règl. 194, règle 25.06(9).

Doctrine citée

Chapman, Bruce, and Michael Trebilcock. « Punitive Damages: Divergence in Search of a Rationale » (1989), 40 *Ala. L. Rev.* 741.

Feldthusen, Bruce. « Punitive Damages : Hard Choices and High Stakes », [1998] *N.Z. L. Rev.* 741.

2002 SCC 18 (CanLII)

Feldthusen, Bruce. "Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 *Can. Bus. L.J.* 241.

Halsbury's Laws of Australia, vol. 9. Sydney: Butterworths, 1995.

Halsbury's Laws of England, vol. 12(1), 4th ed. (reissue). By Lord Mackay of Clashfern. London: Butterworths, 1998.

Hibbert, Christopher. *The Roots of Evil: A Social History of Crime and Punishment*. Boston: Little, Brown, 1963.

Ireland. Law Reform Commission. *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages*. Dublin: The Commission, 1998.

Linden, Allen M. *Canadian Tort Law*, 6th ed. Toronto: Butterworths, 1997.

McGregor on Damages, 16th ed. By Harvey McGregor. London: Sweet & Maxwell, 1997.

Ontario. Law Reform Commission. *Report on Exemplary Damages*. Toronto: The Commission, 1991.

Schlueter, Linda L., and Kenneth R. Redden. *Punitive Damages*, vol. 1, 4th ed. New York: Lexis, 2000.

United Kingdom. House of Commons, 6th series, Written Answers to Questions, November 9, 1999.

United Kingdom. Law Commission for England and Wales, Report 247. *Aggravated, Exemplary and Restitutionary Damages*, December 16, 1997.

Vogel, Paul G. *Cohen Melnitzer's Civil Procedure in Practice*, vol. 1. Toronto: Carswell, 1989 (loose-leaf updated 1990, release No. 1).

Watson, Garry D., and Craig Perkins. *Holmested and Watson: Ontario Civil Procedure*, vol. 1. Toronto: Carswell, 1984 (loose-leaf updated 2001, release No. 5).

Weinrib, Ernest J. *The Idea of Private Law*. Cambridge, Mass.: Harvard University Press, 1995.

Windeyer, William John Victor. *Lectures on Legal History*, 2nd ed. rev. Sydney: Law Book, 1957.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 32 C.P.C. (4th) 3, [1999] I.L.R. ¶ I-3659, [1999] O.J. No. 237 (QL), allowing in part the respondent's appeal from a judgment of the Ontario Court (General Division) (1996), 132 D.L.R. (4th) 568, 47 C.P.C. (3d) 229, [1996] O.J. No. 227 (QL). Appeal allowed, LeBel J. dissenting. Cross-appeal dismissed.

Gary R. Will and *Anil Varma*, for the appellant/respondent on cross-appeal.

Feldthusen, Bruce. « Recent Developments in the Canadian Law of Punitive Damages » (1990), 16 *Rev. can. d. comm.* 241.

Halsbury's Laws of Australia, vol. 9. Sydney : Butterworths, 1995.

Halsbury's Laws of England, vol. 12(1), 4th ed. (reissue). By Lord Mackay of Clashfern. London : Butterworths, 1998.

Hibbert, Christopher. *The Roots of Evil : A Social History of Crime and Punishment*. Boston : Little, Brown, 1963.

Ireland. Law Reform Commission. *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages*. Dublin : The Commission, 1998.

Linden, Allen M. *La responsabilité civile délictuelle*, vol. 1, 6e éd. Ottawa : CFORP, 2001.

McGregor on Damages, 16th ed. By Harvey McGregor. London : Sweet & Maxwell, 1997.

Ontario. Commission de réforme du droit. *Rapport sur les dommages-intérêts exemplaires.* Toronto : La Commission, 1991.

Royaume-Uni. House of Commons, 6th series, Written Answers to Questions, November 9, 1999.

Royaume-Uni. Law Commission for England and Wales. Report 247. *Aggravated, Exemplary and Restitutionary Damages*, December 16, 1997.

Schlueter, Linda L., and Kenneth R. Redden. *Punitive Damages*, vol. 1, 4th ed. New York : Lexis, 2000.

Vogel, Paul G. *Cohen Melnitzer's Civil Procedure in Practice*, vol. 1. Toronto : Carswell, 1989 (loose-leaf updated 1990, release No. 1).

Watson, Garry D., and Craig Perkins. *Holmested and Watson : Ontario Civil Procedure*, vol. 1. Toronto : Carswell, 1984 (loose-leaf updated 2001, release No. 5).

Weinrib, Ernest J. *The Idea of Private Law*. Cambridge, Mass. : Harvard University Press, 1995.

Windeyer, William John Victor. *Lectures on Legal History*, 2nd ed. rev. Sydney : Law Book, 1957.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 32 C.P.C. (4th) 3, [1999] I.L.R. ¶ I-3659, [1999] O.J. No. 237 (QL), qui a accueilli en partie l'appel formé par l'intimée contre un jugement de la Cour de l'Ontario (Division générale) (1996), 132 D.L.R. (4th) 568, 47 C.P.C. (3d) 229, [1996] O.J. No. 227 (QL). Pourvoi principal accueilli, le juge LeBel est dissident. Pourvoi incident rejeté.

Gary R. Will et *Anil Varma*, pour l'appelante/intimée au pourvoi incident.

2002 SCC 18 (CanLII)

Earl A. Cherniak, *Q.C.*, and *Kirk F. Stevens*, for the respondent/appellant on cross-appeal.

Neil Finkelstein, *Melanie L. Aitken* and *Russell Cohen*, for the intervener the Insurance Council of Canada.

Robert B. Munroe, *Andrew J. Spurgeon* and *Thomas P. Connolly*, for the intervener the Ontario Trial Lawyers Association.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ. was delivered by

BINNIE J. — This case raises once again the spectre of uncontrolled and uncontrollable awards of punitive damages in civil actions. The jury was clearly outraged by the high-handed tactics employed by the respondent, Pilot Insurance Company, following its unjustified refusal to pay the appellant's claim under a fire insurance policy (ultimately quantified at approximately $345,000). Pilot forced an eight-week trial on an allegation of arson that the jury obviously considered trumped up. It forced her to put at risk her only remaining asset (the insurance claim) plus approximately $320,000 in legal costs that she did not have. The denial of the claim was designed to force her to make an unfair settlement for less than she was entitled to. The conduct was planned and deliberate and continued for over two years, while the financial situation of the appellant grew increasingly desperate. Evidently concluding that the arson defence from the outset was unsustainable and made in bad faith, the jury added an award of punitive damages of $1 million, in effect providing the appellant with a "windfall" that added something less than treble damages to her actual out-of-pocket loss. The respondent argues that the award of punitive damages is itself outrageous.

Earl A. Cherniak, *Q.C.*, et *Kirk F. Stevens*, pour l'intimée/appelante au pourvoi incident.

Neil Finkelstein, *Melanie L. Aitken* et *Russell Cohen*, pour l'intervenant le Conseil d'assurances du Canada.

Robert B. Munroe, *Andrew J. Spurgeon* et *Thomas P. Connolly*, pour l'intervenante l'Ontario Trial Lawyers Association.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour rendu par

LE JUGE BINNIE — La Cour est à nouveau saisie d'un pourvoi faisant apparaître le spectre de l'explosion des sommes accordées au titre des dommages-intérêts punitifs en matière civile. Le jury a clairement été indigné par les tactiques abusives employées par l'intimée, Pilot Insurance Company (ci-après « Pilot » ou « l'intimée »), à la suite de son refus injustifié de régler la demande d'indemnité présentée en vertu d'une police d'assurance-incendie (réclamation finalement établie à environ 345 000 $). Pilot a imposé à l'appelante un procès de huit semaines, fondé sur une allégation d'incendie criminel que le jury a manifestement considéré comme étant forgée de toutes pièces. Pilot a forcé l'appelante à risquer son dernier élément d'actif (son droit à une indemnité d'assurance) et à s'endetter d'environ 320 000 $ en frais de justice. Le rejet de la demande d'indemnité visait à la contraindre à accepter un règlement inéquitable, une somme inférieure à celle à laquelle elle avait droit. L'intimée s'est livrée, avec préméditation et de propos délibéré, à la conduite reprochée pendant plus de deux ans, tandis que la situation financière de l'appelante devenait de plus en plus désespérée. Estimant de toute évidence que la défense d'incendie criminel était d'entrée de jeu insoutenable et présentée de mauvaise foi, le jury a de plus accordé à l'appelante des dommages-intérêts punitifs de un million de dollars, profit inattendu qui est venu ajouter à la somme obtenue pour la perte réellement subie des dommages-intérêts correspondant à moins du triple de cette somme. L'intimée soutient que la décision même d'accorder des dommages-intérêts punitifs est inacceptable.

2002 SCC 18 (CanLII)

2 The appellant, Daphne Whiten, bought her home in Haliburton County, Ontario, in 1985. Just after midnight on January 18, 1994, when she and her husband Keith were getting ready to go to bed, they discovered a fire in the addition to their house. They and their daughter, who had also been upstairs, fled the house wearing only their night clothes. It was minus 18 degrees Celsius. Mr. Whiten gave his slippers to his daughter to go for help and suffered serious frostbite to his feet for which he was hospitalized. He was thereafter confined to a wheelchair for a period of time. The fire totally destroyed the Whitens' home and its contents, including their few valuable antiques and many items of sentimental value and their three cats.

L'appelante, Daphne Whiten, s'était acheté une maison en 1985 dans le comté d'Haliburton en Ontario. Le 18 janvier 1994, tout juste après minuit, au moment où son mari et elle s'apprêtaient à se mettre au lit, ils ont constaté qu'un incendie s'était déclaré dans une annexe située à l'arrière de la maison. Après avoir alerté leur fille, qui se trouvait elle aussi à l'étage, ils sont sortis précipitamment de la maison, en vêtements de nuit. Il faisait moins 18 degrés Celsius. Ayant donné ses pantoufles à sa fille pour qu'elle aille demander de l'aide, M. Whiten a subi de graves engelures aux pieds qui ont nécessité son hospitalisation. Il a dû ensuite se déplacer en fauteuil roulant pendant quelque temps. Le feu a complètement détruit la maison des Whiten et son contenu, y compris leurs trois chats et les quelques objets anciens de valeur qu'ils possédaient et beaucoup d'articles ayant une valeur sentimentale.

3 The appellant was able to rent a small winterized cottage nearby for $650 per month. Pilot made a single $5000 payment for living expenses and covered the rent for a couple of months or so, then cut off the rent without telling the family, and thereafter pursued a hostile and confrontational policy which the jury must have concluded was calculated to force the appellant (whose family was in very poor financial shape) to settle her claim at substantially less than its fair value. The allegation that the family had torched its own home was contradicted by the local fire chief, the respondent's own expert investigator, and its initial expert, all of whom said there was no evidence whatsoever of arson. The respondent's position, based on wishful thinking, was wholly discredited at trial. Pilot's appellate counsel conceded here and in the Ontario Court of Appeal that there was no air of reality to the allegation of arson.

L'appelante a pu louer, non loin de chez elle, un chalet toutes saisons pour 650 $ par mois. Pilot a effectué un seul versement de 5 000 $ au titre des frais de subsistance. Après avoir payé le loyer pendant quelques mois, Pilot a cessé de le faire, sans aviser la famille de cette décision. Par la suite, elle a adopté une attitude empreinte d'hostilité et d'antagonisme qui, selon ce qu'a dû conclure le jury, visait à forcer l'appelante (dont la famille était dans une situation financière très précaire) à accepter un règlement considérablement inférieur à la juste valeur de la propriété. La prétention de l'intimée selon laquelle la famille avait elle-même incendié la maison était contredite par le chef du service d'incendie local, le propre enquêteur de l'intimée et l'expert auquel elle avait initialement fait appel, toutes ces personnes ayant affirmé qu'il n'existait pas la moindre preuve d'incendie criminel. La thèse de l'intimée, qui participait davantage du vœu pieux que du réalisme, a été entièrement rejetée au procès. Tant devant notre Cour que devant la Cour d'appel de l'Ontario, les avocats de Pilot ont concédé que l'allégation d'incendie criminel n'avait aucune vraisemblance.

4 A majority of the Ontario Court of Appeal allowed the appeal in part and reduced the punitive damage award to $100,000. In my view, on the exceptional facts of this case, there was no basis on

Les juges majoritaires de la Cour d'appel de l'Ontario ont accueilli l'appel en partie et réduit les dommages-intérêts punitifs à 100 000 $. Compte tenu des circonstances exceptionnelles de la présente

2002 SCC 18 (CanLII)

which to interfere with the jury award. The award, though very high, was rational in the specific circumstances disclosed in the evidence and within the limits that a jury is allowed to operate. The appellant was faced with harsh and unreasoning opposition from an insurer whose policy she had purchased for peace of mind and protection in just such an emergency. The jury obviously concluded that people who sell peace of mind should not try to exploit a family in crisis. Pilot, as stated, required the appellant to spend $320,000 in legal costs to collect the $345,000 that was owed to her. The combined total of $665,000 at risk puts the punitive damage awards in perspective. An award of $1 million in punitive damages is certainly at the upper end of a sustainable award on these facts but not beyond it. I would allow the appeal and restore the jury award of $1 million in punitive damages.

affaire, je suis d'avis que rien ne justifiait de modifier la somme accordée par le jury. Quoique très élevée, cette somme était rationnelle eu égard aux circonstances particulières révélées par la preuve et elle se situait dans la fourchette applicable. L'appelante a dû affronter l'opposition acharnée et irrationnelle de l'assureur auprès de qui elle avait souscrit une police afin de pouvoir dormir en paix et d'être protégée justement en cas d'urgence de cette nature. Le jury a manifestement estimé que des gens qui vendent de la tranquillité d'esprit ne doivent pas essayer d'exploiter une famille qui vit une situation difficile. Comme il a été mentionné plus tôt, Pilot a obligé l'appelante à dépenser 320 000 $ en frais de justice pour obtenir paiement des 345 000 $ qui lui étaient dus. Le total de ces deux sommes, c.-à-d. 665 000 $, permet de relativiser le quantum des dommages-intérêts punitifs. Eu égard aux faits de l'espèce, les dommages-intérêts punitifs de un million de dollars se situent certainement à la limite supérieure de la fourchette applicable, mais ils ne l'excèdent pas. Je suis donc d'avis d'accueillir le pourvoi et de rétablir la décision du jury accordant des dommages-intérêts punitifs de un million de dollars.

I. Facts

The facts surrounding the fire itself have already been briefly mentioned. The origin of the fire was never discovered but everyone who investigated the fire in the six months after it occurred concluded that it was accidental. The first persons to investigate the fire were the fire chief and firefighters called to the scene. The fire chief thought, and he was eventually shown to be correct, that the fire was caused at a single point of origin by a malfunctioning kerosene heater in the porch of the addition. This was where the fire was first observed and also the area which had sustained the most fire damage. The firefighters saw no evidence of arson and therefore they did not request the Fire Marshal's office to investigate.

Pilot retained an experienced independent insurance adjuster, Derek Francis, to investigate the loss. Francis inspected the site and interviewed the

I. Les faits

5 Les faits relatifs à l'incendie lui-même ont déjà été brièvement mentionnés. L'origine du sinistre n'a jamais été découverte, mais tous ceux qui ont fait enquête sur l'incendie dans les six mois qui l'ont suivi ont conclu qu'il avait été accidentel. Les premiers enquêteurs ont été le chef du service d'incendie et les pompiers appelés sur les lieux. Le chef du service d'incendie a estimé — et la suite des événements lui a donné raison — que l'incendie, qui n'avait eu qu'un seul foyer initial, fut allumé par un appareil de chauffage au kérosène défectueux se trouvant dans le porche. C'est là que le feu a été découvert et c'est aussi l'endroit qui a été le plus endommagé par les flammes. N'ayant relevé aucune preuve d'incendie criminel, les pompiers n'ont pas demandé au commissaire des incendies de faire enquête.

6 Pilot a demandé à un expert d'assurance indépendant et expérimenté, M. Derek Francis, de faire enquête sur le sinistre. Ce dernier a inspecté les

2002 SCC 18 (CanLII)

2002 SCC 18 (CanLII)

Whitens, who freely acknowledged that they had both been unemployed and had financial difficulties. Francis also interviewed the firefighters about the speed at which the fire spread, a key indicator of arson. Both the physical evidence and the Whitens' conduct satisfied Francis that the fire was accidental and on February 3, 1994 he reported to Pilot that "there is no suspicion of arson on behalf of the insureds or any members of their family".

lieux et a interrogé les Whiten, lesquels ont volontiers reconnu qu'ils étaient tous deux sans emploi et aux prises avec des difficultés financières. Il a également questionné les pompiers au sujet de la vitesse de propagation des flammes, indice clé en matière d'incendie criminel. Tant les éléments de preuve matérielle que la conduite des Whiten ont convaincu M. Francis que l'incendie était accidentel. Le 3 février 1994, ce dernier a indiqué à Pilot qu'[TRADUCTION] « il n'y avait pas lieu de soupçonner les assurés ou un membre de leur famille d'incendie criminel ».

7 Francis made further investigations during which he determined that although the Whitens' mortgage payments were in arrears, refinancing was being arranged. It appears that Pilot's Senior Claims Examiner, Mr. Chris Porter, was already moving towards the conclusion that the claim should be disputed based on his suspicions of the family's financial problems. In a letter dated February 25, 1994, Francis wrote to Pilot:

Poursuivant son enquête, M. Francis a signalé que, même si les Whiten accusaient du retard dans leurs versements hypothécaires, ils étaient en train de négocier un refinancement. Il semble cependant que le rédacteur-sinistres principal de Pilot, M. Chris Porter, était déjà enclin à conclure que la demande d'indemnité devait être contestée, sur le fondement des soupçons que lui inspiraient les difficultés financières de la famille. Dans une lettre datée du 25 février 1994, M. Francis a écrit ce qui suit à Pilot :

> As outlined in my 2nd report with the physical evidence we have and the fact that the insured was attempting to arrange financing through another source and pay off the existing mortgage, there is little or no base [*sic*] to deny this claim. I certainly agree with your train of thought and if we did not have the physical evidence and the information from the insured's solicitor that he was arranging financing for the Whitens, then my recommendations would certainly be opposite to what they are today. Unfortunately we must deal with the facts on hand and proceed with the adjustment accordingly in my opinion. [Emphasis added.]

> [TRADUCTION] Comme je le signalais dans mon deuxième rapport, compte tenu des éléments de preuve matérielle dont nous disposons et du fait que l'assurée tentait d'obtenir du financement d'une autre source pour payer son hypothèque, il existe peu de raisons, sinon aucune, de refuser la demande d'indemnité. Je suis certes d'accord avec votre logique et, si ce n'était des éléments de preuve matérielle dont nous disposons et du renseignement fourni par l'avocat de l'assurée, selon lequel il cherchait à obtenir du financement pour les Whiten, mes recommandations seraient certes tout le contraire de ce qu'elles sont aujourd'hui. Malheureusement, nous devons tenir compte des faits existants et, à mon avis, procéder au règlement en conséquence. [Je souligne.]

8 Pilot did not agree that "there is little or no base [*sic*] to deny this claim", although at that stage it had no evidence to support a defence of arson. It refused to accept Francis's recommendations and decided to deny the claim. It did not tell Francis why it would not pay the claim and Francis in turn did not advise the Whitens of what was happening.

Pilot n'a pas retenu l'opinion qu'« il exist[ait] peu de raisons, sinon aucune, de refuser la demande d'indemnité », bien qu'elle ne disposât alors d'aucun élément de preuve permettant de plaider, en défense, l'incendie criminel. Elle a rejeté les recommandations de M. Francis et a décidé de refuser la demande d'indemnité. Elle n'a pas fait part des motifs de ce refus à M. Francis, qui n'a pas informé les Whiten de ce qui se passait.

Pilot requested the Insurance Crime Prevention Bureau, a body set up by the insurance industry, to review the analysis of Pilot's investigator. By letter dated February 25, 1994, the Bureau reported that "we wouldn't have a leg to stand on as far as declining the claim". Pilot, having asked for the opinion, then apparently decided that the Bureau's evaluator was not in fact qualified to render an opinion. No one from Pilot testified as to why the claims examiner, and subsequently Pilot's Branch Manager, Mr. Steven Carter, rejected this advice as well.

9 Pilot a demandé au Service anti-crime des assureurs, organisme créé par le secteur de l'assurance, d'examiner l'analyse de son enquêteur. Dans une lettre datée du 25 février 1994, l'organisme a écrit ceci à Pilot : [TRADUCTION] « Nous n'aurions aucun argument valable à faire valoir pour refuser la demande d'indemnité ». Après avoir demandé cette opinion, Pilot a apparemment jugé que l'évaluateur de l'organisme n'était pas compétent pour formuler une opinion sur la question. Personne au sein de la société d'assurance n'a témoigné sur les raisons pour lesquelles le rédacteur-sinistres et, subséquemment, le directeur de succursale de Pilot, M. Steven Carter, ont eux aussi rejeté cet avis.

In March 1994, Pilot's Head Office, with nothing to go on except some vague suspicions, instructed Francis to tell the landlord of the cottage that the appellant was renting that it was no longer going to pay the rent. Francis communicated this to the landlord but never told the appellant. We do not know why there was no communication. It was the depth of winter. The respondent's Head Office made this decision with full knowledge that the Whitens were in desperate financial circumstances.

10 Au mois de mars 1994, sur le seul fondement de vagues soupçons, le siège social de Pilot a donné instruction à M. Francis d'informer le propriétaire du chalet loué par l'appelante que la société d'assurance cessait de payer le loyer. Monsieur Francis a transmis ce message au propriétaire, mais il n'a rien dit à l'appelante. Nous ne savons pas pourquoi il ne l'a pas fait. On était en plein cœur de l'hiver. Le siège social de l'intimée a pris cette décision, bien que parfaitement au fait de la situation financière désastreuse des Whiten.

Pilot then instructed Francis to pursue other inquiries about the fire. Francis conducted these inquiries but still ruled out arson. On April 28, 1994, he confirmed his opinion to Pilot. In his reporting letter, he noted that he had come upon the Whitens unannounced and unexpected at the scene of the fire and found them sorting through the debris "trying to salvage anything that might have been left as a result of the fire". He observed the appellant cleaning a small porcelain figure "with her fingers in an obvious attempt to salvage this item". He reported that he "felt this genuine concern to try and see what could be salvaged now that the weather has afforded this opportunity [is] out of character for someone who might be involved in a suspicious fire".

11 Pilot a ensuite donné instruction à M. Francis de continuer d'enquêter sur l'incendie. Ce dernier a poursuivi ses recherches, mais il a continué à écarter la thèse de l'incendie criminel. Le 28 avril 1994, il a confirmé son opinion à Pilot. Dans sa lettre-rapport à Pilot, M. Francis a mentionné qu'il s'était présenté à l'improviste à la maison incendiée des Whiten et les avait trouvés en train de fouiller les décombres pour [TRADUCTION] « essayer de récupérer tout ce qui avait pu échapper aux flammes ». Il a vu l'appelante nettoyer un bibelot de porcelaine « avec ses doigts, de toute évidence pour sauver l'objet ». Il a précisé que « ce désir authentique de récupérer ce qui pouvait l'être, maintenant que le temps le permet, ne ressemble en rien au comportement de quelqu'un qui serait impliqué dans un incendie suspect ».

After receiving Francis's report of April 28, 1994, Pilot removed Francis from the case and hired another adjuster, James Couch, who lived in Owen

12 Après avoir reçu le rapport du 28 avril 1994 de M. Francis, Pilot lui a retiré le dossier et a engagé un autre expert, M. James Couch, qui vivait à Owen

2002 SCC 18 (CanLII)

Sound, a couple of hundred kilometres distant. At trial, no one on behalf of Pilot testified as to why Pilot stopped using Francis.

13 Pilot also retained an engineering expert, Hugh Carter. His initial report was made on January 28, 1994. In that report, he concluded that the fire was accidental. He gave two further reports in which he stated the same opinion. Carter then received a letter dated May 4, 1994 from the respondent's trial counsel, Donald Crabbe, which adverted to the arson theory:

> One wonders whether the Whitens, even if they did not set the fire, sat back and allowed it to achieve a level that was convenient to them.
>
> We need to be on top of this matter and to do it quickly. The other side has retained a lawyer and they are making noises of bad faith. The matter has to be revisited in its entirety, stripped down to the bare facts and rebuilt.

14 Hugh Carter concluded that he may have been misunderstood. He requested a meeting but did not get one at the time. The jury must have concluded that he had not provided the opinion his client wanted to hear.

15 The statement of claim was issued on May 27, 1994. On June 7, 1994, after a further site investigation, Carter did meet with Donald Crabbe and after the meeting, he reclassified the fire as "suspicious, possibly incendiary". Pilot now concedes that Crabbe likely influenced Carter to change his opinion.

16 In its factum before this Court, Pilot also conceded that in addition to the Senior Claims Examiner and the Branch Manager, the latter's "superior, George Hamilton (assistant to the Vice-President in charge of claims), [was] copied with all of the material on the file. Mr. Hamilton reported to Clifford Jones, Executive Vice President and Secretary" (para. 17). The misconduct was therefore not restricted to middle level management but was made known to the directing minds of the respondent company.

Sound, à quelques centaines de kilomètres de distance. Au procès, aucun témoin de Pilot n'a expliqué pourquoi l'on avait cessé de recourir aux services de M. Francis.

Pilot a également fait appel à un ingénieur, M. Hugh Carter, qui a conclu à un incendie accidentel dans son rapport initial le 28 janvier 1994. Deux autres rapports au même effet ont suivi. Monsieur Carter a ensuite reçu du plaideur retenu par l'intimée pour le procès, M. Donald Crabbe, une lettre datée du 4 mai 1994, qui reprenait la thèse de l'incendie criminel :

> [TRADUCTION] On se demande si les Whiten, même s'ils n'ont pas mis le feu, ne l'ont pas laissé se propager jusqu'à un point qui leur convenait.
>
> Nous devons prendre cette affaire en main, et rapidement. La partie adverse a retenu un avocat, et déjà ils parlent de mauvaise foi. Il faut revoir entièrement le dossier, s'attacher aux seuls faits et repartir de là.

Hugh Carter a conclu qu'il avait pu être mal compris. Il a demandé la tenue d'une rencontre, mais il n'y en a pas eu à ce moment-là. Le jury a dû en déduire que l'expert n'avait pas fourni l'opinion que sa cliente voulait entendre.

La déclaration a été délivrée le 27 mai 1994. Le 7 juin 1994, après avoir visité les lieux une nouvelle fois, M. Carter a finalement rencontré Donald Crabbe. Après la rencontre, il a reclassé l'incendie, le qualifiant de [TRADUCTION] « suspect, peut-être volontaire ». Pilot reconnaît maintenant que M. Crabbe a vraisemblablement amené M. Carter à changer d'opinion.

Dans le mémoire qu'elle a déposé devant notre Cour, Pilot a également admis que, outre le rédacteur-sinistres principal et le directeur de succursale, le [TRADUCTION] « supérieur [de ce dernier], M. George Hamilton (adjoint du vice-président aux règlements), lequel relevait de M. Clifford Jones, vice-président directeur et secrétaire de la société, avait reçu photocopie de tout le dossier » (par. 17). La conduite répréhensible n'était donc pas connue seulement des cadres intermédiaires. Les âmes dirigeantes de la société intimée en avaient également été informées.

2002 SCC 18 (CanLII)

The attitude of the respondent and its counsel is apparent from Crabbe's reporting letter dated June 9, 1994 to Pilot's Chris Porter and Steven Carter (Pilot's Branch Manager), parts of which read as follows:

> The bottom line is that we have moved considerably with the upcoming engineer's report towards successfully denying this claim. We still need more evidence, but we moved significantly in the right direction on June 7th.

It appears that all three people directing the respondent's behaviour were agreed that the "right direction" was to deny the claim despite the lack of any evidence that the fire had been deliberately set. Crabbe continued:

> In terms of the [appellant's] punitive damage claim arising from bad faith, this is a cloud with a silver lining. First of all, it gives Hugh Carter a platform from which to discuss the evolution of his opinion. . . . More importantly in this concept of "silver lining" is that the claim renders admissible evidence as to the previous fires in which the Whitens were involved, when otherwise there was a considerable risk that the "similar fact" evidence would not be admitted as a significant enough pattern had perhaps not been established.

The reference to the two "previous fires" was firstly to a fire that occurred in a cottage owned by the Whitens' son-in-law but rented out to a Mrs. Titro and secondly to another fire in another house previously occupied by Mrs. Titro. There was no apparent connection to the appellant or her family. At the Court of Appeal, Pilot conceded that evidence about these two fires was irrelevant and inadmissible. The reporting letter of June 9th continues:

> You [Pilot] raise concerns that the other side has hired competent counsel and, frankly, I would not have it any other way and indeed it would be foolish to make any assumptions otherwise.

17 La lettre-rapport du 9 juin 1994, expédiée par M. Crabbe à Chris Porter et Steven Carter (directeur de succursale), tous deux de Pilot, illustre bien l'attitude de l'intimée et de son avocat. En voici un passage :

> [TRADUCTION] Bref, le rapport que nous remettra sous peu l'ingénieur nous fera faire un grand pas en vue du rejet de la demande d'indemnité. Nous avons encore besoin d'éléments de preuve additionnels, mais nous avons fait un très grand pas dans la bonne direction le 7 juin dernier.

18 Il semble que les trois personnes qui déterminaient le comportement de l'intimée convenaient que la [TRADUCTION] « bonne direction » consistait à refuser la demande d'indemnité, malgré l'absence de tout élément de preuve établissant que l'incendie avait été allumé délibérément. Voici un autre passage de la lettre de M. Crabbe :

> [TRADUCTION] Quant aux dommages-intérêts punitifs demandés [par l'appelante] relativement à l'allégation de mauvaise foi, on peut dire qu'il y a un bon côté à toute chose. Premièrement, cette conclusion fournit à Hugh Carter la possibilité d'expliquer l'évolution de son opinion. [. . .] Autre « avantage » encore plus important, cette conclusion rend admissible la preuve relative aux précédents incendies auxquels les Whiten ont été mêlés, alors qu'autrement il y aurait eu un risque considérable que la recevabilité de la preuve de « faits similaires » soit compromise parce que l'existence d'un comportement suffisamment systématique n'aurait peut-être pas été établie.

19 L'allusion à deux [TRADUCTION] « incendies antérieurs » visait, en premier lieu, un feu survenu dans un chalet appartenant au gendre des Whiten, mais qui était loué à une dame Titro, et, en deuxième lieu, un incendie survenu dans une autre maison précédemment occupée par M^me^ Titro. Il n'existait aucun lien apparent entre ces incendies et l'appelante ou sa famille. Devant la Cour d'appel, Pilot a concédé que la preuve relative à ces deux incendies n'était ni pertinente ni admissible. Dans la lettre-rapport du 9 juin, on ajoute ceci :

> [TRADUCTION] Vous [Pilot] vous préoccupez du fait que la partie adverse ait engagé un avocat compétent mais, franchement, c'est ce que je ferais moi aussi, et il serait d'ailleurs imprudent de présumer qu'ils puissent agir autrement.

2002 SCC 18 (CanLII)

The jury must have asked itself why an insurer dealing in good faith with a policy holder would express "concern" to its own lawyer that she had hired competent counsel. Crabbe continued:

> What we know is that counsel for the Plaintiff is advancing a claim based only on what the Plaintiff has told him. One can imagine the assertions of innocence and the exclusion of any reference to material that might be incriminating. I imagine the motivation was explored in terms of the financially bad times the family had fallen upon, but beyond that, the fire and all of its circumstances and the previous fires will not have been fully disclosed, if at all, to opposing counsel. By the time all of this evidence is disclosed, and coupled with the risk of a jury's impression of it, competent counsel will view advancing the matter to trial as risky and [he] should be recommending a significant compromise, particularly in view of the fact that a trial will take quite some time. [Emphasis added.]

20 It was never explained how the Whitens stood to profit from torching their own home. The fair market value of their house was $157,000. The jury allowed $160,000. The mortgage still had to be paid out of the proceeds, leaving the appellant with only the existing equity in her home. Had the claim been paid promptly, the only financial effect on the appellant would have been to convert the roof over her family's head into cash and oblige them to become renters. Selling the house would have had more or less the same financial impact. It defies common sense to think they would have risked so much — including their daughter's safety, all of their possessions and their cats — for so little. Pilot now concedes (fairly, in my view) that the letter of June 9, 1994 "evinced an attitude which gave priority to Pilot's interests at the expense of a dispassionate and fair approach to the interests of Mrs. Whiten".

21 Thereafter, Pilot retained a forensic engineer, a fire investigator and a firefighter. Pilot did not disclose Francis's exculpatory reports to any of these individuals, but instead, through Donald Crabbe, furnished them with information about the speed of the fire that the trial judge characterized as

Le jury a dû se demander pourquoi un assureur traitant de bonne foi avec une titulaire de police dirait à son avocat être « préoccupé » par le fait que l'assurée a retenu les services d'un avocat compétent. Monsieur Crabbe a poursuivi ainsi :

> [TRADUCTION] Ce que nous savons, c'est que la conclusion formulée par l'avocat de la demanderesse ne s'appuie que sur les dires de cette dernière. On peut imaginer qu'elle aura clamé son innocence et omis tout détail incriminant. Je suppose qu'ils ont dû parler de la motivation susceptible de découler de la situation financière précaire de la famille, mais je ne pense pas qu'on ait révélé à l'avocat de la partie adverse toutes les circonstances entourant l'incendie ainsi que les feux précédents, si tant est qu'on l'ait fait. Or, un avocat compétent prenant connaissance de tous ces éléments de preuve et conscient de l'impression qu'ils susciteront chez un jury verra un procès comme une entreprise risquée, et [il] devrait recommander un compromis substantiel compte tenu, en particulier, qu'un procès demandera beaucoup de temps. [Je souligne.]

Personne n'a expliqué ce que les Whiten auraient gagné à incendier leur propre maison. La juste valeur marchande de la maison était de 157 000 $. Le jury a accordé 160 000 $ à ce titre, mais il restait encore à payer l'hypothèque sur cette somme, ce qui ne laissait à l'appelante que la valeur nette de l'immeuble. Si la demande d'indemnité avait été payée promptement, ses seules incidences financières auraient été de convertir la résidence familiale en argent liquide et à obliger la famille à devenir locataire. La vente de la maison aurait produit sensiblement les mêmes conséquences financières. Il est totalement absurde d'imaginer que la famille aurait risqué autant — notamment la sécurité de leur fille, tous leurs biens ainsi que leurs chats — pour si peu. Pilot concède maintenant (à juste titre selon moi) que la lettre du 9 juin 1994 [TRADUCTION] « témoignait d'une attitude qui donnait priorité aux intérêts de Pilot, au préjudice d'une appréciation objective et équitable des intérêts de M^me^ Whiten ».

Par la suite, Pilot a retenu les services d'un ingénieur légiste, d'un enquêteur en incendies et d'un pompier. Pilot n'a communiqué à aucune de ces personnes les rapports disculpatoires de M. Francis. Par l'intermédiaire de Donald Crabbe, elle leur a plutôt fourni des renseignements sur la rapidité de

2002 SCC 18 (CanLII)

misleading if not inaccurate. The firefighter insisted that the fire was likely accidental but the other two experts gave opinions that provided some support for an arson defence. One of them, Richard Kooren, based his opinion on the existence of signs of a fire accelerant. Crabbe wrote on May 11, 1995:

> Aside from the burn pattern under the washer, Richard Kooren sees liquid accelerant burn patterns on the annex floor which are not innocent. However, these observations are not made by [Pilot's initial expert] Hugh Carter.

Pilot also conceded at the Court of Appeal that these inculpatory opinions were influenced by Crabbe.

The trial judge commented unfavourably about Crabbe's role in this litigation. He felt that his "enthusiasm for his client's case appears to have caused him to exceed the permissible limits which ought to confine a lawyer in the preparation of witnesses". At the Court of Appeal and in this Court, Pilot conceded that these comments were justified, but added:

> . . . Pilot, not its counsel, made the decision to deny the claim and Pilot was fully aware, because it was a recipient of the letters, of counsel's "enthusiasm". Pilot recognizes that it bears the responsibility for what occurred.

The appellant was reinstated in her nursing position in July 1994 and received about $40,000 in back pay in September 1994.

In the spring of 1995 the Whitens, in an attempt to satisfy Pilot that they did not set the fire, offered to take a polygraph test administered by an expert selected by Pilot. This was apparently accepted by the jury as a good faith offer made to allay Pilot's suspicions. Pilot refused, without giving any reasons.

propagation du feu, renseignements que le juge de première instance a qualifié de trompeurs, voire d'inexacts. Le pompier a maintenu que l'incendie était probablement accidentel, mais les deux autres experts ont donné des opinions appuyant dans une certaine mesure la présentation d'une défense d'incendie criminel. L'un d'eux, Richard Kooren, a fondé son opinion sur l'existence de signes indiquant le recours à un accélérateur. Monsieur Crabbe a écrit ceci, le 11 mai 1995 :

> [TRADUCTION] Mises à part les traces de combustion sous la machine à laver, Richard Kooren a relevé sur le plancher de l'annexe des traces de combustion indicatives de l'emploi d'un accélérateur liquide qui ne sont pas innocentes. Toutefois, Hugh Carter [le premier expert engagé par Pilot] n'avait pas fait ces constatations.

En Cour d'appel, Pilot a également reconnu que ces opinions incriminantes résultaient de l'influence exercée par M. Crabbe.

22 Le juge de première instance a commenté défavorablement le rôle joué par M. Crabbe dans cette affaire. Selon lui, [TRADUCTION] « l'enthousiasme qu'il a mis à défendre la cause de sa cliente semble lui avoir fait outrepasser les limites qu'un avocat doit respecter dans la préparation des témoins ». Devant la Cour d'appel et devant notre Cour, Pilot a concédé que ces commentaires étaient justifiés, ajoutant toutefois ce qui suit :

> [TRADUCTION] . . . C'est Pilot, non son avocat, qui a décidé de refuser la demande d'indemnité, et elle n'ignorait rien de l'« enthousiasme » de son avocat, puisqu'elle avait reçu ses lettres. Pilot reconnaît qu'elle est responsable de ce qui est arrivé.

23 L'appelante a été réintégrée dans ses fonctions d'infirmière en juillet 1994 et elle a touché environ 40 000 $ d'arrérages de salaire en septembre 1994.

24 Au printemps 1995, dans l'espoir de convaincre Pilot qu'ils n'avaient pas mis le feu à la maison, les Whiten ont offert de se soumettre à un test polygraphique administré par le spécialiste que choisirait la société d'assurance. Le jury a apparemment considéré cette proposition comme une offre présentée de bonne foi pour dissiper les soupçons de Pilot. Pilot a refusé l'offre sans donner d'explication.

2002 SCC 18 (CanLII)

25 The Whitens lived in a small community. People were aware that their home was not being rebuilt because the insurer was alleging arson. The stigma persisted. Pilot continued to allege arson throughout the trial. Pilot now concedes that the evidence as a whole unequivocally demonstrates that the fire was accidental.

Les Whiten vivaient dans une petite localité. Les gens savaient qu'on ne rebâtissait pas la maison parce que l'assureur prétendait qu'il y avait eu incendie criminel. La stigmatisation a persisté, car Pilot a maintenu cette prétention pendant tout le procès. Pilot reconnaît maintenant que l'ensemble de la preuve démontre sans équivoque que l'incendie était accidentel.

II. Judicial History

II. L'historique des procédures judiciaires

A. *Ontario Court (General Division)* (1996), 132 D.L.R. (4th) 568

A. *Cour de l'Ontario (Division générale)* (1996), 132 D.L.R. (4th) 568

26 This action was tried before Matlow J. and a jury. His instruction to the jury on the issue of punitive damages was skeletal but occasioned no objection from either counsel:

Le procès s'est déroulé devant le juge Matlow et un jury. Relativement aux dommages-intérêts punitifs, le juge n'a donné au jury que des directives sommaires, qui n'ont toutefois pas suscité d'objection de la part des avocats des parties. Voici les directives :

And finally, if you determine that Pilot's defence of arson failed and that Pilot breached the provision of the policy of insurance by denying the plaintiff's claim, you must then go on to determine whether the plaintiff is entitled, as well, to recover punitive damages. Punitive damages can be awarded in certain circumstances to serve as a punishment. In this case, depending on your finding of fact, punitive damages can be awarded to deter Pilot and other insurers from engaging in improper conduct in dealing with the claims of their insureds.

[TRADUCTION] Enfin, si vous estimez que Pilot n'a pas prouvé sa défense d'incendie criminel et qu'elle ne s'est pas conformée aux conditions de la police d'assurance en refusant la demande d'indemnité de la demanderesse, vous devez alors décider si cette dernière a également droit à des dommages-intérêts punitifs. Dans certaines circonstances, ce type de dommages-intérêts peut être accordé à titre de sanction. Suivant vos conclusions de fait, vous pouvez en l'espèce accorder des dommages-intérêts punitifs pour dissuader Pilot et d'autres assureurs de traiter de manière inacceptable les demandes d'indemnité de leurs assurés.

Punitive damages, unlike the other types of damages claimed in this case, are not intended to compensate the plaintiff for her loss. If they are awarded, they will constitute a windfall for the plaintiff and a penalty for Pilot.

Contrairement aux autres types de dommages-intérêts demandés en l'espèce, les dommages-intérêts punitifs ne visent pas à indemniser la demanderesse de sa perte. S'ils sont accordés, ils constitueront un profit inattendu pour la demanderesse et une sanction pour Pilot.

Before you may properly make an award of punitive damages, Pilot's defence of arson must fail and you must be satisfied that the plaintiff has proven that Pilot failed to deal with her claim in good faith and instead dealt with this in a malicious, high-handed, arbitrary or capricious manner, and that Pilot's conduct warrants the imposition of a penalty.

Pour que vous soyez justifiés d'accorder des dommages-intérêts punitifs, il faut que vous ayez écarté la défense d'incendie criminel présentée par Pilot et que la preuve de la demanderesse vous ait convaincus que Pilot n'a pas traité la demande d'indemnité de bonne foi, mais qu'elle a plutôt agi de façon malveillante, abusive ou arbitraire et que sa conduite commande l'infliction d'une sanction.

27 After the charge, the jury returned with the following question:

Après l'exposé du juge, le jury lui a fait parvenir la question suivante :

Dear Justice Matlow, we are having difficulty in agreements pertaining to assessing the amount of

[TRADUCTION] Monsieur le juge Matlow, nous avons du mal à nous entendre sur le montant des dommages-

2002 SCC 18 (CanLII)

the claim for punitive damages. Would you be able to provide us some guidelines to help us arrive at a consensus. Thank you, the jury.

Counsel were consulted and agreed with each other that no dollar amounts should be mentioned. Pilot's counsel told the trial judge, "in terms of suggesting amounts or anything, I think it ought not to occur". In these circumstances, the trial judge responded to the jury by repeating that punitive damages were in their discretion:

Members of the jury, I have considered the question that you sent to me and I don't know that I can really be of all that much help to you. All that I can say to you is that punitive damages are in the discretion of the jury. You have to be fair and reasonable to both sides, and apart from that, there's not much more or anything more that I can tell you. It is not surprising that it is difficult to arrive at a consensus. I urge you to keep talking to each other and endeavour to find what that magic figure should be.

The jury awarded $318,252.32 in compensatory damages and $1 million in punitive damages. In his endorsement granting judgment in accordance with the jury's verdict, Matlow J. awarded pre-judgment interest and costs on a solicitor and own client scale, his intention being "to provide for the plaintiff's fullest possible indemnification for her reasonable costs of this action" (p. 570). (The appellant's costs were ultimately fixed at $317,658.92.)

Matlow J. then made a number of observations about the jury's award of punitive damages. He said that although it was "very high and perhaps without precedent, [it] is not perverse but is entirely reasonable in light of all of the evidence" (p. 572). He noted that the defendant continued to deny the claim even after its own adjuster recommended that it be paid. "[T]he defendant relied on a few suspicious circumstances that were later clarified adequately by the plaintiff in order to press on with an ill-founded defence" (p. 572). "As a result, the plaintiff, who was already in poor financial condition, was required to endure the indignity of having to make temporary living arrangements without the benefit

intérêts punitifs. Pourriez-vous nous donner quelques indications pour nous aider à parvenir à un consensus. Merci, les membres du jury.

28 Le juge a consulté les avocats, qui s'accordaient pour dire qu'aucune somme ne devait être mentionnée. L'avocat de Pilot a dit ceci au juge : [TRADUCTION] « j'estime qu'aucune somme ou autre information ne devrait être mentionnée ». Dans ces circonstances, le juge de première instance a répondu aux jurés en leur répétant que les dommages-intérêts punitifs étaient laissés à leur discrétion :

[TRADUCTION] Membres du jury, j'ai réfléchi à la question que vous m'avez fait parvenir et je ne crois pas pouvoir vous aider beaucoup à ce sujet. Je ne puis que vous dire que les dommages-intérêts relèvent du pouvoir discrétionnaire du jury. Vous devez vous montrer justes et raisonnables envers les deux parties. Outre cela, je ne puis vous en dire beaucoup plus. Il n'est pas surprenant que vous éprouviez des difficultés à parvenir à un consensus. Je vous exhorte à continuer à discuter et à tenter de trouver ce que devrait être le chiffre magique.

29 Le jury a accordé des dommages-intérêts compensatoires de 318 252,32 $ et des dommages-intérêts punitifs de un million de dollars. En rendant jugement conformément au verdict du jury, le juge Matlow a accordé les intérêts avant jugement et adjugé les dépens sur la base procureur-client afin [TRADUCTION] « de fournir à la demanderesse l'indemnisation la plus complète possible des frais raisonnables qu'elle avait faits relativement à l'action » (p. 570). (Les dépens ont finalement été fixés à 317 658,92 $.)

30 Le juge Matlow a ensuite formulé quelques observations au sujet des dommages-intérêts punitifs accordés par le jury. Il a affirmé que, quoique cette somme soit [TRADUCTION] « très élevée et, peut-être, sans précédent, [elle] n'est pas absurde, mais entièrement raisonnable compte tenu de l'ensemble de la preuve » (p. 572). Il a souligné que la défenderesse avait persisté à rejeter la demande d'indemnité, même après la recommandation de son propre expert en faveur du paiement. [TRADUCTION] « [L]a défenderesse s'est autorisée de quelques circonstances suspectes, qui ont plus tard été expliquées adéquatement par la demanderesse, pour s'obstiner dans sa défense mal fondée »

2002 SCC 18 (CanLII)

of the insurance coverage for which she had paid premiums to the defendant" (p. 572). She was also required to undertake litigation to secure the relief to which she was entitled, including a trial which took approximately two months to complete. "In light of the defendant's admission that its net worth was approximately $231 million, I cannot take issue with the jury's conclusion that a very substantial award for punitive damages was required to punish the defendant and to effectively send the implied reminder to the defendant and to other insurers that they owe their insureds a duty of good faith in responding to claims made under policies of insurance issued by them" (p. 572).

B. *Ontario Court of Appeal* (1999), 42 O.R. (3d) 641

(1) Laskin J.A. (dissenting in part)

31 On the issue of punitive damages, Laskin J.A. noted that in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, and again in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, this Court held that in a breach of contract case, punitive damages were only available if, apart from the breach sued upon, the defendant has committed an "independent actionable wrong". Pilot argued that a breach of its duty of good faith was no more than another breach of the same contractual obligations. Laskin J.A. rejected this argument. He said the "obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy" (p. 650). In his view, breach of the former "is a separate or independent wrong from the wrong for which compensation is paid" (p. 650). He said that if the decision in *Vorvis* makes it necessary he "would be prepared to hold that an insure[r] has a duty in tort of good faith towards its insureds" (p. 652), a position taken by some Australian and American courts. In his view "[t]here was overwhelming evidence in this case from which the jury could reasonably conclude that Pilot's handling of the Whitens' claim was so

(p. 572). « La demanderesse, qui était déjà dans une situation financière précaire, a donc dû subir l'indignité d'avoir à se loger temporairement sans pouvoir compter sur la protection de l'assurance dont elle avait payé les primes à la défenderesse » (p. 572). Elle a également dû, pour obtenir l'indemnité à laquelle elle avait droit, intenter des poursuites en justice et notamment participer à un procès qui a duré environ deux mois. [TRADUCTION] « Eu égard à l'admission de la défenderesse que sa valeur nette est d'environ 231 millions de dollars, je ne saurais m'opposer à la conclusion du jury selon laquelle des dommages-intérêts punitifs très substantiels s'imposent pour sanctionner la défenderesse et pour rappeler implicitement à celle-ci, de même qu'aux autres assureurs, qu'ils ont l'obligation d'agir de bonne foi dans le traitement des demandes d'indemnité présentées en vertu des polices qu'ils émettent » (p. 572).

B. *Cour d'appel de l'Ontario* (1999), 42 O.R. (3d) 641

(1) Le juge Laskin (dissident en partie)

Relativement à la question des dommages-intérêts punitifs, le juge Laskin a souligné que, dans l'arrêt *Vorvis c. Insurance Corp. of British Columbia*, [1989] 1 R.C.S. 1085, et à nouveau dans l'arrêt *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, notre Cour a jugé que, en matière de rupture de contrat, des dommages-intérêts punitifs ne peuvent être accordés que si, indépendamment du manquement fondant la poursuite, le défendeur a commis une « faute indépendante donnant ouverture à action ». Pilot a soutenu que le manquement à son obligation de bonne foi n'était rien d'autre qu'une violation supplémentaire des mêmes obligations contractuelles. Le juge Laskin a rejeté cet argument, affirmant que [TRADUCTION] « l'obligation de l'assureur d'agir de bonne foi envers son assuré est distincte de son obligation de l'indemniser d'une perte visée par la police » (p. 650). Selon lui, un manquement à la première obligation [TRADUCTION] « est une faute distincte et indépendante de celle pour laquelle une indemnité est versée » (p. 650). Il a aussi indiqué que, si l'arrêt *Vorvis* l'exigeait, il [TRADUCTION] « était disposé à statuer qu'un assureur a envers ses assurés une

2002 SCC 18 (CanLII)

malicious or vindictive or so reprehensible or high-handed that an award of punitive damages was warranted" (p. 653).

With respect to the $1 million quantum, Laskin J.A. rejected Pilot's submissions that the jury likely inflated the award because of errors made by the trial judge in his charge, or that in any event, the award was much too high. While the award of $1 million was high, the jury's decision was entitled to deference reinforced in this case by the trial judge's endorsement of the award as "entirely reasonable". In Laskin J.A.'s view, Pilot's conduct was "exceptionally reprehensible". The deterrence objective is particularly important in first party insurance cases given the vast number of claims handled by insurers every year. Moreover, to be meaningful, an award of punitive damages "must sting"; it must not be perceived as a mere licence fee or as a cost of doing business. Both courts and legislatures, in recent years, have increased the amount of fines for companies which act irresponsibly or contrary to the public interest. This trend reflects an acknowledgement that "larger fines are needed to deter and punish companies for socially unacceptable behaviour" (p. 661).

(2) Finlayson J.A. (Catzman J.A. concurring)

Finlayson J.A. agreed with Laskin J.A.'s reasons and conclusions on the first issue, namely, whether

obligation de bonne foi à peine d'engager sa responsabilité civile délictuelle » (p. 652), position que certains tribunaux australiens et américains ont adoptée. À son avis, [TRADUCTION] « [i]l existait en l'espèce une preuve irrésistible sur le fondement de laquelle le jury pouvait raisonnablement conclure que Pilot avait traité la demande d'indemnité des Whiten de façon si malveillante, répréhensible ou abusive que des dommages-intérêts punitifs étaient justifiés » (p. 653).

32 Relativement au quantum des dommages-intérêts punitifs accordés par le jury (un million de dollars), le juge Laskin a rejeté l'argument de Pilot selon lequel le jury avait vraisemblablement gonflé cette somme en raison d'erreurs commises par le juge de première instance dans son exposé et que, quoi qu'il en soit, cette somme était beaucoup trop élevée. Bien que cette somme de un million de dollars soit élevée, il y avait lieu de faire preuve de déférence envers la décision du jury, d'autant plus qu'en l'espèce le juge de première instance l'avait considérée [TRADUCTION] « entièrement raisonnable ». De l'avis du juge Laskin, la conduite de Pilot avait été [TRADUCTION] « exceptionnellement répréhensible ». L'objectif de dissuasion est particulièrement important dans les affaires mettant en cause des assurés en raison du très grand nombre de demandes d'indemnité qui sont présentées chaque année aux assureurs. De plus, pour que les dommages-intérêts punitifs soient utiles, ils [TRADUCTION] « doivent faire mal »; il ne faut pas qu'ils soient assimilés à des frais de permis ou d'exploitation. Au cours des dernières années, tant les tribunaux que les législateurs ont haussé le montant des amendes imposées aux entreprises qui agissent de façon irresponsable ou contraire à l'intérêt public. Cette tendance témoigne du fait que [TRADUCTION] « des amendes plus substantielles sont nécessaires pour punir les entreprises qui ont des comportements socialement inacceptables et les dissuader d'adopter de tels comportements » (p. 661).

(2) Le juge Finlayson (avec l'appui du juge Catzman)

33 Le juge Finlayson a souscrit aux motifs et aux conclusions du juge Laskin sur la première question,

2002 SCC 18 (CanLII)

Ms. Whiten was entitled to an award of punitive damages. However, he did not agree with Laskin J.A. that the $1 million award was not excessive. Finlayson J.A. said that, while he was "not entirely happy with the trial judge's charge to the jury" (p. 661), he did not propose to justify his intervention on any other basis than his belief that the award "is simply too high" (p. 661).

34 Finlayson J.A. reviewed the facts of and awards made in other cases to illustrate his concern about quantum. In all of these cases, the defendant insurer was found to have acted unacceptably; in some the plaintiff received solicitor-client costs; in others he or she did not. None of the awards exceeded $50,000. The cases relied upon by the plaintiff went beyond bad faith and reflected the courts' concern with "objectionable corporate policies" (p. 663). Moreover, in three of these cases the trial judge emphasized the need to force tortfeasors to disgorge profits flowing from their actions (pp. 661-65). In the case at bar, according to Finlayson J.A., there was no evidence that Pilot's unacceptable conduct "was the product of a corporate strategy" (p. 665) nor did it profit from its actions. "Rather, it appears to have been an isolated instance for which the appellant's trial counsel should take full responsibility, both for the manner in which the claim was processed and because of the way that the trial was conducted. This certainly was the view of the trial judge" (p. 665).

35 In the view of Finlayson J.A., an award of $100,000 would act as a sufficient deterrent to this and other insurers and would cause the former to take the steps necessary to ensure that "in future it is properly apprised of the nature and kind of the defence its claims adjusters and counsel are advancing" (p. 666).

c'est-à-dire celle de savoir si M^me^ Whiten avait droit à des dommages-intérêts punitifs. Il ne partageait toutefois pas l'avis du juge Laskin que la somme de un million de dollars n'était pas excessive. Bien qu'il ait affirmé ne pas être [TRADUCTION] « entièrement satisfait de l'exposé du juge de première instance au jury » (p. 661), le juge Finlayson s'est contenté de justifier son intervention en disant qu'il croyait que cette somme était [TRADUCTION] « tout simplement trop élevée » (p. 661).

Pour expliquer ses réserves au sujet du quantum des dommages-intérêts, il a passé en revue les faits d'autres affaires pertinentes ainsi que les sommes accordées à ce titre. Il a relevé que, dans toutes ces affaires, la conduite de l'assureur défendeur avait été jugée inacceptable; dans certains cas, le demandeur a eu droit aux dépens sur la base procureur-client, dans d'autres non. La somme accordée n'a jamais dépassé 50 000 $. Les affaires invoquées par la demanderesse ne portaient pas uniquement sur la mauvaise foi, mais reflétaient les préoccupations des tribunaux à l'égard de [TRADUCTION] « pratiques commerciales indésirables » (p. 663). En outre, dans trois de ces affaires, le juge de première instance avait insisté sur la nécessité de contraindre les auteurs du préjudice à rendre les profits découlant de leurs actions (p. 661-665). En l'espèce, selon le juge Finlayson, la preuve n'établissait pas que la conduite inacceptable de Pilot [TRADUCTION] « résultait d'une stratégie commerciale » (p. 665) ni que Pilot avait tiré profit de sa conduite. De dire le juge Finlayson, [TRADUCTION] « il semble plutôt s'agir d'un événement isolé dont l'entière responsabilité doit revenir à l'avocat qui occupait pour l'appelante en première instance, tant pour ce qui est du traitement de la demande d'indemnité que de la conduite du procès. C'est certainement ce qu'a pensé le juge de première instance » (p. 665).

Le juge Finlayson a estimé que des dommages-intérêts punitifs de 100 000 $ auraient un effet dissuasif suffisant sur Pilot et les autres assureurs et contraindraient Pilot à prendre les mesures nécessaires pour [TRADUCTION] « bien s'informer à l'avenir de la nature des moyens de défense que font valoir ses experts d'assurance et ses avocats » (p. 666).

2002 SCC 18 (CanLII)

III. Analysis

Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law. In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of $320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably. Over-compensation of a plaintiff is given in exchange for this socially useful service.

Nevertheless, the hybrid nature of punitive damages offends some jurists who insist that legal remedies should belong to one jurisprudential field or the other. That is one major aspect of the controversy, often framed in the words of Lord Wilberforce's comments, dissenting, in *Cassell & Co. v. Broome*, [1972] A.C. 1027 (H.L.), at p. 1114:

It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval,

III. L'analyse

36 Exceptionnellement, des dommages-intérêts punitifs sont accordés lorsqu'une conduite « malveillante, opprimante et abusive [. . .] choque le sens de la dignité de la cour » : *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196. Ce critère limite en conséquence de tels dommages-intérêts aux seules conduites répréhensibles représentant un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable. Parce qu'ils ont pour objet de punir le défendeur plutôt que d'indemniser le demandeur (la juste indemnité à laquelle ce dernier a droit ayant déjà été déterminée), les dommages-intérêts punitifs chevauchent la frontière entre le droit civil (indemnisation) et le droit criminel (punition).

37 La punition est un objectif légitime non seulement en droit criminel, mais également en droit civil. Les dommages-intérêts punitifs répondent à un besoin que ni le droit civil pur ni le droit criminel pur ne peuvent satisfaire. En l'espèce, par exemple, personne d'autre que l'appelante ne saurait raisonnablement être disposé à investir une somme d'environ 320 000 $ en frais de justice dans un long procès afin d'établir que l'assureur s'est conduit de façon abominable dans ce dossier. La surindemnisation d'un demandeur est accordée en contrepartie de ce service socialement utile.

38 Néanmoins, la nature hybride des dommages-intérêts punitifs rebute certains juristes, qui soutiennent que les mesures de réparation prévues par le droit doivent appartenir à une branche du droit ou à l'autre. Il s'agit là d'un des principaux aspects de la controverse, qui est souvent énoncé au moyen des propos suivants exprimés par lord Wilberforce, en dissidence, dans l'arrêt *Cassell & Co. c. Broome*, [1972] A.C. 1027 (H.L.), p. 1114 :

[TRADUCTION] On ne saurait tenir à la légère pour acquis, même théoriquement, que l'objectif du droit de la responsabilité civile délictuelle est l'indemnisation, encore moins que ce devrait être le cas, question d'une grande importance sociale, ou qu'il y a quelque chose d'inapproprié, d'illogique ou d'anormal (mot qui anticipe la réponse) à inclure un élément punitif dans les dommages-intérêts civils ou, à l'inverse, que

2002 SCC 18 (CanLII)

or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew.

39 A second major aspect of the controversy surrounding punitive damages is related to the quantum. Substantial awards are occasionally assessed at figures seemingly plucked out of the air. The usual procedural protections for an individual faced with potential punishment in a criminal case are not available. Plaintiffs, it is said, recover punitive awards out of all proportion to just compensation. They are subjected, it is said, to "palm tree justice": *Cassell*, *supra*, at p. 1087. They are handed a financial windfall serendipitously just because, coincidentally with their claim, the court desires to punish the defendant and deter others from similar outrageous conduct. Defendants on the other hand say they suffer out of all proportion to the actual wrongs they have committed. Because the punishment is tailored to fit not only the "crime" but the financial circumstances of the defendant (i.e., to ensure that it is big enough to "sting"), defendants complain that they are being punished for who they are rather than for what they have done. The critics of punitive awards refer *in terrorem* to the United States experience where, for example, an Alabama jury awarded $4 million in punitive damages against a BMW dealership for failure to disclose a minor paint job to fix a cosmetic blemish on a new vehicle in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In 1994, a jury in New Mexico awarded 81-year-old Stella Liebeck $160,000 in compensatory damages and $2.7 million in punitive damages against McDonald's Restaurants for burns resulting from a spilled cup of coffee, notwithstanding that she tried to open the cup while balancing it on her lap in the passenger seat of a car (*Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (D. N.M.)). Critics of punitive damages warn against an "Americanization" of our law

le droit criminel constitue un meilleur instrument que le droit civil pour exprimer la réprobation sociale ou pour réparer le tort causé au tissu social, ou que les dommages-intérêts peuvent chaque fois être répartis entre ces deux éléments distincts. Dans la pratique, le droit anglais n'a souscrit à aucune de ces théories, se montrant peut-être en cela plus sage qu'il n'y paraît.

Le deuxième aspect important de la controverse relative aux dommages-intérêts punitifs concerne leur quantum. Il arrive à l'occasion que soient accordés des dommages-intérêts punitifs substantiels, dont le montant semble sortir de nulle part. Les garanties procédurales habituelles dont jouit la personne passible d'une peine dans le cadre de poursuites criminelles ne s'appliquent pas. Les demandeurs, prétend-on, obtiennent des dommages-intérêts punitifs tout à fait disproportionnés avec une juste indemnisation. Ils ont alors droit, affirme-t-on, à une [TRADUCTION] « justice primitive » : *Cassell*, précité, p. 1087. Ils reçoivent ainsi, par pur hasard, un profit inattendu tout simplement parce qu'il se trouve que, en statuant sur leur demande, le tribunal veut aussi punir le défendeur et décourager autrui d'adopter de tels comportements. Les défendeurs quant à eux affirment qu'ils sont pénalisés hors de toute proportion avec le préjudice réellement causé. Parce que la sanction est établie en fonction non seulement du « crime » mais également de la situation financière des défendeurs (c.-à-d. pour faire en sorte qu'elle soit assez sévère pour « faire mal »), ceux-ci se plaignent d'être punis en fonction de leur identité plutôt que de leurs actes. Ceux qui critiquent les dommages-intérêts punitifs évoquent, *in terrorem*, la situation aux États-Unis où, par exemple, un jury de l'Alabama a condamné un concessionnaire BMW à des dommages-intérêts punitifs de 4 millions de dollars pour avoir omis de révéler que la peinture d'un véhicule neuf avait été retouchée pour corriger une imperfection cosmétique (*BMW of North America, Inc. c. Gore*, 517 U.S. 559 (1996)). En 1994, un jury du Nouveau-Mexique a accordé à Stella Liebeck, une dame âgée de 81 ans, des dommages-intérêts compensatoires de 160 000 $ et condamné les restaurants McDonald à des dommages-intérêts punitifs de 2,7 millions de dollars pour des brûlures subies par la demanderesse lorsque son gobelet de café s'est renversé, et ce malgré

2002 SCC 18 (CanLII)

that, if adopted, would bring the administration of justice in this country into disrepute.

These are serious concerns, but in fact, the punitive damage controversies have little if anything to do with Americanization of our law. Jury awards of punitive damages in civil actions have a long and important history in Anglo-Canadian jurisprudence. They defy modern attempts at neat classification of remedies. The jury is invited to treat a plaintiff as a public interest enforcer as well as a private interest claimant. Almost 240 years ago, government agents broke into the premises of a Whig member of Parliament and pamphleteer, John Wilkes, to seize copies of a publication entitled *The North Briton, No. 45*, which the Secretary of State regarded as libellous. Lord Chief Justice Pratt (later Lord Camden L.C.) on that occasion swept aside the government's defence. "If such a [search] power is truly invested in a Secretary of State", he held, "and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject". As to punitive damages, he affirmed that:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

(*Wilkes v. Wood* (1763), Lofft. 1, 98 E.R. 489 (K.B.), at pp. 498-99)

Long before the days of Lord Pratt C.J., the related idea of condemning a defendant to a multiple of what is required for compensation (in the present

le fait qu'elle avait tenté de l'ouvrir en le tenant sur sa cuisse pendant qu'elle était passagère dans une automobile (*Liebeck c. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (D. N.M.)). Ceux qui s'opposent aux dommages-intérêts punitifs préviennent que l'« américanisation » de notre droit, si elle devenait réalité, serait susceptible de déconsidérer l'administration de la justice.

40 Ces inquiétudes sont certes sérieuses mais, dans les faits, la controverse relative aux dommages-intérêts punitifs a peu, sinon rien à voir avec l'américanisation de notre droit. L'attribution par des jurys de dommages-intérêts punitifs en matière civile a une longue et importante histoire dans la jurisprudence anglo-canadienne. Ce type de dommages-intérêts a résisté à toutes les tentatives modernes de classification précise des réparations. Le jury est invité à considérer que le demandeur agit à la fois dans l'intérêt public et dans son propre intérêt. Ainsi, il y a près de 240 ans, des agents du gouvernement sont entrés par effraction dans les locaux de John Wilkes, député « *Whig* » et pamphlétaire, et y ont saisi des exemplaires d'une publication intitulée *The North Briton, No. 45*, que le secrétaire d'État considérait diffamatoire. Le lord juge en chef Pratt (plus tard lord chancelier Camden) a alors rejeté le moyen de défense invoqué par le gouvernement. [TRADUCTION] « Si le secrétaire d'État est véritablement investi d'un tel pouvoir [de perquisition] », a conclu le lord juge en chef Pratt, « et s'il peut déléguer celui-ci, l'exercice de ce pouvoir risque certes de porter atteinte à la personne et aux biens de tous les sujets du royaume, au mépris total de leur liberté ». Au sujet des dommages-intérêts punitifs, il a affirmé ceci :

> [TRADUCTION] Le jury est investi du pouvoir d'accorder des dommages-intérêts supérieurs au préjudice subi. Les dommages-intérêts ne visent pas qu'à indemniser la personne lésée, mais aussi à punir le coupable, à décourager toute action analogue à l'avenir et à marquer l'aversion du jury pour la conduite en cause.

(*Wilkes c. Wood* (1763), Lofft. 1, 98 E.R. 489 (B.R.), p. 498-499)

41 L'idée connexe de condamner le défendeur au paiement d'une somme égale à un multiple de l'indemnité requise (en l'espèce, comme il a été

2002 SCC 18 (CanLII)

2002 SCC 18 (CanLII)

appeal, as stated, the punitive damages were roughly triple the award of compensatory damages) reached back to the Code of Hammurabi, Babylonian law, Hittite law (1400 B.C.), the Hindu Code of Manu (200 B.C.), ancient Greek codes, the Ptolemaic law in Egypt and the Hebrew Covenant Code of Mosaic law (see *Exodus* 22:1 "If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep"). Roman law also included provisions for multiple damages. Admittedly, in these early systems, criminal law and civil law were not always clearly differentiated. The United States Supreme Court in *BMW*, *supra*, referred at p. 581 to "65 different enactments [in English statutes] during the period between 1275 and 1753 [that] provided for double, treble, or quadruple damages".

indiqué plus tôt, les dommages-intérêts punitifs correspondaient à peu près au triple des dommages-intérêts compensatoires), remonte bien avant l'époque du lord juge en chef Pratt, comme en témoignent le Code d'Hammourabi, le droit babylonien, le droit hittite (1400 av. J.-C.), les Lois de Manu (200 av. J.-C.), les codes grecs anciens, la loi ptolémaïque en Égypte et le Livre de l'alliance, code mosaïque du droit hébreu (voir Exode 22:1, « Si un homme vole un bœuf ou un agneau, et qu'il l'égorge ou le vende, il restituera cinq bœufs pour le bœuf, et quatre agneaux pour l'agneau »). Le droit romain prévoyait lui aussi l'octroi de dommages-intérêts majorés par un facteur de multiplication. Il faut cependant reconnaître que, dans ces systèmes anciens, la différence entre le droit criminel et le droit civil n'était pas toujours très nette. Dans l'arrêt *BMW*, précité, p. 581, la Cour suprême des États-Unis a mentionné que [TRADUCTION] « 65 dispositions différentes [dans des lois anglaises], édictées entre 1275 et 1753, prévoyaient des dommages-intérêts doubles, triples ou quadruples ».

42 Even in terms of quantum, the use of punitive damages in the eighteenth century was aggressive. In *Huckle v. Money* (1763), 2 Wils. K.B. 206, 95 E.R. 768, the journeyman Huckle (who had actually printed the pamphlet *The North Briton, No. 45* at issue in *Wilkes*, *supra*) won a cause of action for trespass, assault and false imprisonment and received 300 pounds in damages from the jury despite the comfortable and short six-hour duration of his confinement. The government's motion for a new trial on the basis that the award was "outrageous" was denied, even though actual damages totalled only 20 pounds (i.e., a multiplier of 15) (p. 768). The Lord Chief Justice, in introducing the expression "exemplary damages", thought there was no precedent for judges "intermeddling" with damages awarded by juries.

Même pour ce qui est du quantum, ou recourait énergiquement aux dommages-intérêts punitifs au XVIII[e] siècle. Dans *Huckle c. Money* (1763), 2 Wils. K.B. 206, 95 E.R. 768, l'action intentée par le compagnon imprimeur Huckle (qui avait imprimé le pamphlet *The North Briton, No. 45* en litige dans l'arrêt *Wilkes*, précité) pour intrusion, voies de fait et emprisonnement injustifié a été accueillie, et le jury lui a accordé des dommages-intérêts de 300 livres, même si Huckle n'était demeuré en prison que pendant six heures et avait été bien traité. La requête du gouvernement sollicitant la tenue d'un nouveau procès, pour le motif que la somme accordée était [TRADUCTION] « exorbitante », a été rejetée, même si les dommages-intérêts compensatoires ne s'élevaient qu'à 20 livres (multiplicateur de 15) (p. 768). Introduisant l'expression [TRADUCTION] « dommages-intérêts exemplaires », le lord juge en chef a estimé qu'il n'y avait aucun précédent justifiant les juges de « s'ingérer » dans l'attribution des dommages-intérêts par les jurys.

43 The three objectives identified by Lord Chief Justice Pratt, in *Wilkes*, *supra* — punishment, deterrence and denunciation ("proof of the detes-

Nous poursuivons encore aujourd'hui les trois objectifs décrits par le lord juge en chef Pratt dans l'arrêt *Wilkes*, précité, savoir la punition, la

tation") — are with us still, even though some scholarly critics have argued that these rationales "have very particular and divergent implications" that occasionally wind up undermining each other: B. Chapman and M. Trebilcock, "Punitive Damages: Divergence in Search of a Rationale" (1989), 40 *Ala. L. Rev.* 741, at p. 744. No doubt, as a matter of language, the word "punishment" includes both retribution and denunciation, and the three objectives should perhaps better be referred to as retribution, deterrence and denunciation.

The notion of private enforcers (or "private Attorneys General"), particularly where they act for personal gain, is worrisome unless strictly controlled. Thus, while the availability of punitive damages in Canada was affirmed early on by this Court in *Collette v. Lasnier* (1886), 13 S.C.R. 563, a patent case, they were not widely awarded until the 1970s. Since then the awards have multiplied in number and escalated in amount. A report on punitive damages by the Ontario Law Reform Commission, issued in 1991, which examined research begun in 1989, predicted limited and principled development in the law of punitive damages in Canada: Ontario Law Reform Commission, *Report on Exemplary Damages* (1991), at pp. 93 and 98. By 1998, the report's research director, Dean Bruce Feldthusen, conceded that the law was "certainly developing quite differently in Canada than one would have predicted only a short time ago" and that "many of the doctrinal pillars on which the Report's predictions of limited and principled development in the law governing punitive damages were based have since cracked or collapsed": B. Feldthusen, "Punitive Damages: Hard Choices and High Stakes", [1998] *N.Z. L. Rev.* 741, at p. 742. Contrary to expectations, the awards were much larger, more frequent, appeared to rely more often on the defendant's wealth in support, and included more high profile jury awards. The kinds of causes of action had expanded; punitive damages were the "norm" and had "proliferated" in actions in sexual battery, were now "clearly available" for breach of fiduciary duty, and "persisted" in contract actions. Prior criminal convictions, he concluded, no longer automatically barred punitive awards. He added, "[p]erhaps most

dissuasion et la dénonciation (« marquer l'aversion »), quoique certains auteurs affirment que ces justifications [TRADUCTION] « ont des implications très distinctes et divergentes » qui, à l'occasion, font qu'elles se sapent mutuellement : B. Chapman et M. Trebilcock, « Punitive Damages : Divergence in Search of A Rationale » (1989), 40 *Ala. L. Rev.* 741, p. 744. Il ne fait aucun doute que, d'un point de vue linguistique, le mot « punition » englobe les notions de châtiment et de dénonciation, et qu'il conviendrait peut-être mieux de désigner les trois objectifs comme étant le châtiment, la dissuasion et la dénonciation.

44

L'existence de poursuivants privés (ou « procureurs généraux privés »), en particulier lorsqu'ils agissent pour leur avantage personnel, a de quoi inquiéter si leurs activités ne sont pas strictement encadrées. Voilà pourquoi les dommages-intérêts punitifs n'ont commencé à être largement accordés au Canada que dans les années 1970, bien que notre Cour eût reconnu beaucoup plus tôt leur validité, dans l'arrêt *Collette c. Lasnier* (1886), 13 R.C.S. 563, une affaire de brevet. Depuis les années 1970, le nombre de cas où de tels dommages-intérêts ont été accordés s'est multiplié, et les sommes accordées ont grimpé. En 1991, après avoir examiné des études entreprises en 1989, la Commission de réforme du droit de l'Ontario a publié un rapport sur les dommages-intérêts punitifs dans lequel elle prédisait une évolution limitée et raisonnée du droit relatif aux dommages-intérêts punitifs au Canada : Commission de réforme du droit de l'Ontario, *Rapport sur les dommages-intérêts exemplaires* (1991), p. 93 et 98. En 1998, le directeur de la recherche pour ce rapport, le doyen Bruce Feldthusen, a reconnu que le droit relatif à cette question [TRADUCTION] « évoluait certainement de façon très différente par rapport à ce qu'on prévoyait seulement quelques années auparavant » et que « bon nombre des assises doctrinales sur lesquelles reposait la prédiction d'une évolution limitée et raisonnée du droit relatif aux dommages-intérêts punitifs ont depuis été ébranlées ou se sont écroulées » (B. Feldthusen, « Punitive Damages : Hard Choices and High Stakes », [1998] *N.Z. L. Rev.* 741, p. 742). Contrairement aux prévisions, des dommages-intérêts punitifs ont été accordés fréquemment, plus souvent par des jurys dans le contexte de décisions ayant un grand retentissement, et

2002 SCC 18 (CanLII)

significantly, the courts seem to have accepted general deterrence, not retributive punishment, as the dominant purpose behind punitive damage awards in a number of important decisions" (p. 742).

45 This Court more recently affirmed a punitive damage award of $800,000 in *Hill*, *supra*. On that occasion some guidelines were set out to keep this remedy within reasonable limits. The Court on this occasion has an opportunity to clarify further the rules governing whether an award of punitive damages ought to be made and if so, the assessment of a quantum that is fair to all parties.

46 It is convenient at this point to note how other common law jurisdictions have addressed the problem of disproportionate awards of punitive damages.

A. *England*

47 In *Rookes v. Barnard*, [1964] A.C. 1129, and *Cassell*, *supra*, the House of Lords sought to significantly limit the availability of punitive damages. In Lord Devlin's leading speech in *Rookes*, he distinguished "exemplary" (punitive) and "aggravated" (compensatory) damages and classified many purportedly punitive awards in the law books as disguised compensation. Second, he reduced the availability of punitive damages to two common law categories of causes of action, namely (1) "oppressive, arbitrary, or unconstitutional action

les sommes accordées ont été plus élevées et semblaient plus souvent fondées sur la richesse des défendeurs. La nature des causes d'action donnant ouverture à ces décisions s'était élargie. La condamnation à des dommages-intérêts punitifs avait [TRADUCTION] « proliféré » et était devenue la « norme » dans les actions pour voies de fait de nature sexuelle; de tels dommages-intérêts étaient « clairement ouverts » en cas de manquement à une obligation de fiduciaire et ils « continuaient » d'être accordés en matière contractuelle. L'existence de déclarations de culpabilité pénale, de conclure l'auteur, ne faisait plus automatiquement obstacle à l'attribution de dommages-intérêts punitifs. L'auteur ajoute ceci : [TRADUCTION] « [f]ait plus important peut-être, dans d'importantes décisions, les tribunaux semblent avoir accepté que la dissuasion générale, plutôt que le châtiment, constitue l'objectif dominant des dommages-intérêts punitifs » (p. 742).

Plus récemment, dans l'arrêt *Hill*, précité, notre Cour a confirmé une décision accordant des dommages-intérêts punitifs de 800 000 $ et elle a formulé, à cette occasion, des lignes directrices visant à contenir cette réparation dans des limites raisonnables. Dans la présente affaire, la Cour a la possibilité de préciser davantage les règles applicables pour décider si des dommages-intérêts punitifs doivent être accordés et, dans l'affirmative, pour fixer un quantum qui soit équitable pour toutes les parties.

Il est utile, à ce stade-ci, de signaler comment réagissent les autres pays de common law au problème des dommages-intérêts punitifs disproportionnés.

A. *Angleterre*

Dans les arrêts *Rookes c. Barnard*, [1964] A.C. 1129, et *Cassell*, précité, la Chambre des lords a cherché à limiter de façon substantielle le champ d'application des dommages-intérêts punitifs. Dans *Rookes*, le lord juge Devlin a différencié les dommages-intérêts « exemplaires » (caractère punitif) des dommages-intérêts « majorés » (caractère compensatoire) et indiqué que, dans bon nombre de décisions publiées, les dommages-intérêts censément punitifs étaient plutôt une forme d'indemnisation déguisée. Il a ensuite restreint le droit aux

2002 SCC 18 (CanLII)

by the servants of the government" (p. 1226) and (2) where the defendant's conduct is calculated to make a profit. To these he added a third permissible category where punitive damages have express statutory authorization. Since *Rookes* was decided, the categories test has persisted despite various academic and judicial assaults, but later cases have somewhat loosened the categories' application (by, for example, including police wrongdoing in category one). More recently, in June of last year, the House of Lords opened up the categories themselves to further evolution: *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2001] 3 All E.R. 193.

The attempt in *Rookes* to narrow the availability of punitive damages by a categorical approach, has been criticized in both academic and judicial forums. The Court of Appeal in England attempted to undermine the new doctrine in *Broome v. Cassell & Co.*, [1971] 2 Q.B. 354; however, the attempt was crushed on further appeal of its decision to the House of Lords, [1972] A.C. 1027. The Law Commission for England and Wales concluded recently that the limitations comported neither with "sound principle" nor "sound policy" (Report 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), at para 1.2). Canada, Australia, New Zealand, and Ireland have all explicitly rejected the "category" approach of *Rookes*: *Vorvis*, *supra*, at pp. 1104-6; *Uren v. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118 (Austl. H.C.); *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.); *Conway v. Irish National Teachers' Organisation*, [1991] 11 I.L.R.M. 497 (S.C.). Category one has been criticized on the grounds that corporations and individuals can exercise enormous power in an outrageous way just as governmental actors do. Criticisms have been especially vigorous against category two which strikes many as illogical. Commentators wonder why conduct motivated by economic profit is punished while that inspired "only" by malice escapes. (Lord Nicholls lends support to both

dommages-intérêts punitifs à deux catégories de causes d'action en common law : [TRADUCTION] (1) « les actes oppressifs, arbitraires ou inconstitutionnels accomplis par les préposés de l'État » (p. 1226); (2) les affaires où la conduite du défendeur visait à obtenir un profit. À ces deux catégories il en a ajouté une troisième : (3) les affaires où la condamnation au versement de dommages-intérêts punitifs est expressément autorisée par un texte de loi. Depuis l'arrêt *Rookes*, le critère fondé sur ces catégories est demeuré, en dépit de diverses attaques doctrinales et jurisprudentielles, mais des décisions subséquentes ont quelque peu assoupli l'application des catégories (par exemple en incluant dans la première catégorie les fautes policières). Plus récemment, en juin 2001, la Chambre des lords a ouvert la porte à l'élargissement des catégories elles-mêmes : *Kuddus c. Chief Constable of Leicestershire Constabulary*, [2001] 3 All E.R. 193.

48

La tentative dans *Rookes* en vue de limiter, par une approche fondée sur des catégories, les cas donnant ouverture aux dommages-intérêts punitifs a suscité des critiques, tant dans la doctrine que dans la jurisprudence. La Cour d'appel d'Angleterre a tenté d'ébranler cette nouvelle doctrine dans *Broome c. Cassell & Co.*, [1971] 2 Q.B. 354, mais la Chambre des lords a fait échec à cette tentative dans l'appel formé contre cette décision ([1972] A.C. 1027). Récemment, la Law Commission for England and Wales a conclu que les limites établies ne sont pas conciliables avec quelque [TRADUCTION] « principe judicieux » ou « politique d'intérêt général valable » (Rapport 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), par. 1.2). Tant au Canada qu'en Australie, en Nouvelle-Zélande et en Irlande, on a explicitement rejeté l'approche fondée sur des « catégories » retenue dans *Rookes* (*Vorvis*, précité, p. 1104-1106; *Uren c. John Fairfax & Sons Pty. Ltd.* (1966), 117 C.L.R. 118 (H.C. Austr.); *Taylor c. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.); *Conway c. Irish National Teachers' Organisation*, [1991] 11 I.L.R.M. 497 (C.S.)). Relativement à la première catégorie, on oppose que des personnes morales et des personnes physiques peuvent posséder d'énormes pouvoirs et en abuser, tout comme le font des acteurs gouvernementaux. Les critiques sont particulièrement vives à l'égard

2002 SCC 18 (CanLII)

these views in *Kuddus*, *supra*, at paras. 66-67; see also Taylor J. in *Uren*, *supra*, at pp. 132-39; and Richardson J. in *Taylor*, *supra*, at p. 92.)

de la deuxième catégorie qui, pour beaucoup, paraît illogique. Les commentateurs se demandent pourquoi une conduite motivée par le profit financier est punie alors que des actes animés « seulement » par la malveillance échappent à la condamnation. (Lord Nicholls souscrit à ces deux arguments dans *Kuddus*, précité, par. 66-67; voir également les motifs du juge Taylor dans *Uren*, précité, p. 132-139, et ceux du juge Richardson dans *Taylor*, précité, p. 92.)

49 The study of punitive damages by the Law Commission for England and Wales was extensive, first seeking public consultation with two papers in 1993 and 1995, and finally reporting in 1997. It recommended that punitive damages should be retained and expanded, while also emphasizing that punitive damage awards should be "consistent, moderate and proportionate" (Part 5, at para. 82). The Law Commission was guided by five principles in formulating their specific recommendations for punitive damages (Part. 1, at para. 17):

La Law Commission for England and Wales a étudié de façon approfondie la question des dommages-intérêts punitifs. Elle a d'abord mené des consultations publiques en publiant deux documents à cette fin, l'un en 1993 et l'autre en 1995, puis elle a produit son rapport en 1997. Elle a recommandé le maintien des dommages-intérêts punitifs et l'élargissement de leur champ d'application, tout en insistant sur le fait que les sommes accordées à ce titre devraient être [TRADUCTION] « cohérentes, modérées et proportionnées » (partie 5, par. 82). Cinq principes ont guidé la Commission dans ses recommandations sur les dommages-intérêts punitifs (partie 1, par. 17) :

> First, exemplary damages should be an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law. Secondly, their availability (and assessment) must be placed on a clear, principled basis. Thirdly, although flexibility is necessary, unnecessary uncertainty as to the availability and assessment of the remedy must be avoided. Fourthly, defendants must not be unfairly prejudiced. Fifthly, the impact on the administration and funding of civil justice should not be adverse.

> [TRADUCTION] Premièrement, les dommages-intérêts exemplaires devraient être une réparation exceptionnelle, rarement accordée et réservée aux cas les plus répréhensibles de délit civil qui autrement resteraient impunis par la justice. Deuxièmement, le droit à des dommages-intérêts punitifs et la détermination de leur quantum doivent reposer sur un fondement raisonné et clair. Troisièmement, quoique la souplesse soit un aspect nécessaire, il faut éviter toute incertitude inutile quant à l'ouverture de cette réparation et à la détermination de son quantum. Quatrièmement, il ne faut pas causer de préjudice indû aux défendeurs. Cinquièmement, cette réparation ne doit pas avoir d'incidences négatives sur l'administration et le financement du système de justice civile.

The specific proposals have not yet been accepted by the U.K. Parliament which is said to be awaiting further judicial development of the law in that country: House of Commons, Written Answers to Questions, November 9, 1999, col. 502.

Le Parlement du Royaume-Uni, qui, affirme-t-on, attendrait que la jurisprudence précise cet aspect du droit dans ce pays, n'a pas encore entériné ces propositions : House of Commons, Written Answers to Questions, 9 novembre 1999, col. 502.

50 At the present time, the English courts are developing a variety of principles and guidelines to control the award of punitive damages: *Halsbury's Laws of England* (4th ed. 1998), vol. 12(1), at paras. 1115-17; *McGregor on Damages* (16th ed. 1997),

Les tribunaux anglais élaborent actuellement des principes et des lignes directrices, tant d'ordre substantiel que procédural, pour encadrer l'attribution des dommages-intérêts punitifs : *Halsbury's Laws of England* (4e éd. 1998), vol. 12(1), par. 1115-1117;

2002 SCC 18 (CanLII)

at paras. 461-70; Law Commission for England and Wales, *supra*, Part IV. Some of these are substantive and some are procedural. In substantive terms, it is now well established that the plaintiff and not somebody else must be the victim of the defendant's wrongful conduct; restraint should be exercised in the award of punitive damages; and punitive damages should be awarded under the *Rookes* approach "if, but only if" compensatory damages are inadequate to punish the defendant (which means that punitive damages are a "topping up" award and a remedy of last resort). Relevant factors include the reprehensibility of the defendant's conduct; the existence of multiple plaintiffs or multiple defendants; the defendant's good faith; and whether the defendant has already been punished under criminal law (this may be an absolute bar). The parties' means are relevant to the assessment.

In terms of procedure, the English courts have made important changes. In *John v. MGN Ltd.*, [1997] Q.B. 586, the Court of Appeal ruled that a jury's attention can be directed to previous awards that the Court of Appeal has either approved or substituted for a jury award as well as to compensatory damage scales. The Court of Appeal also approved the practice of judges and counsel indicating an appropriate award level. The Court of Appeal felt that the process of mentioning figures, "far from developing into an auction", would "induce a mood of realism" on both sides (p. 615). In *Thompson v. Commissioner of Police of the Metropolis*, [1997] 2 All E.R. 762, the Court of Appeal went further still and approved "guideline" brackets for both compensatory and punitive damages. The Court of Appeal set down general guiding principles, and minimum and ceiling amounts specific to the cause of action at issue, thus permitting brackets in the consideration of punitive damages claims. The Court of Appeal's guiding principles for jury instruction included (1) the familiar "if, but only if" test; (2) pointing out that aggravated damages, because they compensate for injuries due to outrageous defendant behaviour, already include a measure of punishment, albeit incidental; (3) punitive dam-

McGregor on Damages (16e éd. 1997), par. 461-470; Law Commission for England and Wales, *op. cit.*, partie IV. Sur le plan substantiel, il est maintenant bien établi que la victime de la conduite fautive doit être le demandeur et non un tiers, qu'il faut faire preuve de modération dans le recours à cette réparation et que, conformément à l'approche préconisée dans l'arrêt *Rookes*, des dommages-intérêts ne doivent être accordés que [TRADUCTION] « si, mais seulement si » les dommages-intérêts compensatoires ne suffisent pas à punir le défendeur (ce qui signifie que les dommages-intérêts punitifs sont « complémentaires » et constituent une réparation de dernier ressort). Parmi les facteurs pertinents, mentionnons le caractère répréhensible de la conduite du défendeur, l'existence de multiples demandeurs ou défendeurs, la bonne foi du défendeur et l'existence d'une condamnation criminelle déjà prononcée contre le défendeur (laquelle peut constituer un empêchement absolu). Les ressources des parties sont également une considération pertinente.

51

Du point de vue procédural, les tribunaux anglais ont apporté d'importants changements. Dans l'arrêt *John c. MGN Ltd.*, [1997] Q.B. 586, la Cour d'appel a jugé qu'on peut faire état au jury, à l'égard des dommages-intérêts punitifs, d'exemples de sommes qui ont été accordées par des jurys et approuvées par les tribunaux d'appel ou de sommes accordées par ces tribunaux en remplacement de sommes fixées par un jury, ainsi que de barèmes de dommages-intérêts compensatoires. La Cour d'appel a également approuvé la pratique suivie par des juges et des avocats consistant à indiquer un chiffre approprié à l'égard des dommages-intérêts punitifs. Elle a estimé que, [TRADUCTION] « loin de créer un climat de surenchère », la mention de chiffres « inspirerait un certain réalisme » aux deux parties (p. 615). Dans *Thompson c. Commissioner of Police of the Metropolis*, [1997] 2 All E.R. 762, la Cour d'appel est allée plus loin et a approuvé des fourchettes « indicatives » tant pour les dommages-intérêts compensatoires que pour les dommages-intérêts punitifs. Elle a établi des principes directeurs généraux ainsi qu'un minimum et un maximum pour la cause d'action concernée, permettant ainsi le recours à des fourchettes d'indemnisation dans l'examen des demandes de dommages-intérêts punitifs. Au

2002 SCC 18 (CanLII)

ages are a "windfall" to the plaintiff; and (4) punitive damages against a public authority may mean that the sums are not available to be spent on behalf of the general public (i.e., punitive damages against the state come at the general public's expense) (p. 776). In the specific case of an action of a malicious prosecution and false imprisonment against police, for example, the Court of Appeal selected brackets (to be adjusted for inflation) for the punitive damages that are "unlikely to be less than £5,000" as otherwise the conduct probably does not justify any punitive damages award. The "conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent" (p. 776). The Court of Appeal in *Thompson* also observed that a useful rule of thumb is that the total sum of damages (including punitive damages) should not exceed three times the basic compensatory damages (p. 777).

nombre des principes directeurs énoncés par la Cour d'appel à l'égard des directives au jury, on trouve : (1) le critère bien connu [TRADUCTION] « si, mais seulement si »; (2) l'indication que, du fait qu'ils indemnisent un préjudice causé par une conduite inacceptable du défendeur, les dommages-intérêts majorés comportent déjà, quoiqu'accessoirement, un aspect punitif; (3) le fait que les dommages-intérêts punitifs constituent un « profit inattendu » pour le demandeur; (4) le fait que la condamnation d'une autorité publique au versement de dommages-intérêts punitifs peut signifier que cette somme ne sera pas dépensée pour l'ensemble de la population (c.-à-d. que c'est l'ensemble des citoyens qui paie les dommages-intérêts punitifs auxquels l'État est condamné) (p. 776). Dans le cas particulier des actions contre la police pour poursuite malveillante et emprisonnement injustifié, par exemple, la Cour d'appel a précisé que le montant des dommages-intérêts punitifs (qui doit être indexé sur l'inflation) ne devrait [TRADUCTION] « vraisemblablement pas être inférieur à 5 000 livres », car autrement la conduite ne justifie probablement pas l'attribution de tels dommages-intérêts. [TRADUCTION] « [P]our que des dommages-intérêts aussi élevés que 25 000 livres soient justifiés, il faut que la conduite mérite particulièrement d'être condamnée, et la somme de 50 000 livres devrait être considérée comme la limite supérieure absolue, la conduite reprochée devant alors impliquer directement des policiers ayant au moins le grade de chef de police » (p. 776). Dans l'arrêt *Thompson*, la Cour d'appel a également signalé que, selon une règle empirique utile, la somme totale des dommages-intérêts accordés (y compris les dommages-intérêts punitifs) ne devrait pas dépasser le triple des dommages-intérêts compensatoires (p. 777).

B. *Australia*

52 The High Court of Australia takes the view that the purposes of punitive damages are (1) deterrence of the wrongdoer, "other like-minded persons", and generally of "conduct of the same reprehensible kind"; and (2) the social function of "teach[ing] a wrong-doer that tort does not pay" (*Lamb v. Cotogno* (1987), 164 C.L.R. 1, at p. 10; *XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd.* (1985),

B. *Australie*

La Haute Cour d'Australie estime que les dommages-intérêts punitifs jouent un double rôle : (1) celui de dissuader l'auteur de l'acte fautif et les [TRADUCTION] « personnes du même acabit » et de prévenir de façon générale « les conduites similairement répréhensibles »; (2) le rôle social « d'enseigner à l'auteur de l'acte fautif que les délits ne paient pas » (*Lamb c. Cotogno* (1987), 164 C.L.R.

2002 SCC 18 (CanLII)

155 C.L.R. 448, at p. 471, *per* Brennan J.). Punitive damages "serve to mark the court's condemnation" and "disapprobation" of the defendant's behaviour (*Lamb*, *supra*, at pp. 10 and 13). Punitive damages require something more than a jury's "mere disapproval" of the defendant's conduct (*Uren*, *supra*, at p. 153). The High Court has endorsed moderation and proportion in punitive awards; proportionality is relative to the circumstances of the case, and there is "no necessary proportionality" between the assessment of compensatory and punitive damages (*XL Petroleum (N.S.W.) Pty.*, *supra*, *per* Gibbs C.J., at p. 463, and Brennan J., at p. 471; *Lamb*, *supra*).

In 1966 in the companion cases of *Uren*, *supra*, and *Australian Consolidated Press Ltd. v. Uren* (1966), 117 C.L.R. 185, the High Court declined to adopt *Rookes*'s "categories" of restrictions on punitive damage awards. Punitive damages are available for "conscious wrongdoing in contumelious disregard of another's rights" (*Whitfeld v. De Lauret & Co.* (1920), 29 C.L.R. 71 (Austl. H.C.), at p. 77, *per* Knox C.J.). Punitive damages are awarded "rarely" but in a wider range of torts than those prescribed in *Rookes*, *supra*. They are most commonly awarded for intentional torts but their availability is not precluded merely because the cause of action is framed in negligence if the wrongdoing is wanton, reckless or outrageous (*Gray v. Motor Accident Commission* (1998), 196 C.L.R. 1 (Austl. H.C.), at pp. 9 and 28; *Lamb*, *supra*). Thus punitive damages have been awarded for trespass to chattels, trespass to land, trespass to the person, deceit, reckless negligence, and defamation (*Gray*, *supra*, at pp. 27-28); and see generally, *Halsbury's Laws of Australia* (1995), vol. 9, 1995, "Damages", at paras. 135-505. The defendant's misconduct, and not the cause of action, thus governs the availability of punitive damages.

1, p. 10; *XL Petroleum (N.S.W.) Pty. Ltd. c. Caltex Oil (Australia) Pty. Ltd.* (1985), 155 C.L.R. 448, p. 471, le juge Brennan). Les dommages-intérêts punitifs [TRADUCTION] « permettent de montrer que le tribunal condamne » et « réprouve » le comportement du défendeur (*Lamb*, précité, p. 10 et 13). Leur attribution exige davantage que la [TRADUCTION] « simple réprobation » par le jury de la conduite du défendeur (*Uren*, précité, p. 153). La Haute Cour a approuvé les principes de modération et de proportionnalité en matière de dommages-intérêts punitifs; la proportionnalité est fonction des circonstances de l'espèce et il n'y a pas de [TRADUCTION] « coefficient de proportionnalité obligatoire » entre les dommages-intérêts compensatoires et les dommages-intérêts punitifs (*XL Petroleum (N.S.W.) Pty.*, précité, le juge en chef Gibbs, p. 463, et le juge Brennan, p. 471; *Lamb*, précité).

53

Dans les affaires connexes *Uren*, précitée, et *Australian Consolidated Press Ltd. c. Uren* (1966), 117 C.L.R. 185, la Haute Cour a refusé d'adopter les « catégories » énoncées dans l'arrêt *Rookes* qui limitent le champ d'application des dommages-intérêts punitifs. De tels dommages-intérêts peuvent être accordés à l'égard [TRADUCTION] « d'actes fautifs délibérés dénotant une insouciance démesurée envers les droits d'autrui » (*Whitfeld c. De Lauret & Co.* (1920), 29 C.L.R. 71 (H.C. Austr.), p. 77, le juge en chef Knox). Les dommages-intérêts punitifs ne sont accordés que « rarement », mais ils le sont pour un plus large éventail de délits que ceux prévus dans l'arrêt *Rookes*, précité. Il s'agit le plus souvent de délits intentionnels, mais le seul fait que la cause d'action soit fondée sur la négligence ne fait pas pour autant obstacle au droit d'obtenir des dommages-intérêts punitifs lorsque l'acte fautif est démesuré, téméraire ou inacceptable (*Gray c. Motor Accident Commission* (1998), 196 C.L.R. 1 (H.C. Austr.), p. 9 et 28; *Lamb*, précité). Ainsi, des dommages-intérêts punitifs ont été accordés pour atteinte à la possession mobilière, intrusion, atteinte à la personne, dol, négligence téméraire et diffamation (*Gray*, précité, p. 27-28); et voir, généralement, *Halsbury's Laws of Australia*, vol. 9, 1995, « Damages », par. 135-505. Le droit à des dommages-intérêts punitifs dépend donc de la conduite répréhensible du défendeur et non de la cause d'action.

2002 SCC 18 (CanLII)

54 With respect to the potential duplication of the punitive function of the criminal law, the High Court has ruled that the "infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding" bars the award of punitive damages (*Gray*, *supra*, at p. 14). The dissent on this point by Callinan J. is closer to the Canadian position at pp. 50-51:

> The fact of the imposition of punishment and its extent and impact on the defendant will always be relevant factors, probably on most occasions the major and decisive factors. They may not however be conclusive ones for all cases. . . . A court would also be entitled to take into account that lesser punishments may have been, or might be imposed as a consequence of the acceptance of a lesser plea, the availability (for what might be sound policy reasons in and for the purposes of the criminal law) of a small penalty only, the desirability of the less condemnatory process by way of civil rather than criminal proceedings, the need to encourage compliance with the law, and the fact that the possibility of any criminal sanction is illusory.

C. *New Zealand*

55 Punitive damages in tort have always been part of New Zealand's common law and have been recognized repeatedly by its Supreme Court and Court of Appeal. See, for example, *M'Comb v. Low* (1873), 1 N.Z. Jur. 49 (punitive damages award in malicious prosecution). After *Rookes*, *supra*, New Zealand affirmed the judicial power to mark high-handed and heinous conduct in contumelious disregard of another's rights through the award of punitive damages without limitation to *Rookes*'s narrow categories (*Taylor*, *supra*; *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.); and *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.)).

56 The New Zealand courts have permitted punitive damage awards in a wide range of causes of action in both common law and equity (*Cook v. Evatt (No. 2)*, [1992] 1 N.Z.L.R. 676 (H.C.)) and for both intentional and unintentional defendant

Pour ce qui est du chevauchement possible de cette réparation et de la fonction punitive du droit criminel, la Haute Cour a jugé que [TRADUCTION] « l'infliction d'une peine sévère pour la conduite qui correspond essentiellement à celle faisant l'objet de l'instance civile » fait obstacle à l'attribution de dommages-intérêts punitifs (*Gray*, précité, p. 14). L'opinion dissidente exprimée sur cette question par le juge Callinan (aux p. 50-51) se rapproche davantage de la position canadienne :

> [TRADUCTION] Le fait qu'une punition a été infligée ainsi que la sévérité et les conséquences de celle-ci pour le défendeur constitueront toujours des facteurs pertinents et probablement, la plupart du temps, des facteurs importants et décisifs. Il se peut toutefois qu'ils ne soient pas déterminants dans tous les cas. [. . .] Un tribunal pourrait aussi prendre en considération le fait qu'une peine moins sévère a été ou pourrait être appliquée par suite de l'acceptation d'un plaidoyer de culpabilité à l'égard d'une infraction moindre, que (pour des raisons de principe judicieuses en matière criminelle) le défendeur n'est passible que de peines légères, qu'il est souhaitable de préférer à la poursuite criminelle la voie moins stigmatisante de l'instance civile, qu'il est nécessaire d'encourager le respect de la loi et que l'infliction d'une sanction criminelle peut être illusoire.

C. *Nouvelle-Zélande*

Les dommages-intérêts punitifs en matière civile délictuelle ont toujours fait partie de la common law en Nouvelle-Zélande. La Cour suprême et la Cour d'appel de ce pays en ont maintes fois reconnu la validité (voir, par exemple, *M'Comb c. Low* (1873), 1 N.Z. Jur. 49 (poursuite abusive)). Après l'arrêt *Rookes*, précité, des décisions ont confirmé le pouvoir des tribunaux de souligner, par des dommages-intérêts punitifs, le caractère abusif ou haineux de comportements dénotant une insouciance démesurée envers les droits d'autrui, sans se limiter aux catégories étroites introduites par cet arrêt (*Taylor*, précité; *Donselaar c. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.), et *Daniels c. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.)).

Les tribunaux de la Nouvelle-Zélande ont accordé des dommages-intérêts punitifs relativement à un large éventail de causes d'action tant en common law qu'en equity (*Cook c. Evatt (No. 2)*, [1992] 1 N.Z.L.R. 676 (H.C.)), ainsi que pour

2002 SCC 18 (CanLII)

conduct: see, for example, *McLaren Transport Ltd. v. Somerville*, [1996] 3 N.Z.L.R. 424 (H.C.) (negligence); *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 (C.A.) (breach of confidence); *Coloca v. B.P. Australia Ltd.*, [1992] 2 V.R. 441 (S.C.) (negligence); *L. v. Robinson*, [2000] 3 N.Z.L.R. 499 (H.C.) (negligence). Punitive damages for negligence causing personal injury, while rare, may be awarded if, but only if, the level of negligence is "so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment" (*McLaren Transport*, *supra*, at p. 434, *per* Tipping J.; *Ellison v. L.*, [1998] 1 N.Z.L.R. 416 (C.A.)).

New Zealand's situation is somewhat complicated by its extensive statutory scheme of no-fault benefits to compensate personal injuries from accidents in lieu of compensatory damages. However, even here the New Zealand Court of Appeal has held that the legislation does not bar the award of punitive damages for the defendant's related misconduct because the respective functions are different: the benefits under no-fault legislation compensate the victim for his or her loss without punishing the defendant, while punitive damages punish and deter the wrongdoer and are based on the quality of the defendant's conduct (*Donselaar*, *supra*; *McLaren Transport*, *supra*; *Auckland City Council v. Blundell*, [1986] 1 N.Z.L.R. 732; *Green v. Matheson*, [1989] 3 N.Z.L.R. 564; *McKenzie v. Attorney-General*, [1992] 2 N.Z.L.R. 14). Punitive damages awards are a "serious and exceptional remedy" (*Donselaar*, *supra*, at p. 107). They are reserved for truly outrageous conduct where the other remedies that the defendant must bear will fall short of an adequate punishment (*Dunlea v. Attorney-General*, [2000] 3 N.Z.L.R. 136 (C.A.); *Ellison*, *supra*; *Blundell*, *supra*; *Aquaculture Corp.*, *supra*; *Cook*, *supra*). The marking out and punishment of outrageous conduct can be achieved by a relatively modest penalty that is fairly and reasonably commensurate with the gravity of the conduct being condemned (*Daniels*, *supra*; *Ellison*, *supra*; *Blundell*, *supra*). Civil actions should be stayed until criminal actions

des conduites intentionnelles ou non intentionnelles (voir, par exemple, *McLaren Transport Ltd. c. Somerville*, [1996] 3 N.Z.L.R. 424 (H.C.) (négligence); *Aquaculture Corp. c. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 (C.A.) (abus de confiance); *Coloca c. B.P. Australia Ltd.*, [1992] 2 V.R. 441 (S.C.) (négligence); *L. c. Robinson*, [2000] 3 N.Z.L.R. 499 (H.C.) (négligence)). Quoique des dommages-intérêts punitifs soient rarement accordés dans les affaires de négligence ayant causé des blessures, ils peuvent l'être si, mais seulement si la négligence atteint un degré tel [TRADUCTION] « qu'elle témoigne d'une insouciance flagrante et inacceptable envers la sécurité du demandeur et qu'elle mérite condamnation et punition » (*McLaren Transport*, précité, p. 434, le juge Tipping; *Ellison c. L.*, [1998] 1 N.Z.L.R. 416 (C.A.)).

57

En Nouvelle-Zélande, la situation se complique quelque peu du fait que, dans ce pays, on a substitué aux dommages-intérêts compensatoires, un régime législatif général d'indemnisation sans égard à la faute en matière de préjudices corporels résultant d'accidents. Toutefois, malgré l'existence de ce régime, la Cour d'appel de ce pays a jugé que la loi n'interdit pas l'attribution de dommages-intérêts punitifs visant la conduite répréhensible du défendeur, parce que le rôle de ces derniers et celui du régime diffèrent : les prestations prévues par le régime d'indemnisation sans égard à la faute compensent la victime pour sa perte sans punir le défendeur, alors que les dommages-intérêts punitifs, qui reposent sur la qualification de la conduite du défendeur, sanctionnent l'auteur de la faute et le découragent de récidiver (*Donselaar*, précité; *McLaren Transport*, précité; *Auckland City Council c. Blundell*, [1986] 1 N.Z.L.R. 732; *Green c. Matheson*, [1989] 3 N.Z.L.R. 564; *McKenzie c. Attorney-General*, [1992] 2 N.Z.L.R. 14). Les dommages-intérêts punitifs constituent [TRADUCTION] « une mesure réparatrice sévère et exceptionnelle » (*Donselaar*, précité, p. 107). Ils ne sont accordés qu'à l'égard de conduites absolument inacceptables, lorsque les autres mesures de réparation auxquelles le défendeur est condamné ne constituent pas une punition suffisante (*Dunlea c. Attorney-General*, [2000] 3 N.Z.L.R. 136 (C.A.); *Ellison*, précité; *Blundell*, précité; *Aquaculture*

2002 SCC 18 (CanLII)

are concluded or until it is clear that they will not be instituted (*W. v. W.*, [1999] 2 N.Z.L.R. 1 (P.C.)). Professional disciplinary sanctions against a defendant are a "factor" but not a decisive bar against the award of punitive damages (*Robinson*, *supra*).

D. *Ireland*

58 In Ireland, punitive damages are said to arise from the nature of the wrong that has been committed or the manner of its commission and are intended to punish the defendant for outrageous conduct, deter the defendant and others from such conduct in the future, and "to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct" (*Conway*, *supra*, at p. 503, *per* Finlay C.J.). Ireland does not follow the categorical approach set out in *Rookes*, *supra*.

59 Irish courts also emphasize the need for moderation and restraint in the award of punitive damages. The Irish Supreme Court has recognized that the power to award punitive damages is a "weapon" that can be used both in defence of, and against, liberty, and that punitive damages are a "drastic, although essential, rule grounded on public policy" (*Conway*, *supra*, at p. 512, *per* Griffin J.; *Cooper v. O'Connell*, No. 85/90-96, 1997 Ireland S.C. Lexis, June 5, 1997, at p. 8 *per* Keane J.). As a general principle, punitive damages are not awarded if the amount of compensatory damages constitutes a sufficient public disapproval of and punishment for the particular form of the wrongdoing. See generally, Ireland, Law Reform Commission, *Consultation Paper on*

Corp., précité; *Cook*, précité). La dénonciation et la punition d'une conduite inacceptable peuvent se faire au moyen d'une pénalité relativement modérée, qui soit juste et raisonnablement proportionnée à la gravité de la conduite condamnée (*Daniels*, précité; *Ellison*, précité; *Blundell*, précité). Les actions civiles devraient être suspendues tant que des poursuites criminelles sont en cours ou jusqu'à ce qu'il soit clair que de telles poursuites ne seront pas engagées (*W. c. W.*, [1999] 2 N.Z.L.R. 1 (C.P.)). La prise de sanctions disciplinaires contre un défendeur constitue un « facteur » à prendre en compte, mais elle ne constitue pas un empêchement absolu à l'attribution de dommages-intérêts punitifs (*Robinson*, précité).

D. *Irlande*

En Irlande, on considère que les dommages-intérêts punitifs découlent de la nature de la faute qui a été commise ou de la manière dont elle l'a été et qu'ils visent à punir le défendeur de sa conduite inacceptable, à le dissuader — lui et autrui — de récidiver et [TRADUCTION] « à signaler que le tribunal désapprouve de façon particulière la conduite du défendeur dans les circonstances de l'affaire et estime devoir montrer publiquement qu'elle le punit pour cette conduite » (*Conway*, précité, p. 503, le juge en chef Finlay). L'Irlande n'applique pas l'approche par catégorisation établie dans l'arrêt *Rookes*, précité.

Les tribunaux irlandais ont eux aussi insisté sur la nécessité de faire preuve de modération et de circonspection dans l'attribution de dommages-intérêts punitifs. La Cour suprême de ce pays a reconnu que le pouvoir d'accorder de tels dommages-intérêts est une [TRADUCTION] « arme » qui peut servir autant à défendre la liberté qu'à l'attaquer, et que cette sanction relève de l'application d'une règle [TRADUCTION] « draconienne, quoiqu'essentielle, fondée sur des considérations relatives à l'ordre public » (*Conway*, précité, p. 512, le juge Griffin; *Cooper c. O'Connell*, No. 85/90-96, 1997 Ireland S.C. Lexis, 5 juin 1997, p. 8, le juge Keane). En principe, si le montant des dommages-intérêts compensatoires marque suffisamment la désapprobation du public à l'égard de la faute

2002 SCC 18 (CanLII)

Aggravated, Exemplary and Restitutionary Damages (1998).

E. *United States*

Punitive damages have not lacked for critics in the United States. However, in response to those critics who questioned "the propriety of this doctrine", the Supreme Court pointed to its history: "[I]f repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument" (*Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), at p. 371). Nevertheless, as early as 1872, Foster J. of the New Hampshire Supreme Court surveyed the American and English precedents in *Fay v. Parker*, 53 N.H. 342 (1872), and, at p. 382, uttered a much-quoted condemnation calling punitive damages a "monstrous heresy" and an "unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law".

For practical rather than such theoretical reasons, numerous pieces of state and federal legislation now add a variety of controls, ranging from elimination of punitive damages, elimination of punitive damages in certain causes of action, caps, ratios, and diversion of portions of the money (or "kickers") to public funds so the total amount of compensation does not go to the plaintiff. The most common form of intervention has been to cap the punitive damages at three times the compensatory award. Additionally, there are constitutional limitations (both federal and state) on the awards of punitive damages (see generally L. L. Schlueter and K. R. Redden, *Punitive Damages* (4th ed. 2000), vol. 1, c. 3).

en cause, en plus de constituer une peine suffisante, on n'accorde pas de dommages-intérêts punitifs. Voir, en général, Irlande, Law Reform Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* (1998).

E. *États-Unis*

60 Les critiques ne manquent pas au sujet des dommages-intérêts punitifs aux États-Unis. Toutefois, la Cour suprême a invité ceux qui mettaient en doute [TRADUCTION] « l'opportunité de cette doctrine » à se reporter à son histoire : « [S]i les décisions répétées des tribunaux pendant plus d'un siècle doivent être considérées comme la meilleure indication de ce qu'est le droit applicable, la question n'admet aucun débat » (*Day c. Woodworth*, 54 U.S. (13 How.) 363 (1851), p. 371). Il n'en reste pas moins que, dès 1872, dans l'affaire *Fay c. Parker*, 53 N.H. 342 (1872), le juge Foster de la Cour suprême du New Hampshire a passé en revue la jurisprudence américaine et anglaise, et prononcé, à l'égard des dommages-intérêts punitifs, la condamnation maintes fois citée par la suite, les qualifiant [TRADUCTION] « [d']hérésie monstrueuse » et « [d']excroissance disgracieuse et malsaine rompant la symétrie du droit » (p. 382).

61 Davantage par pragmatisme que sur le fondement de telles considérations théoriques, de nombreuses lois fédérales et étatiques prévoient maintenant diverses restrictions, allant de l'abolition pure et simple des dommages-intérêts punitifs à la distraction dans le Trésor public d'une partie de ces sommes ou « *kickers* » (« contribution ») de façon que le demandeur ne touche pas la totalité de ceux-ci, en passant par l'élimination des dommages-intérêts punitifs pour certaines causes d'action et par l'établissement de plafonds et de ratios. La mesure la plus fréquente a consisté à fixer un plafond égal à trois fois le montant des dommages-intérêts compensatoires accordés. En outre, des restrictions d'ordre constitutionnel (tant aux niveaux fédéral qu'étatique) limitent également les sommes accordées au titre des dommages-intérêts punitifs (voir, généralement, L. L. Schlueter et K. R. Redden, *Punitive Damages* (4e éd. 2000), vol. 1, ch. 3).

2002 SCC 18 (CanLII)

62 The standard of behaviour required to trigger an award of punitive damages in the United States is usually formulated in the epithets (malicious, high-handed, oppressive, outrageous, etc.) familiar to Canadian courts.

63 In the absence of statutory intervention, the appellate courts in the United States impose a measure of discipline usually based on constitutional due process considerations. In *BMW*, *supra*, the Alabama trial jury awarded punitive damages of $4 million. The Alabama appellate court substituted an award of $2 million, which the U.S. Supreme Court quashed as so "grossly excessive" as to be unconstitutional. In its view, BMW's conduct was not particularly reprehensible and there was an unacceptable ratio of 500:1 between the punitive damages and the actual harm. The issue of quantum was remitted to the Alabama courts and Dr. Gore's roller coaster ride in the courts terminated in $50,000 in punitive damages: *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (Ala. 1997). In the case of *Liebeck*, *supra*, the jury's award of $2.7 million in punitive damages for a hot coffee burn was reduced to $480,000 by the trial judge, and the parties settled the case before appeal.

64 The United States Supreme Court has consistently rejected the suggestion of a mechanical or "mathematical formula" or "bright line" for determining whether a punitive damage award is constitutional. In the 1991 case of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Blackmun J., for the majority, concluded that punitive damages were not *per se* unconstitutional and held that the punitive damages award in that case, though "close to the line" (p. 23), did not violate due process despite being a multiple of four times the compensatory damages and much exceeding the amount set by state legislation for insurance fraud.

Les comportements donnant ouverture à l'attribution de dommages-intérêts punitifs aux États-Unis sont habituellement décrits au moyen de certains épithètes (par exemple : malveillant, abusif, oppressif ou inacceptable) qui sont familiers aux tribunaux canadiens.

En l'absence d'encadrement législatif, les cours d'appel américaines imposent une certaine discipline, généralement fondée sur l'application de considérations touchant au principe constitutionnel de l'application régulière de la loi. Ainsi, dans l'affaire *BMW*, précitée, le jury de l'Alabama avait accordé des dommages-intérêts punitifs de 4 millions de dollars, que la Cour d'appel de cet État avait réduits à 2 millions. La Cour suprême des États-Unis a par la suite infirmé cette décision, la jugeant si [TRADUCTION] « démesurément excessive » qu'elle en devenait inconstitutionnelle. Selon la Cour suprême, la conduite de BMW n'était pas particulièrement répréhensible, et le ratio de 500 pour 1 entre les dommages-intérêts punitifs et le préjudice réel était inacceptable. Elle a renvoyé la question du quantum aux tribunaux de l'État, et la saga de M. Gore devant les tribunaux s'est soldée pour ce dernier par l'obtention d'une somme de 50 000 $ au titre des dommages-intérêts punitifs (*BMW of North America, Inc. c. Gore*, 701 So.2d 507 (Ala. 1997)). Dans l'affaire *Liebeck*, précitée, les dommages-intérêts punitifs de 2,7 millions de dollars accordés par le jury pour les brûlures causées par du café chaud ont été réduits à 480 000 $ par le juge de première instance. Les parties ayant réglé à l'amiable, il n'y a pas eu d'appel.

La Cour suprême des États-Unis rejette systématiquement l'idée de recourir à une « formule mathématique » ou mécanique ou à une « ligne de démarcation nette » pour décider si une somme accordée au titre des dommages-intérêts punitifs est constitutionnelle. Dans l'affaire *Pacific Mutual Life Insurance Co. c. Haslip*, 499 U.S. 1 (1991), le juge Blackmun, qui prononçait l'opinion majoritaire, a estimé que les dommages-intérêts punitifs n'étaient pas en eux-mêmes inconstitutionnels et il a conclu que, en l'occurrence, bien que [TRADUCTION] « frôlant la limite » (p. 23) ils ne portaient pas atteinte au droit à l'application

2002 SCC 18 (CanLII)

The court approved the relatively loose instructions to the jury in that case. O'Connor J. in dissent, at p. 51, objected to the lack of more specific direction. She instead proposed standards that would include factors such as (1) whether the punitive award had a reasonable relationship to the harm; (2) the defendant's conduct, including any cover-ups, length of conduct and patterns of similar conduct; (3) the defendant's profits; (4) the criminal sanctions against the defendant; (5) the litigation costs; (6) the defendant's financial means; and (7) other civil actions against the defendant for the same conduct. (The reference to "(5) litigation costs" reflects the fact that in the United States even successful plaintiffs will generally have to bear their own costs.)

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the court again emphasized the need for rationality. Then in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), it held that even a "dramatic disparity" (p. 462) between the actual and punitive award is not a controlling factor, in part because the magnitude of the potential harm to the intended victim and the possible harm to other victims if the conduct were not deterred are important considerations. (In that case, punitive damages were about ten times the compensatory damages.) The most recent decision by the U.S. Supreme Court on punitive damage awards was handed down in May 2001 in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001). *Cooper Industries* held that the courts of appeal should apply a *de novo*, rather than abuse of discretion, standard when reviewing district court determinations of the constitutionality of punitive damages awards. The court again emphasized that, while the constitutional line is "inherently imprecise" (p. 1684) for assessing whether punishments are grossly disproportionate to the gravity of the misconduct, the three factors from *BMW* (1996),

régulière de la loi, même si leur quantum était quatre fois supérieur à celui des dommages-intérêts compensatoires et excédait de beaucoup la somme prévue par le législateur de l'État en cas de fraude en matière d'assurance. La Cour a approuvé les directives plutôt générales qui avaient été données au jury. Madame le juge O'Connor, dissidente, a estimé, à la p. 51, qu'il aurait fallu des directives plus précises, proposant des normes faisant appel à des facteurs tels : (1) l'existence d'un lien raisonnable entre les dommages-intérêts punitifs et le préjudice; (2) la conduite du défendeur, notamment toute tentative de dissimulation, la durée du comportement ou sa répétition; (3) les profits réalisés par le défendeur; (4) les sanctions criminelles infligées au défendeur; (5) les frais de justice; (6) les ressources financières du défendeur; (7) les autres poursuites civiles intentées contre le défendeur relativement à la même conduite. (L'inclusion du facteur « (5) les frais de justice », s'explique par le fait que, aux États-Unis, même les demandeurs qui ont gain de cause doivent généralement supporter leurs propres frais.)

65

Dans *Honda Motor Co. c. Oberg*, 512 U.S. 415 (1994), la Cour suprême des États-Unis a une fois de plus insisté sur la nécessité de la rationalité puis, dans *TXO Production Corp. c. Alliance Resources Corp.*, 509 U.S. 443 (1993), elle a jugé que même un [TRADUCTION] « écart marqué » (p. 462) entre les dommages-intérêts compensatoires et punitifs ne constituait pas un facteur déterminant, parce qu'il existe d'autres considérations importantes, notamment l'ampleur du préjudice qu'aurait pu subir la victime visée et le tort susceptible d'être causé à d'autres victimes en l'absence de dissuasion. (Dans cette affaire, les dommages-intérêts punitifs équivalaient à environ dix fois les dommages-intérêts compensatoires.) La Cour suprême a prononcé son plus récent arrêt au sujet des dommages-intérêts punitifs au mois de mai 2001, dans l'affaire *Cooper Industries, Inc. c. Leatherman Tool Group, Inc*., 121 S.Ct. 1678 (2001). Elle y a jugé que les cours d'appel doivent appliquer la norme de l'audience *de novo* plutôt que la norme de l'abus de pouvoir discrétionnaire, lorsqu'elles contrôlent les décisions des cours de district concernant la constitutionnalité des sommes accordées au titre des

2002 SCC 18 (CanLII)

supra, provide "guideposts" (p. 605): (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm or potential harm to the victim caused by the defendant's actions; and (3) civil or criminal penalties imposed in other cases for comparable misconduct.

F. *Conclusions from the Comparative Survey*

66 For present purposes, I draw the following assistance from the experience in other common law jurisdictions which I believe is consistent with Canadian practice and precedent.

67 First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in *Vorvis*, *supra*, at pp. 1104-6. The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in *Hill*, *supra*, or breach of fiduciary duty as in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, but *Vorvis* itself affirmed the availability of punitive damages in the exceptional case in contract. In *Denison v. Fawcett*, [1958] O.R. 312, the Ontario Court of Appeal asserted in *obiter* that on proper facts punitive damages would be available in negligence and nuisance as well. In *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228, the British Columbia Court of Appeal awarded punitive damages in a negligence case on the principle that they ought to be available whenever "the conduct of the defendant [was] such as to merit condemnation by the [c]ourt" (p. 250). This broader approach seems to be in line

dommages-intérêts punitifs. La Cour suprême des États-Unis a une fois de plus rappelé que, bien que la ligne de démarcation constitutionnelle permettant de déterminer si la punition est exagérément disproportionnée par rapport à la gravité de la conduite répréhensible soit [TRADUCTION] « intrinsèquement imprécise » (p. 1684), les trois facteurs suivants, énoncés dans l'arrêt *BMW* (1996), précité, constituent des [TRADUCTION] « balises » (p. 605) à cet égard : (1) le caractère répréhensible de la conduite du défendeur ou le degré de culpabilité de ce dernier, (2) le lien entre la peine et le préjudice — réel ou potentiel — découlant des actes du défendeur; (3) les sanctions civiles ou criminelles imposées dans d'autres affaires pour une conduite comparable.

F. *Conclusions de l'étude comparative*

Voici, pour les besoins de la présente analyse, les enseignements que je tire de l'expérience des autres pays de common law qui, selon moi, s'accorde aux pratiques et précédents canadiens.

Premièrement, la limitation des dommages-intérêts punitifs par l'établissement de « catégories » est inefficace et elle a à juste titre été rejetée au Canada dans l'arrêt *Vorvis*, précité, p. 1104-1106. Le mécanisme de modération ne devrait pas reposer sur la catégorisation d'une affaire mais plutôt sur la détermination rationnelle des circonstances justifiant, dans une action civile, d'ajouter une sanction en sus des dommages-intérêts compensatoires. La nature même des dommages-intérêts punitifs limitera largement l'application de cette réparation aux délits intentionnels (comme dans l'affaire *Hill*, précitée) ou de manquement à une obligation de fiduciaire (comme dans l'affaire *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6), mais l'arrêt *Vorvis* lui-même a confirmé que des dommages-intérêts punitifs pouvaient exceptionnellement être accordés en matière contractuelle. Dans une remarque incidente dans l'arrêt *Denison c. Fawcett*, [1958] O.R. 312, la Cour d'appel de l'Ontario a signalé que, lorsque les faits le justifiaient, de tels dommages-intérêts pouvaient également être accordés dans les affaires de négligence ou de nuisance. Dans l'arrêt *Robitaille c. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R.

2002 SCC 18 (CanLII)

with most common law jurisdictions apart from England.

Second, there is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill*, *supra*, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").

Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts (*Gray*, *supra*; *Daniels*, *supra*), but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance. (*Buxbaum (Litigation guardian of) v. Buxbaum*, [1997] O.J. No. 5166 (QL) (C.A.); *Glendale v. Drozdzik* (1993), 77 B.C.L.R. (2d) 106 (C.A.); *Pollard v. Gibson* (1986), 1 Y.R. 167 (S.C.); *Joanisse v. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224 (S.C.); *Canada v. Lukasik* (1985), 18 D.L.R. (4th) 245 (Alta. Q.B.); *Wittig v. Wittig* (1986), 53 Sask. R. 138 (Q.B.)) The Ontario Law Reform Commission, *supra*, recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in

(3d) 228, s'appuyant sur le principe selon lequel des dommages-intérêts punitifs devraient être accordés dans tous les cas où [TRADUCTION] « la conduite des défendeurs mérite d'être condamnée par le [t]ribunal » (p. 250), la Cour d'appel de la Colombie-Britannique a accordé des dommages-intérêts de cette nature dans une affaire de négligence. Cette conception plus large semble être partagée par la plupart des pays de common law, exception faite de l'Angleterre.

68 Deuxièmement, un large consensus s'est établi à partir de l'opinion exprimée par le lord juge en chef Pratt, en 1763, selon laquelle les dommages-intérêts punitifs ont comme objectifs généraux la punition (au sens de châtiment), la dissuasion de l'auteur de la faute et d'autrui ainsi que la dénonciation (ou, pour reprendre les propos suivants du juge Cory dans l'arrêt *Hill*, précité, par. 196, les dommages-intérêts punitifs sont « le moyen par lequel le jury ou le juge exprime son outrage à l'égard du comportement inacceptable »).

69 Troisièmement, il est généralement reconnu que le premier mécanisme punitif est le droit criminel (et les infractions d'ordre réglementaire) et qu'il faut recourir aux dommages-intérêts punitifs uniquement dans les cas exceptionnels et faire alors preuve de modération. Dans certains pays (par exemple l'Australie et la Nouvelle-Zélande), de tels dommages-intérêts ne peuvent être accordés lorsqu'un tribunal de juridiction criminelle a infligé une peine à l'égard d'une infraction découlant en substance des mêmes faits (*Gray*, précité; *Daniels*, précité). Ailleurs, notamment au Canada, l'approche dominante consiste à considérer la condamnation criminelle comme un facteur parmi d'autres, quoiqu'on reconnaisse qu'elle puisse prendre une grande importance. (*Buxbaum (Litigation guardian of) c. Buxbaum*, [1997] O.J. No. 5166 (QL) (C.A.); *Glendale c. Drozdzik* (1993), 77 B.C.L.R. (2d) 106 (C.A.); *Pollard c. Gibson* (1986), 1 Y.R. 167 (C.S.); *Joanisse c. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224 (C.S.); *Canada c. Lukasik* (1985), 18 D.L.R. (4th) 245 (B.R. Alb.); *Wittig c. Wittig* (1986), 53 Sask. R. 138 (B.R.)) Dans son rapport, *op. cit.*, p. 46, la Commission de réforme du droit de l'Ontario a

2002 SCC 18 (CanLII)

any criminal or other similar proceeding brought against the defendant" (p. 46).

70 Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell*, *supra*, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.

71 Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

72 Sixth, it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

73 Seventh, none of the common law jurisdictions has adopted (except by statute) a formulaic approach, as advocated by the intervener the Insurance Council of Canada in this appeal, such as a fixed cap or fixed ratio between compensatory and punitive damages. The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.

recommandé que [TRADUCTION] « le tribunal soit habilité à tenir compte de toute peine antérieure infligée à l'issue d'une poursuite criminelle ou d'une instance analogue visant le défendeur ainsi que du caractère adéquat de cette sanction ».

Quatrièmement, la panoplie des épithètes péjoratives consacrées (« abusif » « oppressif », « malveillante », etc.) est insuffisante pour assister (ou modérer) le juge ou le jury appelé à fixer le montant à accorder. Dans l'arrêt *Cassell*, précité, p. 1129, lord Diplock a qualifié cette liste [TRADUCTION] « [d']éventail complet des épithètes dépréciatives employées par les juges ». Il est préférable de recourir à une approche qui fasse appel davantage à la raison et moins à l'exhortation.

Cinquièmement, tous les pays cherchent à favoriser la rationalité. Lorsqu'un tribunal se penche sur la question des dommages-intérêts punitifs, il doit mettre en corrélation les faits de l'affaire et les buts visés par de tels dommages-intérêts et se demander en quoi, dans ce cas *particulier*, leur attribution favoriserait la réalisation de l'un ou l'autre des objectifs du droit, et quelle est la somme la moins élevée qui permettrait d'atteindre ce but, car l'attribution de toute somme plus élevée serait irrationnelle.

Sixièmement, il est rationnel d'utiliser les dommages-intérêts punitifs pour dépouiller l'auteur de la faute des profits qu'elle lui a rapportés lorsque le montant des dommages-intérêts compensatoires ne représenterait rien d'autre que le coût d'un permis lui permettant d'accroître ses bénéfices tout en bafouant de façon inacceptable les droits d'autrui, d'ordre juridique ou fondés sur l'equity.

Septièmement, aucun pays de common law n'a adopté (sauf par voie législative) d'approche fondée sur l'application d'une formule tel un plafond fixe ou un ratio déterminé entre les dommages-intérêts compensatoires et punitifs, comme le préconise le Conseil d'assurances du Canada en l'espèce. L'aspect auquel il faut s'attacher n'est pas la perte du demandeur, mais la conduite répréhensible du défendeur. En procédant de façon mécanique ou en appliquant une formule, on ne fait pas une place suffisante aux nombreuses variables qui doivent être prises en considération pour prononcer une décision équitable.

2002 SCC 18 (CanLII)

Eighth, the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes*, *supra*, and affirmed here in *Hill*, *supra*.

Ninth, it has become evident that juries can and should receive more guidance and help from the judges in terms of their mandate. They should be told in some detail about the function of punitive damages and the factors that govern both the award and the assessment of a proper amount. Juries should not be thrown into their assignment without any help, then afterwards be criticized for the result.

Tenth, and finally, there is substantial consensus (even the United States is moving in this direction) that punitive damages are not at large (as pointed out by Cory J. in *Hill*, *supra*, at para. 197) and that an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case.

With the benefit of these general principles, I now turn to the specific issues raised by this appeal.

(1) Punitive Damages for Breach of Contract

This, as noted, is a breach of contract case. In *Vorvis*, *supra*, this Court held that punitive damages are recoverable in such cases provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong" (p. 1106). The scope to be given this expression is the threshold question in this case, i.e., is a breach of an insurer's duty to act in good faith an actionable wrong independent of the loss claim under the fire insurance policy? *Vorvis* itself was a case about the employer's breach of

74 Huitièmement, la règle cardinale en matière de quantum est la *proportionnalité*. La réparation globale accordée — c.-à-d. les dommages-intérêts compensatoires, les dommages-intérêts punitifs et toute autre sanction se rapportant à la même conduite répréhensible — doit avoir un lien rationnel avec les objectifs poursuivis par l'attribution des dommages-intérêts punitifs (châtiment, dissuasion et dénonciation). Le critère « si, mais seulement si » formulé dans l'arrêt *Rookes*, précité, et confirmé au Canada dans l'arrêt *Hill*, précité, jouit donc d'assises solides.

75 Neuvièmement, il est devenu évident que les jurys peuvent et doivent recevoir des juges davantage d'indications et d'assistance quant à la mission qui leur est confiée. Il faut leur expliquer de manière assez détaillée le rôle des dommages-intérêts punitifs et les facteurs qui régissent l'opportunité d'une telle sanction et la détermination de son quantum. Il ne faut pas abandonner les jurés à leur sort et critiquer ensuite leur décision.

76 Enfin, dixièmement, il existe un large consensus (tendance qui est observable même aux États-Unis) sur le fait que les dommages-intérêts punitifs ne sont pas généraux (comme l'a signalé le juge Cory dans l'arrêt *Hill*, précité, par. 197) et qu'une cour d'appel peut intervenir lorsqu'ils excèdent la limite maximale d'une réponse rationnelle et mesurée aux faits en cause.

77 À la lumière de ces principes généraux, je vais maintenant examiner les questions particulières que soulève le présent pourvoi.

(1) Dommages-intérêts punitifs en cas de rupture de contrat

78 Comme il a été signalé plus tôt, il s'agit en l'espèce d'une affaire de rupture de contrat. Dans l'arrêt *Vorvis*, précité, p. 1106, notre Cour a jugé que de tels dommages-intérêts sont recouvrables dans ce genre d'affaires si la conduite reprochée au défendeur constitue en elle-même une faute donnant ouverture à action. La portée à donner à cette expression est la question préliminaire à laquelle il faut répondre en l'espèce : Le manquement par un assureur à son obligation d'agir de bonne foi constitue-t-il,

2002 SCC 18 (CanLII)

an employment contract. This is how McIntyre J. framed the rule at pp. 1105-6:

> When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff. [Emphasis added.]

This view, McIntyre J. said (at p. 1106), "has found approval in the *Restatement on the Law of Contracts 2d* in the United States", which reads as follows:

> Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. [Emphasis added.]

Applying these principles in *Vorvis*, McIntyre J. stated, at p. 1109:

> Each party had the right to terminate the contract without the consent of the other, and where the employment contract was terminated by the employer, the appellant was entitled to reasonable notice of such termination or payment of salary and benefits for the period of reasonable notice. The termination of the contract on this basis by the employer is not a wrong in law and, where the reasonable notice is given or payment in lieu thereof is made, the plaintiff — subject to a consideration of aggravated damages which have been allowed in some cases but which were denied in this case — is entitled to no further remedy . . . . [Emphasis added.]

Wilson J., with whom L'Heureux-Dubé J. concurred, dissented. She did not agree "that punitive damages can only be awarded when the misconduct is in itself an 'actionable wrong'". She stated, at p. 1130:

indépendamment de la demande d'indemnité présentée en vertu de la police d'assurance-incendie, une faute donnant ouverture à action? L'affaire *Vorvis* portait sur la rupture d'un contrat de travail par l'employeur. Voici comment le juge McIntyre a formulé la règle, aux p. 1105-1106 :

> Quand peut-on accorder des dommages-intérêts punitifs? Il ne faut jamais oublier que lorsqu'elle est imposée par un juge ou un jury, une punition est infligée à une personne par un tribunal en vertu du processus judiciaire. Qu'est-ce qui est puni? Ce ne peut certainement pas être simplement le comportement que le tribunal désapprouve, quels que puissent être les sentiments du juge. Dans une société civilisée, on ne saurait infliger de peine sans une justification en droit. L'imposition d'une telle peine ne peut se justifier que par la conclusion qu'il y a eu méfait donnant ouverture à un droit d'action et qui a causé le préjudice allégué par le demandeur. [Je souligne.]

Ce point de vue, d'affirmer le juge McIntyre, à la p. 1106, « a été approuvé aux États-Unis dans *Restatement on the Law of Contracts 2d* » :

> [TRADUCTION] Des dommages-intérêts punitifs ne sont pas recouvrables pour la violation d'un contrat à moins que la conduite qui constitue la violation ne constitue aussi un délit pour lequel des dommages-intérêts punitifs sont recouvrables. [Je souligne.]

Appliquant ces principes dans l'affaire *Vorvis*, le juge McIntyre a dit ceci, à la p. 1109 :

> Chacune des parties avait le droit de résilier le contrat de travail sans le consentement de l'autre et, si l'employeur le résiliait, l'appelant avait droit à un préavis raisonnable de cette résiliation ou au paiement d'un salaire et d'avantages pendant la période de préavis raisonnable. La résiliation du contrat dans ces conditions ne constitue pas un acte fautif en droit et, s'il y a eu préavis raisonnable ou versement d'une somme qui en tienne lieu, le demandeur n'a droit à aucune autre réparation, sauf la possibilité de dommages-intérêts majorés qui ont été accordés dans certaines affaires, mais qui ont été refusés en l'espèce . . . [Je souligne.]

Madame le juge Wilson, aux motifs de laquelle a souscrit madame le juge L'Heureux-Dubé, ne partageait pas cet avis. Elle n'estimait pas que les « dommages-intérêts punitifs ne peuvent être accordés que si la mauvaise conduite constitue en elle-même "un méfait donnant ouverture à un droit d'action" ». Elle s'est exprimée ainsi, à la p. 1130 :

2002 SCC 18 (CanLII)

In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

Selon moi, la bonne méthode consiste à évaluer la conduite à la lumière de toutes les circonstances et à déterminer si elle mérite d'être punie en raison de son caractère scandaleusement dur, vengeur, répréhensible ou malicieux. Sans aucun doute, une certaine conduite dont on juge qu'elle mérite d'être punie constituera un méfait donnant ouverture à un droit d'action tandis que ce ne sera pas nécessairement le cas d'un autre type de conduite.

In the case at bar, Pilot acknowledges that an insurer is under a duty of good faith and fair dealing. Pilot says that this is a contractual duty. *Vorvis*, it says, requires a tort. However, in my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an "actionable wrong" within the *Vorvis* rule, which does not require an independent tort. I say this for several reasons.

79 En l'espèce, la société Pilot reconnaît qu'un assureur a l'obligation d'agir de bonne foi et équitablement, mais elle prétend qu'il s'agit d'une obligation contractuelle, alors que l'arrêt *Vorvis* exige l'existence d'une faute d'ordre délictuel. À mon avis, toutefois, le manquement à l'obligation contractuelle d'agir de bonne foi est indépendant du manquement à l'obligation d'indemniser l'assuré de sa perte et il s'y ajoute. Il constitue une faute donnant ouverture à action au sens de la règle énoncée dans *Vorvis*, laquelle n'exige pas un délit indépendant. Plusieurs raisons m'incitent à tirer cette conclusion.

First, McIntyre J. chose to use the expression "actionable wrong" instead of "tort" even though he had just reproduced an extract from the *Restatement* which *does* use the word tort. It cannot be an accident that McIntyre J. chose to employ a much broader expression when formulating the Canadian test.

80 Premièrement, le juge McIntyre a choisi le terme anglais « *actionable wrong* » (« faute donnant ouverture à action ») plutôt que « *tort* » (« délit »), même s'il venait tout juste de citer un extrait du *Restatement* qui *lui* emploie ce mot. Ce ne saurait être par hasard que le juge McIntyre a choisi une expression beaucoup plus large pour énoncer le critère applicable au Canada.

Second, in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, at para. 26, this Court, referring to McIntyre J.'s holding in *Vorvis*, said "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare" (emphasis added). Rare they may be, but the clear message is that such cases do exist. The Court has thus confirmed that punitive damages can be awarded in the absence of an accompanying tort.

81 Deuxièmement, dans l'arrêt *Banque Royale du Canada c. W. Got & Associates Electric Ltd.*, [1999] 3 R.C.S. 408, par. 26, se référant à la décision du juge McIntyre dans l'arrêt *Vorvis*, notre Cour a indiqué qu'« il [est] rare que les circonstances justifient l'attribution de dommages-intérêts punitifs pour violation de contrat en l'absence d'actions constituant également un délit » (je souligne). De tels cas sont peut-être rares, mais la Cour a clairement indiqué qu'ils existent, confirmant ainsi que des dommages-intérêts punitifs peuvent être accordés en l'absence d'un délit coexistant.

Third, the requirement of an independent tort would unnecessarily complicate the pleadings, without in most cases adding anything of substance. *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, held that a common law duty of care sufficient to

82 Troisièmement, le fait d'exiger un délit indépendant compliquerait inutilement la rédaction des actes de procédure, sans rien ajouter de substantiel dans la plupart des cas. Dans l'arrêt *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, notre Cour a

2002 SCC 18 (CanLII)

found an action in tort can arise within a contractual relationship, and in that case proceeded with the analysis in tort instead of contract to deprive an allegedly negligent solicitor of the benefit of a limitation defence. To require a plaintiff to formulate a tort in a case such as the present is pure formalism. An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

jugé que des rapports contractuels pouvaient donner naissance à une obligation de diligence en common law suffisante pour fonder une action en responsabilité civile délictuelle et, au terme d'une analyse fondée sur la responsabilité délictuelle plutôt que contractuelle, elle a écarté en matière contractuelle la défense de prescription invoquée par un avocat accusé de négligence. Le fait d'obliger le demandeur à énoncer un délit dans une affaire comme la présente n'est que pur formalisme. Il faut certes une faute indépendante donnant ouverture à action, mais elle peut découler de la violation d'une stipulation contractuelle distincte ou d'une autre obligation, telle une obligation de fiduciaire.

83 I should add that insurance companies have also asserted claims for punitive damages against their insured for breach of the mutual "good faith" obligation in insurance contracts. In *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Q.B.), the court awarded $20,000 in punitive damages against an Aetna policy holder in addition to an order for the repayment of $260,000 in disability payments. The insurance company was not required to identify a separate tort to ground its claim for punitive damages. In that case it was the misconduct of the policy holder, not the insurance company, that was seen as such a marked departure from ordinary standards of decent behaviour as to invite the censure of punitive damages, *per* Murray J. at paras. 84-85:

J'ajouterais que des sociétés d'assurance ont elles aussi demandé des dommages-intérêts punitifs à des assurés pour manquement à l'obligation mutuelle de « bonne foi » comprise dans les contrats d'assurance. Dans *Andrusiw c. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (B.R.), le tribunal a condamné le titulaire de la police à verser des dommages-intérêts punitifs de 20 000 $ à Aetna, en plus de l'obliger à rembourser 260 000 $ en prestations d'invalidité. La société d'assurance n'a pas été obligée de préciser l'existence d'un délit distinct pour justifier sa demande de dommages-intérêts punitifs. Dans cette affaire, c'est la conduite répréhensible du titulaire de la police — et non de l'assureur — qui a été considérée comme une dérogation si marquée par rapport aux normes ordinaires de bonne conduite qu'elle commandait la condamnation que constituent les dommages-intérêts punitifs. Le juge Murray s'est exprimé ainsi aux par. 84-85 :

> This leaves the question of whether or not the plaintiff's conduct was so reprehensible and high-handed that he should be punished for his behaviour. Counsel for the defendant makes the point that the plaintiff embarked on a deliberate course of conduct to misrepresent facts to the defendant in order to continue to collect disability benefits. If the only consequence of this behaviour is forfeiture of his claim then in effect he is no worse off than if he had been truthful in the first place and deterrence which is one of the objects of granting punitive damages is given no effect.
>
> A great deal has been made in the case law, to which this court was referred, of the fact that insurers vis-à-vis their insureds are in a superior bargaining position and

> [TRADUCTION] Il reste à se demander si la conduite du demandeur était répréhensible et abusive au point qu'il faille le punir à cet égard. L'avocat de la défenderesse fait valoir que le demandeur a, de façon délibérée, présenté inexactement les faits à la défenderesse afin de continuer à percevoir des prestations d'invalidité. Si la seule conséquence de ce comportement est la perte par le demandeur de son droit aux prestations, ce dernier n'est pas dans une situation plus défavorable que s'il avait dit la vérité au départ, et on ne produit aucun effet dissuasif, un des objectifs des dommages-intérêts punitifs.
>
> On a fait grand cas, dans la jurisprudence qui a été citée à notre cour, du fait que les assureurs sont en position de force vis-à-vis leurs assurés lorsqu'il négocient et

2002 SCC 18 (CanLII)

one which places the insureds in positions of dependency and vulnerability. Equally, insurers must not be looked upon as fair game. It is a two-way street founded upon the principle of utmost good faith arising from the very nature of the contract. Thus, it is appropriate that punitive damages be awarded and I do so in the sum of $20,000.00.

I refrain from any comment on the correctness of this award, but to those who subscribe to "the sting" approach to punitive damages, I pose the question whether an award of $20,000 against a cheating policy holder in the *Aetna* case has at least as much "sting", or possibly more, than the award of $1 million against Pilot in this case.

(2) Was the Claim for Punitive Damages Properly Pleaded?

The respondent says that even if a separate claim arising under the insurance contract *could* provide the basis for punitive damages, none was pleaded in this case.

In other words, while "punitive and exemplary damages" are explicitly requested in para. 13 of the statement of claim, the material facts necessary for the grant of such an award are not spelled out in the body of the pleading. Further, the respondent in its cross-appeal says that even if the plaintiff has established an "independent actionable wrong", she failed to prove any separate and distinct damage flowing from it. The appellant thus failed, Pilot says, to meet the *Vorvis* requirements and her claim for punitive damages ought to have been dismissed.

There is some case law that says a claim for punitive damages need not be specifically pleaded as it is included conceptually in a claim for general damages: *Edwards v. Harris-Intertype (Canada) Ltd.* (1983), 40 O.R. (2d) 558 (H.C.), aff'd (1984), 9 D.L.R. (4th) 319 (Ont. C.A.); *Grenn v. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (Ont. C.A.), *Starkman v. Delhi Court Ltd.* (1960), 24 D.L.R. (2d) 152 (Ont. H.C.), aff'd (1961), 28 D.L.R. (2d) 269 (Ont. C.A.); *Gastebled v. Stuyck* (1973), 12 C.P.R.

que cette position favorable rend les assurés dépendants et vulnérables. Il ne s'ensuit pas pour autant qu'il est de bonne guerre de duper les assureurs. De par sa nature même, ce contrat implique une réciprocité fondée sur la bonne foi la plus absolue. Il convient donc d'accorder des dommages-intérêts punitifs, que j'établis à 20 000 $.

Je m'abstiendrai de tout commentaire sur la justesse de la somme accordée, mais à ceux qui croient que les dommages-intérêts doivent « faire mal » je demanderai si la condamnation de l'assuré fraudeur à des dommages-intérêts punitifs de 20 000 $ dans l'affaire *Aetna* ne fait pas tout aussi mal, sinon davantage, que celle de Pilot au paiement de un million de dollars en l'espèce.

(2) Les dommages-intérêts punitifs ont-ils été demandés régulièrement dans les actes de procédure?

84 Selon l'intimée, même si une demande distincte découlant du contrat d'assurance *pouvait* fonder l'attribution de dommages-intérêts punitifs, aucune demande de la sorte n'a été présentée en l'espèce.

85 Autrement dit, bien que des « dommages-intérêts punitifs et exemplaires » soient explicitement demandés au par. 13 de la déclaration, l'acte de procédure n'expose pas les faits matériels justifiant de faire droit à cette conclusion. Dans son pourvoi incident, l'intimée soutient en outre que, même si la demanderesse a établi l'existence d'une [TRADUCTION] « faute indépendante donnant ouverture à action », elle n'a pas prouvé qu'un préjudice distinct en découlait. L'appelante n'a donc pas, d'affirmer Pilot, satisfait aux exigences énoncées dans l'arrêt *Vorvis* et sa demande de dommages-intérêts punitifs aurait dû être rejetée.

86 Dans certaines décisions, on affirme qu'il n'est pas nécessaire de faire expressément état des dommages-intérêts punitifs, puisqu'ils sont conceptuellement compris dans la demande de dommages-intérêts généraux : *Edwards c. Harris-Intertype (Canada) Ltd.* (1983), 40 O.R. (2d) 558 (H.C.), conf. par (1984), 9 D.L.R. (4th) 319 (C.A. Ont.); *Grenn c. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (C.A. Ont.); *Starkman c. Delhi Court Ltd.* (1960), 24 D.L.R. (2d) 152 (H.C. Ont.), conf. par

2002 SCC 18 (CanLII)

(2d) 102 (F.C.T.D.), aff'd (1974), 15 C.P.R. (2d) 137 (F.C.A.); *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta. S.C., App. Div.). In my view, the suggestion that no pleading is necessary overlooks the basic proposition in our justice system that before someone is *punished* they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. This principle, which is really no more than a rule of fairness, is made explicit in the civil rules of some of our trial courts. For example, in Saskatchewan the *Queen's Bench Rules* require that claims for punitive damages be expressly pleaded and specify the misconduct which is claimed to give rise to such damages (*Rieger v. Burgess*, [1988] 4 W.W.R. 577 (Sask. C.A.); *Lauscher v. Berryere* (1999), 172 D.L.R. (4th) 439 (Sask. C.A.)). Rule 25.06(9) of the Ontario *Rules of Civil Procedure* also has the effect of requiring that punitive damages claims be expressly pleaded. It is quite usual, of course, for the complexion of a case to evolve over time, but a pleading can always be amended on terms during the proceedings, depending on the existence and extent of prejudice not compensable in costs, and the justice of the case.

87 One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious"

(1961), 28 D.L.R. (2d) 269 (C.A. Ont.); *Gastebled c. Stuyck* (1973), 12 C.P.R. (2d) 102 (C.F. 1re inst.), conf. par (1974), 15 C.P.R. (2d) 137 (C.A.F.); *Paragon Properties Ltd. c. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156 (C.S. Alb., div. app.). À mon avis, l'affirmation selon laquelle aucune allégation n'est nécessaire à cet égard ne tient pas compte du principe fondamental de notre système de justice voulant que quiconque s'expose à une *punition* doit être informé suffisamment à l'avance de ce qu'on lui reproche afin de pouvoir apprécier l'ampleur du risque qu'il court et d'avoir la possibilité de répliquer. Cela ne peut se faire que si la demande de dommages-intérêts punitifs, par opposition à la demande de dommages-intérêts compensatoires, n'est pas incluse dans une vague mention des dommages-intérêts généraux. Ce principe, qui n'est en fait rien de plus qu'une règle d'équité, est énoncé dans les règles de procédure civile de certains tribunaux de première instance. Par exemple, les *Règles de la Cour du Banc de la Reine* de la Saskatchewan exigent que les dommages-intérêts punitifs soient expressément demandés et qu'on précise la conduite répréhensible qui, prétend-on, y donnerait ouverture (*Rieger c. Burgess*, [1988] 4 W.W.R. 577 (C.A. Sask.); *Lauscher c. Berryere* (1999), 172 D.L.R. (4th) 439 (C.A. Sask.)). Le paragraphe 25.06(9) des *Règles de procédure civile* de l'Ontario a également pour effet d'exiger du plaideur qui entend réclamer des dommages-intérêts punitifs qu'il les demande expressément dans son acte de procédure. Il va de soi qu'il arrive fréquemment qu'une affaire évolue, mais il est toujours possible, à certaines conditions, de modifier un acte de procédure en cours d'instance, s'il existe un préjudice important non susceptible d'indemnisation par l'attribution de dépens et si les fins de la justice le requièrent.

La déclaration a notamment pour objet d'informer le défendeur des conclusions recherchées contre lui, et il serait manifestement inéquitable qu'à l'issue de l'instance il ait la surprise de se voir condamné à une somme plusieurs fois supérieure à celle qui, selon lui, était en litige. Il faut en outre que les faits invoqués pour justifier les dommages-intérêts punitifs soient exposés avec assez de précision. Quoiqu'ils expriment bien l'essence de la réparation

2002 SCC 18 (CanLII)

(*per* McIntyre J. in *Vorvis*, *supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

Whether or not a defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case.

In this case, the plaintiff specifically asked for punitive damages in her statement of claim and if the respondent was in any doubt about the facts giving rise to the claim, it ought to have applied for particulars and, in my opinion, it would have been entitled to them.

However, the respondent did not apply for particulars, and I think there is sufficient detail in the statement of claim to show that its failure to do so was not a self-inflicted injustice. There was no surprise except perhaps as to the quantum, which resulted in an amendment of the statement of claim at trial. Quite apart from the advance notice that she was seeking punitive damages (para. 1(e)), the appellant specifically pleaded the basis for the independent "actionable wrong" in para. 10:

10. The Plaintiff pleads an implied term of the insurance contract was a covenant of good faith and fair dealings which required the Defendant, Pilot Insurance Company to deal fairly and in good faith in handling the claim of the Plaintiff.

The appellant also pleaded that Pilot's manner of dealing with her claim had created "hardship" of which "the Defendants, through their agents and employees always had direct and ongoing knowledge" (para. 8). In para. 14 she pleaded that "as a result of the actions of the Defendants, the Plaintiff has suffered and continues to suffer great emotional stress" (although there was no claim for aggravated damages). The respondent specifically

recherchée, les adjectifs consacrés qui décrivent un comportement comme étant « dur, vengeur, répréhensible et malicieux » (*Vorvis*, précité, p. 1108, le juge McIntyre), ou des termes péjoratifs équivalents, tendent davantage à qualifier le comportement qu'à le décrire.

88 La question de savoir si, dans les faits, un défendeur a été pris par surprise par un acte de procédure insuffisant ou défectueux est décidée selon les circonstances propres à chaque espèce.

89 En l'occurrence, la demanderesse a expressément demandé des dommages-intérêts punitifs dans sa déclaration et si l'intimée entretenait le moindre doute au sujet des faits qui fondaient les conclusions de la demanderesse, elle pouvait demander des précisions auxquelles, selon moi, elle aurait eu droit.

90 Toutefois, l'intimée n'a pas demandé de précisions, et je crois que la déclaration renferme suffisamment de précisions pour indiquer que cette omission n'est pas une injustice qu'elle s'est infligée à elle-même. Il n'y a pas eu de surprise sauf, peut-être, en ce qui concerne le quantum, ce qui a entraîné la modification de la déclaration au procès. Indépendamment du fait que, dans sa déclaration (au par. 1(e)), l'appelante avisait l'intimée qu'elle demandait des dommages-intérêts punitifs, elle y précisait également, au par. 10, le fondement de son allégation relative à l'existence d'une [TRADUCTION] « [faute indépendante] donnant ouverture à action » :

[TRADUCTION] 10. La partie demanderesse plaide que le contrat d'assurance comportait une stipulation implicite obligeant la partie défenderesse, Pilot Insurance Company, à agir de bonne foi et de manière équitable dans le règlement de la demande d'indemnité de la partie demanderesse.

91 L'appelante a également prétendu que la façon dont Pilot a traité sa demande d'indemnité lui avait créé des [TRADUCTION] « difficultés » dont « les défendeurs, par le truchement de leurs mandataires et préposés, étaient directement et continuellement informés » (par. 8). Au paragraphe 14, elle a allégué ceci : [TRADUCTION] « les actions des défendeurs ont causé et continuent de causer à la demanderesse un stress émotif énorme » (bien qu'elle n'ait pas

2002 SCC 18 (CanLII)

denied acting in bad faith (Statement of Defence and Counterclaim of the Defendant, at para. 6). The statement of claim was somewhat deficient in failing to relate the plea for punitive damages to the precise facts said to give rise to the outrage, but Pilot was content to go to trial on this pleading and I do not think it should be heard to complain about it at this late date.

92 As to the respondent's objection that the pleading does not allege separate and distinct damages flowing from the independent actionable wrong, the respondent's argument overlooks the fact that punitive damages are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss. As Cory J. observed in *Hill*, *supra*, at para. 196, "[p]unitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". In any event, there is a good deal of evidence of emotional stress and financial cost over and above the loss that would have been incurred had the claim been settled in good faith within a reasonable time.

(3) Was the Jury Charge Adequate?

93 The respondent argues that the trial judge did not give the jury adequate guidance on how to assess punitive damages. There is considerable merit in this submission. The judge's charge on this point was skeletal. It is my view, for the reasons already discussed, that the charge on punitive damages should not be given almost as an afterthought but should be understood as an important source of control and discipline. The jurors should not be left to guess what their role and function is.

94 To this end, not only should the pleadings of punitive damages be more rigorous in the future

demandé de dommages-intérêts majorés). L'intimée a expressément nié avoir fait preuve de mauvaise foi (Défense et demande reconventionnelle de la partie défenderesse, par. 6). La déclaration était jusqu'à un certain point défectueuse en ce qu'elle ne rattachait pas la demande de dommages-intérêts punitifs aux faits précis censés en être à l'origine, mais Pilot s'en est satisfaite pour lier contestation et je ne crois pas qu'elle soit recevable à se plaindre à une date aussi tardive.

Par ailleurs, quand l'intimée objecte que la déclaration ne fait pas état de dommages distincts découlant de la faute indépendante donnant ouverture à action, elle oublie que les dommages-intérêts punitifs sont liés à la nature de la conduite du défendeur et non à l'ampleur de la perte (si perte il y a) du demandeur. Comme l'a signalé le juge Cory dans l'arrêt *Hill*, précité, par. 196, « [l]es dommages-intérêts punitifs n'ont aucun lien avec ce que le demandeur est fondé à recevoir au titre d'une compensation. Ils visent non pas à compenser le demandeur, mais à punir le défendeur. C'est le moyen par lequel le jury ou le juge exprime son outrage à l'égard du comportement inacceptable du défendeur ». Quoi qu'il en soit, il ne manque pas d'éléments de preuve indiquant que l'appelante a souffert — émotivement et financièrement — bien plus qu'elle ne l'aurait fait si Pilot avait réglé la demande d'indemnité de bonne foi et dans un délai raisonnable.

(3) L'exposé au jury était-il adéquat?

L'intimée soutient que le juge de première instance n'a pas donné au jury suffisamment d'indications sur la façon d'établir les dommages-intérêts punitifs. Cet argument a une valeur considérable. L'exposé du juge sur cette question était sommaire. Je suis d'avis, pour les raisons exposées précédemment, que les directives sur la question des dommages-intérêts punitifs ne doivent pas être traitées pratiquement comme un aspect accessoire, mais elles doivent plutôt être considérées comme une importante mesure de modération et de discipline. Il ne faut pas que les jurés aient à deviner ce qu'on attend d'eux.

Pour cela, non seulement les plaideurs devront-ils rédiger avec plus de rigueur leurs prétentions au

2002 SCC 18 (CanLII)

than in the past (see para. 87 above), but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

These particular expressions are not, of course, obligatory. What is essential in a particular case will be a function of its particular circumstances, the

sujet des dommages-intérêts punitifs dans les actes de procédure (voir le par. 87 ci-dessus), mais il serait également utile que le juge du procès fasse comprendre les points suivants au jury dans son exposé, en se répétant s'il le faut. (1) Les dommages-intérêts punitifs sont vraiment l'exception et non la règle. (2) Ils sont accordés *seulement* si le défendeur a eu une conduite malveillante, arbitraire ou extrêmement répréhensible, qui déroge nettement aux normes ordinaires de bonne conduite. (3) Lorsqu'ils sont accordés, leur quantum doit être raisonnablement proportionné, eu égard à des facteurs comme le préjudice causé, la gravité de la conduite répréhensible, la vulnérabilité relative du demandeur et les avantages ou bénéfices tirés par le défendeur, (4) ainsi qu'aux autres amendes ou sanctions infligées à ce dernier par suite de la conduite répréhensible en cause. (5) En règle générale, des dommages-intérêts punitifs sont accordés seulement lorsque la conduite répréhensible resterait autrement impunie ou lorsque les autres sanctions ne permettent pas ou ne permettraient probablement pas de réaliser les objectifs de châtiment, dissuasion et dénonciation. (6) L'objectif de ces dommages-intérêts n'est pas d'indemniser le demandeur, mais (7) de punir le défendeur comme il le mérite (châtiment), de le décourager — lui et autrui — d'agir ainsi à l'avenir (dissuasion) et d'exprimer la condamnation de l'ensemble de la collectivité à l'égard des événements (dénonciation). (8) Ils sont accordés *seulement* lorsque les dommages-intérêts compensatoires, qui ont dans une certaine mesure un caractère punitif, ne permettent pas de réaliser ces objectifs. (9) Leur quantum ne doit pas dépasser la somme nécessaire pour réaliser rationnellement leur objectif. (10) Bien que l'État soit généralement le bénéficiaire des amendes ou sanctions infligées pour cause de conduite répréhensible, les dommages-intérêts punitifs constituent pour le demandeur un « profit inattendu » qui s'ajoute aux dommages-intérêts compensatoires. (11) Dans notre système de justice, les juges et les jurys estiment que des dommages-intérêts punitifs modérés sont généralement suffisants, puisqu'ils entraînent inévitablement une stigmatisation sociale.

95

Il n'est évidemment pas impératif de reprendre ces expressions particulières. Les éléments essentiels dans une affaire donnée sont fonction des

2002 SCC 18 (CanLII)

need to emphasize the nature, scope and exceptional nature of the remedy, and fairness to both sides.

96 The trial judge should keep in mind that the standard of appellate review applicable to punitive damages ultimately awarded, is that a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct, as discussed below.

97 If counsel can agree on a "bracket" or "range" of an appropriate award, the trial judge should convey these figures to the jury, but at the present time specific figures should not be mentioned in the absence of such agreement (*Hill*, *supra*, *per* Cory J., at paras. 162-63). (This prohibition may have to be reexamined in future, based on further experience.) Counsel should also consider the desirability of asking the trial judge to advise the jury of awards of punitive damages made in comparable circumstances that have been sustained on appeal.

98 The foregoing suggestions are put forward in an effort to be helpful rather than dogmatic. They grow out of the observation in *Hill* that punitive damages are not "at large" (para. 197). Unless punitive damages can be approached rationally they ought not to be awarded at all. To the extent these suggestions are considered useful, they will obviously have to be both modified and elaborated to assist the jury on the facts of a particular case. The point, simply, is that jurors should not be left in any doubt about what they are to do and how they are to go about it.

99 It is evident that I am suggesting a more ample charge on the issue of punitive damages than was

circonstances qui lui sont propres à cette affaire, du besoin de souligner la nature, la portée et le caractère exceptionnel de cette réparation, ainsi que de l'obligation de faire preuve d'équité à l'endroit des deux parties.

Le juge du procès doit se rappeler que la norme de contrôle applicable en cas d'appel d'une décision accordant des dommages-intérêts punitifs consiste à se demander si un jury raisonnable et correctement instruit aurait pu conclure que la somme accordée, et non une somme inférieure, était rationnellement nécessaire pour punir la conduite répréhensible du défendeur, conformément aux explications données plus loin.

Lorsque les avocats peuvent s'entendre sur la « fourchette » des quanta appropriés, le juge de première instance devrait communiquer cette information au jury, mais, présentement, il ne devrait mentionner aucune somme précise s'il n'y a pas d'entente à cet égard : *Hill*, précité, le juge Cory, par. 162-163. (Cette prohibition pourrait devoir être réexaminée dans le futur, selon ce que l'expérience révélera.) Les avocats devraient également se demander s'il est souhaitable de demander au juge de renseigner le jury sur les sommes qui, dans des circonstances comparables, ont été accordées au titre des dommages-intérêts punitifs et qui ont été maintenues en appel.

Les suggestions qui précèdent sont faites dans le but d'assister les tribunaux et non de leur imposer un carcan. Ils découlent de l'observation formulée dans l'arrêt *Hill* et selon laquelle les dommages-intérêts punitifs ne sont pas généraux. Des dommages-intérêts punitifs ne devraient être accordés que si leur attribution a un fondement rationnel. Dans la mesure où les suggestions qui précèdent seront jugées utiles, elles devront évidemment, pour aider le jury, être adaptées et explicitées en fonction des faits particuliers de l'affaire. Bref, il s'agit simplement de veiller à ce que les jurés n'aient pas le moindre doute sur la nature de leur tâche et la façon de s'en acquitter.

Il est évident que je recommande un exposé plus détaillé sur la question des dommages-intérêts puni-

2002 SCC 18 (CanLII)

given in this case. Finlayson J.A. said that he was "not entirely happy with the trial judge's charge to the jury on the issue of punitive damages" (p. 661), and Laskin J.A. agreed that "[t]he trial judge might have given the jury more help than he did" (p. 656). However, both Finlayson and Laskin JJ.A. agreed that the jury charge covered the essentials, however lightly. This conclusion is reinforced by the fact that no objection was made by either counsel. With some hesitation, I agree with the Court of Appeal, unanimous on this point, that in the circumstances this ground of appeal should be rejected.

(4) Reviewing the Jury Award

(a) *Whether the Award of Punitive Damages in This Case was a Rational Response to the Respondent's Misconduct*

The applicable standard of review for "rationality" was articulated by Cory J. in *Hill*, *supra*, at para. 197:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

The "rationality" test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum.

The respondent claims that an insurer is entirely within its rights to thoroughly investigate a claim and exercise caution in evaluating the circumstances. It is not required to accept the initial views of its investigators. It is perfectly entitled to pursue further inquiries. I agree with these points. The problem here is that Pilot embarked on a "train of thought" as early as February 25, 1994 (see para. 7

tifs que celui qui a été fait en l'espèce. En Cour d'appel, le juge Finlayson a déclaré qu'il n'était pas [TRADUCTION] « entièrement satisfait des directives données par le juge de première instance au jury sur la question des dommages-intérêts punitifs » (p. 661), et le juge Laskin a admis que « [l]e juge de première instance aurait pu aider davantage le jury » (p. 656). Toutefois, ils ont tous les deux reconnu que l'exposé avait, bien que superficiellement, traité des divers éléments essentiels. L'absence d'objection de la part des deux avocats renforce cette conclusion. Non sans certaines hésitations, je souscris à l'opinion unanime exprimée par la Cour d'appel sur ce point et selon laquelle ce moyen d'appel doit être écarté dans les circonstances.

(4) Contrôle de la somme accordée par le jury

(a) *L'attribution de dommages-intérêts punitifs en l'espèce était-elle une réponse rationnelle à la conduite répréhensible de l'appelante?*

100 Dans l'arrêt *Hill*, précité, par. 197, le juge Cory a décrit ainsi la norme de contrôle applicable pour l'appréciation de la « rationalité » :

> Contrairement aux dommages-intérêts compensatoires, les dommages-intérêts punitifs ne sont pas généralisés. En conséquence, les tribunaux disposent d'une latitude et d'une discrétion beaucoup plus grandes en appel. Le contrôle en appel devrait consister à déterminer si les dommages-intérêts punitifs servent un objectif rationnel. En d'autres termes, la mauvaise conduite du défendeur était-elle si outrageante qu'il était rationnellement nécessaire d'accorder des dommages-intérêts punitifs dans un but de dissuasion?

101 Le critère de la « rationalité » s'applique tant pour statuer sur l'opportunité des dommages-intérêts punitifs que sur leur quantum.

102 L'intimée prétend qu'un assureur est entièrement fondé à procéder à une enquête approfondie en cas de demande d'indemnité et à faire montre de circonspection dans l'évaluation des circonstances de l'affaire. L'assureur n'est pas tenu d'accepter les opinions initiales de ses enquêteurs et il a parfaitement le droit d'effectuer des enquêtes supplémentaires. Je ne conteste pas ces affirmations. En l'espèce, le

2002 SCC 18 (CanLII)

above) that led to the arson trial, with nothing to go on except the fact that its policy holder had money problems.

103 The "train of thought" mentioned in the letter to Pilot from Derek Francis kept going long after the requirements of due diligence or prudent practice had been exhausted. There is a difference between due diligence and wilful tunnel vision. The jury obviously considered this case to be an outrageous example of the latter. In my view, an award of punitive damages (leaving aside the issue of quantum for the moment) was a rational response on the jury's part to the evidence. It was not an inevitable or unavoidable response, but it was a *rational* response to what the jury had seen and heard. The jury was obviously incensed at the idea that the respondent would get away with paying no more than it ought to have paid after its initial investigation in 1994 (plus costs). It obviously felt that something more was required to demonstrate to Pilot that its bad faith dealing with this loss claim was not a wise or profitable course of action. The award answered a perceived need for retribution, denunciation and deterrence.

104 The intervener, the Insurance Council of Canada, argues that the award of punitive damages will overdeter insurers from reviewing claims with due diligence, thus lead to the payment of unmeritorious claims, and in the end drive up insurance premiums. This would only be true if the respondent's treatment of the appellant is not an isolated case but is widespread in the industry. If, as I prefer to believe, insurers generally take seriously their duty to act in good faith, it will only be rogue insurers or rogue files that will incur such a financial penalty, and the extra economic cost inflicted by punitive damages will either cause the delinquents to mend their ways or, ultimately, move them on to lines of work

problème tient au fait que, dès le 25 février 1994 (voir le par. 7 ci-dessus), Pilot s'est enfermée dans une « logique » qui a conduit au procès où elle a invoqué l'incendie criminel, sans autre fondement que les difficultés financières de la titulaire de la police.

Pilot a persisté dans cette « logique » — dont Derek Francis a fait mention dans la lettre qu'il a adressée à Pilot — bien au-delà de ce que dictaient la diligence raisonnable ou la prudence. Il existe une différence entre faire preuve de diligence raisonnable et porter délibérément des œillères. De toute évidence, le jury a estimé être en présence d'un exemple inacceptable de la seconde situation. À mon avis, l'attribution de dommages-intérêts punitifs (indépendamment de leur quantum pour l'instant) constituait, eu égard à la preuve, une réponse rationnelle de la part du jury. Il ne s'agissait pas d'une réponse inévitable ou incontournable, mais d'une réponse *rationnelle* compte tenu de ce que le jury avait vu et entendu. Manifestement, le jury était indigné à l'idée que l'intimée puisse s'en tirer en payant uniquement la somme (majorée des dépens) qu'elle aurait eu à verser au terme de son enquête initiale en 1994. Le jury a clairement estimé qu'il fallait faire davantage pour démontrer à Pilot que la mauvaise foi dont elle avait fait preuve en traitant la demande d'indemnité n'était pas une conduite judicieuse ou profitable. La décision du jury répondait à la nécessité qu'il percevait de punir, de dénoncer et de dissuader.

Le Conseil d'assurances du Canada intervenant affirme que l'attribution de dommages-intérêts punitifs aura un effet de dissuasion excessif sur les assureurs, qui se montreront moins diligents dans l'examen des demandes d'indemnité et régleront des demandes non fondées, situation qui fera grimper les primes d'assurance en bout de ligne. Cela ne pourrait se produire que si le traitement réservé à l'appelante par l'intimé n'était pas un cas isolé, mais constituait une pratique généralisée dans ce secteur d'activité. Si, comme je préfère plutôt le croire, les assureurs prennent généralement au sérieux leur obligation d'agir de bonne foi, seulement des assureurs indésirables ou quelques dossiers épars seront

2002 SCC 18 (CanLII)

that do not call for a good faith standard of behaviour.

The Ontario Court of Appeal was unanimous that punitive damages in some amount were justified and I agree with that conclusion. This was an exceptional case that justified an exceptional remedy. The respondent's cross-appeal will therefore be dismissed.

We now come to the issue of quantum.

(b) *Whether the Jury's Award of $1 Million in Punitive Damages Should Be Restored*

In *Hill*, *supra*, Cory J., while emphasizing the overriding obligation of rationality, also recognized that the jury must be given some leeway to do its job. The issue of punitive damages, after all, is a matter that has been confided in the first instance to their discretion. Thus, to be reversed, their award of punitive damages must be "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate" (para. 159). Putting these two notions together, the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct.

This test provides an appellate court with supervisory powers over punitive damages that are more interventionist than in the case of other jury awards of general damages, where the courts may only intervene if the award is "so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice" (*Hill*, *supra*, at para. 159; *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.)). In the case of punitive damages, the emphasis is on the appellate court's obligation

l'objet d'une telle sanction financière et le coût supplémentaire imposé par les dommages-intérêts punitifs incitera les délinquants à s'amender ou bien les poussera vers des activités où la bonne foi n'est pas la norme de conduite requise.

105 La Cour d'appel a jugé, à l'unanimité, que des dommages-intérêts punitifs étaient justifiés, et je souscris à cette conclusion. Il s'agissait d'une affaire exceptionnelle justifiant une réparation exceptionnelle. Je suis donc d'avis de rejeter le pourvoi incident de l'intimée.

106 Je vais maintenant examiner la question du quantum.

(b) *Faut-il rétablir la somme de un million de dollars accordée par le jury au titre des dommages-intérêts punitifs?*

107 Dans l'arrêt *Hill*, précité, tout en soulignant le caractère primordial de l'obligation de rationalité, le juge Cory a également reconnu qu'il fallait laisser au jury une certaine latitude dans l'accomplissement de son travail. Après tout, la question des dommages-intérêts punitifs n'est-elle pas, en première instance, laissée à son appréciation? En conséquence, pour être justifié d'infirmer sa décision à cet égard, il faut que « le verdict [soit] si extraordinairement élevé qu'il excède de toute évidence la limite maximale d'une échelle raisonnable à l'intérieur de laquelle le jury peut légitimement agir » (par. 159). Si l'on combine ces deux éléments, le critère applicable consiste à se demander si un jury raisonnable, correctement instruit, aurait pu conclure que la somme accordée, et non une somme inférieure, était rationnellement nécessaire pour punir la conduite répréhensible du défendeur.

108 Ce critère permet aux cours d'appel d'exercer, en matière de dommages-intérêts punitifs, un pouvoir de surveillance plus interventionniste que celui dont elles disposent à l'égard des décisions des jurys relativement aux dommages-intérêts généraux, situations où elles ne peuvent intervenir que si « le verdict est si exorbitant ou si manifestement exagéré par rapport [au préjudice] qu'il choque la conscience de la cour et le sentiment de justice » (*Hill*, précité, par. 159; *Walker c. CFTO Ltd.* (1987), 59

2002 SCC 18 (CanLII)

to ensure that the award is the product of reason and rationality. The focus is on whether the court's sense of reason is offended rather than on whether its conscience is shocked.

109 If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal.

110 An award that is higher than required to fulfil its purpose is, by definition, irrational. The more difficult task is to determine what is "inordinate". Here, I think, the Court must come to grips with the issue of proportionality.

111 I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. Thus a proper award must look at proportionality in several dimensions, including:

(i) Proportionate to the Blameworthiness of the Defendant's Conduct

112 The more reprehensible the conduct, the higher the *rational* limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).

O.R. (2d) 104 (C.A.)). Pour ce qui est des dommages-intérêts punitifs, l'accent est mis sur l'obligation des cours d'appel de vérifier que la somme accordée par le jury est le fruit d'une opération raisonnable et rationnelle. Il s'agit de déterminer si cette somme heurte le sens du raisonnable de la cour et non si elle choque sa conscience.

Si l'addition des dommages-intérêts punitifs aux dommages-intérêts compensatoires produit une somme si « extraordinairement élevé[e] » qu'elle excède celle qui serait « rationnellement » nécessaire pour punir le défendeur, les dommages-intérêts punitifs seront réduits ou annulés en appel.

Une somme plus élevée que nécessaire est, par définition, irrationnelle. La plus grande difficulté consiste à déterminer ce qui est « extraordinaire ». En l'espèce, je pense que la Cour doit se pencher sur la question de la proportionnalité.

J'ai indiqué, plus tôt, que la proportionnalité était la clé permettant d'établir le quantum permissible des dommages-intérêts punitifs. Le châtiment, la dénonciation et la dissuasion sont des justifications acceptées relativement à l'attribution de dommages-intérêts punitifs, et le moyen utilisé doit être rationnellement proportionné au but visé. Une somme excessive n'atteint pas le but visé et devient irrationnelle, alors qu'une somme insuffisante ne réalise pas son objectif. La détermination de la somme appropriée exige donc que l'on aborde la proportionnalité sous plusieurs aspects, dont les suivants.

(i) Somme proportionnée au caractère répréhensible de la conduite du défendeur

Plus la conduite est répréhensible, plus les limites *rationnelles* de la somme susceptible d'être accordée seront élevées. Le besoin de dénoncer est encore plus criant lorsque, comme en l'espèce, la conduite s'est poursuivie pendant une longue période (deux ans jusqu'au procès) sans aucune justification rationnelle, et ce malgré le fait que la défenderesse était consciente des épreuves qu'elle infligeait (d'ailleurs, elle prévoyait que plus l'appelante souffrirait, plus elle règlerait à rabais en bout de ligne).

2002 SCC 18 (CanLII)

The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include:

(1) whether the misconduct was planned and deliberate: *Patenaude v. Roy* (1994), 123 D.L.R. (4th) 78 (Que. C.A.), at p. 91;

(2) the intent and motive of the defendant: *Recovery Production Equipment Ltd. v. McKinney Machine Co.* (1998), 223 A.R. 24 (C.A.), at para. 77;

(3) whether the defendant persisted in the outrageous conduct over a lengthy period of time: *Mustaji v. Tjin* (1996), 30 C.C.L.T. (2d) 53 (B.C.C.A.), *Québec (Curateur public) v. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1, *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL) (S.C.);

(4) whether the defendant concealed or attempted to cover up its misconduct: *Gerula v. Flores* (1995), 126 D.L.R. (4th) 506 (Ont. C.A.), at p. 525, *Walker v. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367 (C.A.), *United Services Funds (Trustees) v. Hennessey*, [1994] O.J. No. 1391 (QL) (Gen. Div.), at para. 58;

(5) the defendant's awareness that what he or she was doing was wrong: *Williams v. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76 (Ont. C.A.), and *Procor Ltd. v. U.S.W.A.* (1990), 71 O.R. (2d) 410 (H.C.), at p. 433;

(6) whether the defendant profited from its misconduct: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.);

(7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g., professional reputation (*Hill*, *supra*)) or a thing that was irreplaceable (e.g., the mature trees cut down by the real estate developer in *Horseshoe Bay Retirement Society v. S.I.F.*

113

De nombreux facteurs peuvent influer sur la gravité du caractère répréhensible. En voici quelques-uns qui ont été mentionnés dans certaines décisions canadiennes publiées dans des recueils de jurisprudence :

(1) Le fait que la conduite répréhensible ait été préméditée et délibérée : *Patenaude c. Roy* (1994), 123 D.L.R. (4th) 78 (C.A. Qué.), p. 91.

(2) L'intention et la motivation du défendeur : *Recovery Production Equipment Ltd. c. McKinney Machine Co.* (1998), 223 A.R. 24 (C.A.), par. 77.

(3) Le caractère prolongé de la conduite inacceptable du défendeur : *Mustaji c. Tjin* (1996), 30 C.C.L.T. (2d) 53 (C.A.C.-B.); *Québec (Curateur public) c. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1; *Matusiak c. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL) (C.S.).

(4) Le fait que le défendeur ait caché sa conduite répréhensible ou tenté de la dissimuler : *Gerula c. Flores* (1995), 126 D.L.R. (4th) 506 (C.A. Ont.), p. 525; *Walker c. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367 (C.A.), *United Services Funds (Trustees) c. Hennessey*, [1994] O.J. No. 1391 (QL) (Div. gén.), par. 58.

(5) Le fait que le défendeur savait ou non que ses actes étaient fautifs : *Williams c. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76 (C.A. Ont.); *Procor Ltd. c. U.S.W.A.* (1990), 71 O.R. (2d) 410 (H.C.), p. 433.

(6) Le fait que le défendeur ait ou non tiré profit de sa conduite répréhensible : *Claiborne Industries Ltd. c. National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.).

(7) Le fait que le défendeur savait que sa conduite répréhensible portait atteinte à un intérêt auquel le demandeur attachait une grande valeur (par exemple sa réputation professionnelle (*Hill*, précité)) ou à un bien irremplaçable (par exemple les arbres matures abattus par un

2002 SCC 18 (CanLII)

Development Corp. (1990), 66 D.L.R. (4th) 42 (B.C.S.C.)); see also *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.). Special interests have included the reproductive capacity of the plaintiff deliberately sterilized by an irreversible surgical procedure while the plaintiff was confined in a provincial mental institution, although no award of punitive damages was made on the facts (*Muir v. Alberta*, [1996] 4 W.W.R. 177 (Alta. Q.B.)); the deliberate publication of an informant's identity (*R. (L.) v. Nyp* (1995), 25 C.C.L.T. (2d) 309 (Ont. Ct. (Gen. Div.)). In *Weinstein v. Bucar*, [1990] 6 W.W.R. 615 (Man. Q.B.), the defendant shot and killed plaintiffs' three companion and breeding German Shepherds who had merely wandered onto the defendant's property from a neighbouring yard. Here the "property" was sentimental, not replaceable, and, unlike the trees, themselves sentient beings.

promoteur immobilier sans scrupule dans l'affaire *Horseshoe Bay Retirement Society c. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (C.S.C.-B.)); voir aussi *Kates c. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.). A été considérée comme faisant partie de ces intérêts comportant une valeur spéciale, la capacité de reproduction d'une demanderesse, qui avait été stérilisée de façon irréversible pendant son internement dans un hôpital psychiatrique provincial, bien que, eu égard aux faits de cette affaire, aucuns dommages-intérêts punitifs n'aient été accordés (*Muir c. Alberta*, [1996] 4 W.W.R. 177 (B.R. Alb.)); la publication délibérée de l'identité d'un informateur (*R. (L.) c. Nyp* (1995), 25 C.C.L.T. (2d) 309 (C. Ont. (Div. gén.)). Dans l'affaire *Weinstein c. Bucar*, [1990] 6 W.W.R. 615 (B.R. Man.), le défendeur a abattu les chiens de compagnie des demandeurs, trois bergers allemands reproducteurs, qui s'étaient simplement aventurés sur la propriété du défendeur à partir d'une cour voisine. Dans cette affaire, le « bien » possédait une valeur sentimentale et irremplaçable et, contrairement aux arbres, il s'agissait de créatures douées de sensation.

(ii) Proportionate to the Degree of Vulnerability of the Plaintiff

(ii) Somme proportionnée au degré de vulnérabilité du demandeur

114 The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, for example, speaking of a physician who had used his access to drugs to purchase sex from a female patient, McLachlin J. (as she then was) stated, at p. 276:

La vulnérabilité — financière ou autre — du demandeur et l'abus de pouvoir dont se rend coupable le défendeur en conséquence sont des facteurs très pertinents lorsqu'il y a inégalité de pouvoir. Dans l'arrêt *Norberg c. Wynrib*, [1992] 2 R.C.S. 226, par exemple, madame le juge McLachlin (maintenant Juge en chef de notre Cour) a déclaré ceci, au sujet d'un médecin qui s'était servi de son accès à des médicaments pour obtenir des faveurs sexuelles d'une patiente, à la p. 276 :

> Society has an abiding interest in ensuring that the power entrusted to physicians by us, both collectively and individually, not be used in corrupt ways . . . .

> La société a un intérêt permanent à ce que la confiance dont nous investissons les médecins, tant collectivement qu'individuellement, ne soit pas employée [. . .] de manière malhonnête.

A similar point was made by Laskin J.A. in the present case (at p. 659):

Le juge Laskin a fait une affirmation semblable dans la présente affaire, à la p. 659 :

> [V]indicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal

> [TRADUCTION] Il est particulièrement important de soutenir l'objectif de dissuasion dans les poursuites

2002 SCC 18 (CanLII)

with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes.

engagées par des assurés contre leur assureur. Les assureurs examinent chaque année des milliers de demandes d'indemnité. La société Pilot devrait être condamnée à une somme considérable au titre des dommages-intérêts punitifs pour la dissuader, ainsi que les autres assureurs, d'exploiter la vulnérabilité des assurés, lesquels sont complètement à la merci des assureurs lorsque survient une catastrophe.

I add two cautionary notes on the issue of vulnerability. First, this factor militates *against* the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.

115 J'ajouterais deux mises en garde sur la question de la vulnérabilité. Premièrement, en contexte commercial, ce facteur milite généralement *contre* l'attribution de dommages-intérêts punitifs, en particulier lorsque la cause d'action est de nature contractuelle et que le tribunal est aux prises avec la difficulté de déterminer quelle est l'entente intervenue entre les parties. La plupart des gens savent fort bien que, dans le monde des affaires, les différents acteurs poursuivent farouchement leur intérêt personnel. En l'espèce, toutefois, nous sommes en présence d'un contrat tendant à assurer la « tranquillité d'esprit » du propriétaire d'une habitation.

Second, it must be kept in mind that punitive damages are not compensatory. Thus the appellant's pleading of emotional distress in this case is only relevant insofar as it helps to assess the oppressive character of the respondent's conduct. Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant. Otherwise there is a danger of "double recovery" for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment.

116 Deuxièmement, il ne faut pas oublier que les dommages-intérêts punitifs n'ont pas un caractère compensatoire. Voilà pourquoi les troubles émotionnels allégués par l'appelante en l'espèce n'ont de pertinence que dans la mesure où ils aident à évaluer le caractère oppressif de la conduite de l'intimée. Les dommages-intérêts majorés constituent le moyen approprié pour tenir compte du préjudice moral supplémentaire causé par la conduite répréhensible ou inacceptable d'un défendeur. Autrement, il y aurait un danger de « double recouvrement » sous le chef du stress émotif, d'une part au titre de l'indemnisation et d'autre part au titre de la punition.

(iii) Proportionate to the Harm or Potential Harm Directed Specifically at the Plaintiff

(iii) Somme proportionnée au préjudice — réel ou potentiel — infligé au demandeur en particulier

The jury is not a general ombudsman or roving Royal Commission. There is a limited role for the plaintiff as private attorney general. It would be irrational to provide the plaintiff with an excessive windfall arising out of a defendant's scam of which the plaintiff was but a minor or peripheral victim. On the other hand, malicious and high-handed conduct which could be expected to cause severe

117 Le jury n'est ni un ombudsman ni une commission d'enquête itinérante, et le demandeur à une action civile ne joue qu'un rôle limité en tant que procureur général privé. Il serait irrationnel qu'un demandeur tire un profit inattendu et excessif de l'escroquerie d'un défendeur dont il n'aurait été qu'une victime mineure ou indirecte. Par ailleurs, la conduite malveillante et abusive d'un défendeur qui

2002 SCC 18 (CanLII)

injury to the plaintiff is not necessarily excused because fortuitously it results in little damage.

(iv) Proportionate to the Need for Deterrence

118 The theory is that it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities. The appellant's argument is that the punitive damages award of $1 million represents less than one half of one percent of Pilot's net worth. This is a factor, but it is a factor of limited importance.

119 A defendant's financial power may become relevant (1) if the defendant chooses to argue financial hardship, or (2) it is *directly* relevant to the defendant's misconduct (e.g., financial power is what enabled the defendant Church of Scientology to sustain such an outrageous campaign for so long against the plaintiff in *Hill*, *supra*), or (3) other circumstances where it may *rationally* be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.

120 Deterrence is an important justification for punitive damages. It would play an even greater role in this case if there had been evidence that what happened on this file were typical of Pilot's conduct towards policyholders. There was no such evidence. The deterrence factor is still important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action.

121 The fact the respondent's assets of $231 million were mentioned to the jury in this case was unhelpful. Pilot was obviously a substantial corporation. Disclosure of detailed financial information before liability is established may wrongly influence the jury to find liability where none exists (i.e., the subliminal message may be "What's a $345,000 insurance claim to a $231 million company?").

aurait par ailleurs pu causer un grave préjudice au demandeur n'est pas nécessairement excusée parce que le hasard a voulu qu'elle ne cause pas beaucoup de dommage.

(iv) Somme proportionnée au besoin de dissuasion

Pour rappeler à un défendeur riche et puissant ses responsabilités, il faut, selon la théorie, frapper encore plus fort. L'argument de l'appelante est que les dommages-intérêts punitifs de un million de dollars représentent moins de 1/2 de 1 pour 100 de la valeur nette de Pilot. Ce facteur est pertinent, mais son importance est limitée.

Les ressources financières d'un défendeur peuvent devenir un facteur pertinent dans les cas suivants : (1) celui-ci invoque des difficultés financières; (2) les ressources financières ont un lien *direct* avec la conduite répréhensible du défendeur (par exemple, c'est ce qui a permis à l'Église de scientologie de soutenir pendant si longtemps sa campagne inacceptable contre le demandeur dans l'affaire *Hill*, précitée); (3) il existe d'autres circonstances permettant rationnellement de conclure que la condamnation d'un riche défendeur à une somme peu élevée n'aurait pas d'effet dissuasif.

La dissuasion est une justification importante en matière de dommages-intérêts punitifs. Elle jouerait un rôle encore plus grand en l'espèce si on avait établi que ce qui s'est produit dans ce dossier était la conduite typique de Pilot à l'endroit des titulaires de police. Aucune preuve à cet effet n'a été produite. La dissuasion demeure toutefois un facteur important, car, à l'époque pertinente, la conduite extrêmement répréhensible des cadres intermédiaires était connue de la haute direction, qui n'a rien fait pour y remédier.

En l'espèce, il n'était pas utile d'informer le jury que l'intimée possédait des actifs de 231 millions de dollars. Pilot était de toute évidence une société d'envergure. Le fait de communiquer des renseignements financiers précis avant que la responsabilité ne soit établie peut amener indûment le jury à conclure à tort à la responsabilité du défendeur (le message subliminal pouvant être « Que représente

2002 SCC 18 (CanLII)

Moreover, pre-trial discovery of financial capacity would unnecessarily prolong the pre-trial proceedings and prematurely switch the focus from the plaintiff's claim for compensation to the defendant's capacity to absorb punishment. In any event, the court should hesitate to attribute anthropomorphic qualities to large corporations (i.e., the punishment should "sting").

Where a trial judge is concerned that the claim for punitive damages may affect the fairness of the liability trial, bifurcated proceedings may be appropriate. On the facts of this case, no harm was done by the procedure followed, including the mention of the $231 million figure.

(v) Proportionate, Even After Taking Into Account the Other Penalties, Both Civil and Criminal, Which Have Been or Are Likely to Be Inflicted on the Defendant for the Same Misconduct

Compensatory damages also punish. In many cases they will be all the "punishment" required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for *additional* punishment in the case before the court is lessened and may be eliminated. In Canada, unlike some other common law jurisdictions, such "other" punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution,

une demande d'indemnité de 345 000 $ pour une société valant 231 millions de dollars? »). Qui plus est, la communication préalable de renseignements sur les ressources financières prolongerait inutilement les procédures antérieures à l'instruction et mettrait prématurément l'accent sur la capacité du défendeur de supporter le coût de la sanction. Quoi qu'il en soit les tribunaux devraient hésiter à attribuer des qualités anthropomorphiques aux grandes sociétés (c.-à-d. en appliquant l'idée que la sanction doit « faire mal »).

122 Dans les cas où le juge de première instance craint que la demande en dommages-intérêts punitifs puisse nuire à l'instruction équitable de la question de la responsabilité, il pourrait être indiqué d'entendre l'affaire en deux temps. À la lumière des faits de l'espèce, aucun préjudice n'a découlé de la procédure suivie, y compris la mention du chiffre 231 millions de dollars.

(v) Proportionnalité de la somme, même après avoir tenu compte des autres sanctions, civiles et criminelles, infligées ou susceptibles d'être infligées au défendeur pour la même conduite répréhensible

123 Les dommages-intérêts compensatoires ont également pour effet de punir. Souvent, ils constitueront la seule « punition » nécessaire. Dans la mesure où un défendeur s'est déjà vu imposer, au civil ou au criminel, d'autres mesures de châtiment, de dénonciation ou de dissuasion à l'égard de sa conduite répréhensible, la nécessité d'une sanction *supplémentaire* diminue et peut disparaître. Au Canada, contrairement à ce qui se passe dans d'autres pays de common law, l'existence d'« autres » sanctions est un facteur pertinent, mais celles-ci ne font pas nécessairement obstacle à l'attribution de dommages-intérêts punitifs. Par exemple, l'amende prévue pourrait être disproportionnément légère par rapport au degré d'indignation que désire exprimer le jury. La conduite répréhensible en cause pourrait avoir une portée plus grande que celle prouvée dans les poursuites relatives à l'infraction criminelle ou à l'infraction d'ordre réglementaire. Il est possible que le législateur ait fixé le montant sur la base de considérations de politique générale autres que le

2002 SCC 18 (CanLII)

deterrence, and denunciation. The intervener, the Insurance Council of Canada, argues that the discipline of insurance companies should be left to the regulator. Nothing in the appeal record indicates that the Registrar of Insurance (now the Superintendent of Financial Services) took an interest in this case prior to the jury's unexpectedly high award of punitive damages.

simple fait de punir. Essentiellement, les dommages-intérêts punitifs sont attribués « si, mais seulement si » *toutes* les autres sanctions ont été prises en considération et jugées insuffisantes pour réaliser les objectifs de châtiment, de dissuasion et de dénonciation. Le Conseil d'assurances du Canada intervenant a soutenu que c'est à l'organisme de réglementation compétent qu'il appartient de sanctionner les sociétés d'assurance. Rien dans le dossier d'appel n'indique que le Registrar of Insurance (maintenant le surintendant des services financiers) se soit intéressé à l'affaire avant que soit connue la somme étonnamment élevée accordée par le jury au titre des dommages-intérêts punitifs.

(vi) Proportionate to the Advantage Wrongfully Gained by a Defendant from the Misconduct

(vi) Somme proportionnée aux avantages que le défendeur a injustement tirés de sa conduite répréhensible

124 A traditional function of punitive damages is to ensure that the defendant does not treat compensatory damages merely as a licence to get its way irrespective of the legal or other rights of the plaintiff. Thus in *Horseshoe Bay Retirement Society*, *supra*, a real estate developer cut down mature trees on the plaintiff's property to improve the view from neighbouring lots which it was developing for sale. The defendant appeared to have calculated that enhanced prices for its properties would exceed any "compensation" that it might be required to pay to the plaintiff. Punitive damages of $100,000 were awarded to reduce the profits and deter "like-minded" developers (p. 50). For a similar case, see *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.), *per* Galligan J., at p. 87, ". . . the law would say to the rich and powerful, 'Do what you like, you will only have to make good the plaintiff's actual financial loss, which compared to your budget is negligible'". In *Claiborne Industries*, *supra*, an award of punitive damages was made against the defendant bank in an amount sufficient to ensure that it did not profit from its outrageous conduct (p. 106).

L'un des rôles traditionnels des dommages-intérêts punitifs consiste à faire en sorte que le défendeur ne voit pas les dommages-intérêts compensatoires simplement comme des frais à payer pour être autorisé à agir comme bon lui semble, sans égard aux droits d'ordre juridique ou autre du demandeur. C'était le cas dans l'affaire *Horseshoe Bay Retirement Society*, précitée, où un promoteur immobilier avait abattu des arbres matures sur la propriété des demandeurs pour améliorer la vue à partir des lots adjacents qu'il aménageait en vue de les vendre. Le défendeur avait, semble-t-il, calculé que le prix de vente plus élevé de ses lots excéderait toute « compensation » qu'il pourrait être tenu de verser au demandeur. Des dommages-intérêts punitifs de 100 000 $ ont été accordés afin de réduire les profits et de dissuader d'autres promoteurs [TRADUCTION] « du même acabit » d'agir de la sorte (p. 50). Pour une affaire semblable, voir *Nantel c. Parisien* (1981), 18 C.C.L.T. 79 (H.C. Ont.), où le juge Galligan a dit ceci, à la p. 87 : [TRADUCTION] « . . . la justice se trouverait à dire aux riches et puissants : "Faites à votre guise, vous n'aurez qu'à dédommager le demandeur de sa perte financière réelle, obligation négligeable par rapport à votre budget" ». Dans l'affaire *Claiborne Industries*, précitée, la banque défenderesse a été condamnée à verser des dommages-intérêts punitifs suffisants pour faire en sorte qu'elle ne tire pas avantage de sa conduite inacceptable (p. 106).

2002 SCC 18 (CanLII)

On the other hand, care must be taken not to employ the "wrongful profit" factor irrationally. Thus, in *Lubrizol Corp. v. Imperial Oil Ltd.* (1994), 84 F.T.R. 197, the court ordered the defendant to account to the plaintiff for all profits gained by infringing the plaintiff's patent, with interest, then added $15 million in punitive damages (without waiting for the profits to be ascertained) because, *per* Cullen J., "[t]he volume of [patented] product sold, although not quantified, must be enormous" and the defendant was "a large corporation with annual sales of 10 billion dollars" (p. 209). The duplicative remedies thus relieved the defendant of the profit twice, once through the accounting remedy and a second time (at least in part) through an award of punitive damages. The trial judge's approach was reversed on appeal ([1996] 3 F.C. 40).

125 Il faut toutefois prendre soin de ne pas appliquer de façon irrationnelle le facteur des « profits injustement obtenus ». Ainsi, dans l'affaire *Lubrizol Corp. c. Imperial Oil Ltd.* (1994), 84 F.T.R. 197, le tribunal a ordonné à la défenderesse de rendre compte à la demanderesse de tous les profits que lui avait rapportés la contrefaçon du brevet de cette dernière, majorés des intérêts, puis il a ajouté des dommages-intérêts punitifs de 15 millions de dollars (sans attendre la détermination du montant des profits) parce que, d'affirmer le juge Cullen, « [l]e chiffre de ventes du produit [breveté], même s'il n'a pas été quantifié, doit être énorme » et que la défenderesse était une « grande entreprise dont le chiffre d'affaire annuel atteignait 10 milliards de dollars » (p. 209). Par cette double réparation, la défenderesse s'est vue retirer deux fois les profits, une première fois par la reddition de compte et une seconde (du moins en partie) par sa condamnation au paiement des dommages-intérêts punitifs. La Cour d'appel a infirmé la décision du juge de première instance ([1996] 3 C.F. 40).

In the present case, the effort to force the appellant into a disadvantageous settlement having failed, it is not alleged that the respondent profited from its misconduct.

126 En l'espèce, les efforts déployés en vue de contraindre l'appelante à accepter un règlement désavantageux ayant échoué, il n'a pas été allégué que l'intimée avait tiré profit de sa conduite répréhensible.

(5) The Usefulness of Ratios

(5) L'utilité des ratios

The respondent and its supporting intervener suggest that an award of $1 million in punitive damages is out of line because compensatory damages were ultimately assessed only at about $345,000. The result, they argue, is an improper ratio. It is apparent from what has already been said, however, that proportionality is a much broader concept than the simple relationship between punitive damages and compensatory damages. That relationship, moreover, is not even the most relevant because it puts the focus on the plaintiff's loss rather than where it should be, on the defendant's misconduct. If a ratio is to be used what should the ratio measure? The fact that compensatory damages are quantified in dollars and cents is temptingly useful, but wholly inadequate, for example, in a case where outrageous misconduct has fortuitously (and

127 L'intimée et l'intervenant appuyant sa cause soutiennent que la somme de un million de dollars accordée au titre des dommages-intérêts punitifs est disproportionnée parce que les dommages-intérêts compensatoires ont finalement été évalués à environ 345 000 $. Le ratio qui en résulte, affirment-ils, est inapproprié. Cependant, il ressort clairement de ce qui a été dit jusqu'ici que la proportionnalité est une notion beaucoup plus complexe que le simple rapport entre dommages-intérêts punitifs et dommages-intérêts compensatoires. En outre, ce rapport ne constitue même pas l'élément le plus important, puisqu'il fait porter l'accent sur la perte subie par le demandeur plutôt que sur l'aspect auquel il devrait s'attacher, c'est-à-dire la conduite répréhensible du défendeur. S'il faut utiliser un ratio, que doit-il mesurer? En raison du fait que les dommages-

2002 SCC 18 (CanLII)

fortunately) resulted in a small financial loss. Potential, as well as actual, harm is a reasonable measure of misconduct, and so are the other factors, already mentioned, such as motive, planning, vulnerability, abuse of dominance, other fines or penalties, and so on. None of these features are captured by the ratio of punitive damages to compensatory damages. Adoption of such a ratio, while easy to supervise, would do a disservice to the unavoidable complexity of the analysis. It would in fact undermine the nuanced principles on which the concept of punitive damages has been justified. There is no doubt at all that evaluation of outrageous conduct in terms of dollars and cents is a difficult and imprecise task, but so is evaluating the worth of a cracked skull, a lost business opportunity or a shattered reputation. Yet all these things are done every day in the courts in the calculation of compensatory damages without resort to formulae or arbitrary rules such as ratios.

intérêts compensatoires sont exprimés en dollars et en cents, leur côté pratique peut rendre leur utilisation tentante. Toutefois, ils sont tout à fait inadéquats dans les cas où, par exemple, la conduite inacceptable s'est (heureusement) soldée par une perte financière minime. Le préjudice potentiel et le préjudice réel constituent une mesure raisonnable de la conduite répréhensible, tout comme d'autres facteurs déjà mentionnés, notamment la motivation, la préméditation, la vulnérabilité, l'abus de position dominante et les autres amendes ou sanctions imposées. Le ratio entre les dommages-intérêts punitifs et les dommages-intérêts compensatoires ne rend compte d'aucun de ces facteurs et, bien que son application soit aisée à contrôler, son adoption masquerait l'inévitable complexité de l'analyse. De fait, son utilisation ébranlerait les principes nuancés invoqués pour justifier le concept de dommages-intérêts punitifs. Certes, l'évaluation en dollars d'une conduite inacceptable est une tâche difficile et imprécise, mais il en va de même de la détermination de la valeur d'une fracture du crâne, de la perte de possibilités d'affaires ou d'une réputation démolie. Pourtant, les tribunaux se livrent quotidiennement à ces déterminations dans le cadre du calcul des dommages-intérêts compensatoires, sans recourir à des formules ou règles arbitraires comme des ratios.

(6) Conclusion on "Rationality"

128 I would not have awarded $1 million in punitive damages in this case but in my judgment the award is within the rational limits within which a jury must be allowed to operate. The award was not so disproportionate as to exceed the bounds of rationality. It did not overshoot its purpose. I have already outlined the reasons why I believe this to be the case.

129 The jury followed the "if, but only if" model, i.e., punitive damages should be awarded "if, but only if" the compensatory award is insufficient. The form and order of the questions put to the jury required them first of all to deal with compensation for the loss of the plaintiff's house (replacement or cash value), its contents, and any increase in her living

(6) Conclusion relative à la « rationalité »

Je n'aurais pas accordé des dommages-intérêts punitifs de un million de dollars en l'espèce, mais j'estime que cette somme respecte les limites rationnelles à l'intérieur desquelles le jury doit être libre d'agir. Cette somme n'est pas disproportionnée au point d'outrepasser les limites de la rationalité. Elle ne dépasse pas l'objectif visé par son attribution. J'ai déjà exposé les motifs qui justifient cette opinion.

Le jury a appliqué le principe « si, mais seulement si », selon lequel des dommages-intérêts punitifs ne doivent être accordés que « si, mais seulement si » les dommages-intérêts compensatoires sont insuffisants. La formulation et l'ordre des questions soumises au jury ont obligé celui-ci à se pencher d'abord sur l'indemnisation au titre

2002 SCC 18 (CanLII)

and moving expenses. Only after those matters had been dealt with was the jury instructed to turn their minds to a final question on punitive damages. They were clearly aware that compensatory damages might well be sufficient punishment to avoid a repetition of the offence and a deterrent to others. In this case, the jury obviously concluded that the compensatory damages ($345,000) were not sufficient for those purposes. It was no more than the respondent had contractually obligated itself to pay under the insurance policy. In this case, the power imbalance was highly relevant. Pilot holds itself out to the public as a sure guide to a "safe harbour". In its advertising material it refers to itself as "*Your* Pilot" and makes such statements as:

de la perte de la maison (valeur de reconstruction ou valeur en espèces), de son contenu et des frais additionnels de subsistance et de logement de l'appelante. Suivant les instructions qu'il avait reçues, ce n'est qu'après avoir examiné ces points que le jury devait aborder la dernière question, soit celle des dommages-intérêts punitifs. Les jurés étaient clairement au fait que les dommages-intérêts compensatoires pourraient fort bien constituer une sanction suffisante pour empêcher la répétition de la conduite répréhensible et dissuader autrui de s'y livrer. De toute évidence, ils ont conclu que, en l'espèce, les dommages-intérêts compensatoires (345 000 $) ne permettaient pas de réaliser ces objectifs. Cette somme ne dépassait pas celle que l'intimée s'était contractuellement engagée à payer aux termes de la police d'assurance. L'inégalité du rapport de force était un facteur très pertinent dans la présente affaire. Pilot se targue d'être en mesure de guider les gens à [TRADUCTION] « bon port ». Dans sa publicité, l'assureur se décrit comme [TRADUCTION] « *Votre* Pilote » et fait notamment l'affirmation suivante :

At Pilot Insurance Company, guiding people like you into safe harbours has been our mission for nearly 75 years.

[TRADUCTION] Depuis près de 75 ans, la mission de Pilot Insurance Company est de conduire des gens comme vous à bon port.

Insurance contracts, as Pilot's self-description shows, are sold by the insurance industry and purchased by members of the public for peace of mind. The more devastating the loss, the more the insured may be at the financial mercy of the insurer, and the more difficult it may be to challenge a wrongful refusal to pay the claim. Deterrence is required. The obligation of good faith dealing means that the appellant's peace of mind should have been Pilot's objective, and her vulnerability ought not to have been aggravated as a negotiating tactic. It is this relationship of reliance and vulnerability that was outrageously exploited by Pilot in this case. The jury, it appears, decided a powerful message of retribution, deterrence and denunciation had to be sent to the respondent and they sent it.

Comme l'indique le portrait que la société Pilot brosse d'elle-même, la tranquillité d'esprit est l'argument qu'invoquent les assureurs pour vendre leurs contrats d'assurance et la raison qui incite les membres du public à les acheter. Plus la perte est catastrophique, plus l'assuré risque de se trouver financièrement à la merci de l'assureur et plus il peut lui être difficile de contester un refus illégitime de verser l'indemnité demandée. La dissuasion est nécessaire. En raison de l'obligation qu'avait Pilot d'agir de bonne foi, la tranquillité d'esprit de l'appelante aurait dû être l'objectif de Pilot, qui n'aurait pas dû accroître la vulnérabilité de cette dernière comme tactique de négociation. C'est cette situation de dépendance et de vulnérabilité que Pilot a exploitée de façon inacceptable en l'espèce. Le jury a, semble-t-il, décidé qu'un vigoureux message de châtiment, de dissuasion et de dénonciation s'imposait, et il a donné ce message.

130 The respondent points out that there is no evidence this case represents a deliberate corporate

L'intimée souligne qu'il n'y a aucune preuve que la présente affaire est un exemple de stratégie com-

2002 SCC 18 (CanLII)

strategy as opposed to an isolated, mishandled file that ran amok. This is true, but it is also true that Pilot declined to call evidence to explain *why* this file ran amok, and what steps, if any, have been taken to prevent a recurrence.

merciale délibérée, plutôt qu'un cas isolé de dossier mal mené qui a dérapé. C'est exact, mais il est également vrai que Pilot a décidé de ne pas présenter de preuve expliquant *pourquoi* le dossier a dérapé et précisant les mesures, s'il en est, qui ont été prises pour prévenir toute récurrence.

131 The respondent also argues that at the end of the day, it did not profit financially from its misbehaviour. This may also be true, but if so, that result was not for want of trying. The respondent clearly hoped to starve the appellant into a cheap settlement. Crabbe's letter of June 9, 1994, quoted earlier, suggests as much. That it failed to do so is due in no small part to appellant's counsel who took a hotly contested claim into an eight-week jury trial on behalf of a client who was effectively without resources of her own; and who obviously *could* have been starved into submission but for his firm's intervention on her behalf.

L'intimée fait également valoir qu'elle n'a en définitive tiré aucun avantage financier de sa conduite répréhensible. Il se peut que cela aussi soit vrai, mais, si c'est le cas, ce n'est pas faute d'avoir essayé. De toute évidence, l'intimée espérait, par cette guerre d'usure, amener l'appelante à régler à rabais. C'est en tout cas ce qu'indique la lettre précitée de M. Crabbe, en date du 9 juin 1994. Si elle n'y est pas parvenue, c'est dans une large mesure grâce à l'avocat de l'appelante, qui a pris en charge une demande d'indemnité vigoureusement contestée, qui a donné lieu à un procès devant jury de huit semaines, et ce pour le compte d'une cliente pratiquement sans ressources financières et qui, sans l'intervention de son cabinet, *aurait pu* clairement se faire forcer la main par l'intimée.

132 While, as stated, I do not consider the "ratio" test to be an appropriate indicator of rationality, the ratio of punitive damages to compensatory damages in the present case would be either a multiple of three (if only the insurance claim of $345,000 is considered) or a multiple of less than two (if the claim plus the award of solicitor-client costs is thought to be the total compensation). Either way, the ratio is well within what has been considered "rational" in decided cases.

Bien que, comme je l'ai dit plus tôt, je ne considère pas que le critère du « ratio » soit un indice de rationalité adéquat, le ratio entre les dommages-intérêts punitifs et les dommages-intérêts compensatoires serait, en l'espèce, égal à trois (si l'on tient compte uniquement de l'indemnité d'assurance de 345 000 $), ou inférieur à deux (si l'on considère que l'indemnité totale est composée de cette somme majorée des dépens calculés sur la base procureur-client). De l'une ou l'autre façon, le ratio se situe bien à l'intérieur des limites considérées comme « rationnelles » par la jurisprudence.

133 The majority opinion of the Ontario Court of Appeal recognized that punitive damages are not "at large" and appellate courts have "much greater scope and discretion on appeal" than they do in the case of general damages (*Hill*, *supra*, at para. 197). If the court considers the award or its quantum to be irrational, it is its duty to interfere.

Les juges majoritaires de la Cour d'appel ont reconnu que les dommages-intérêts punitifs ne sont pas des dommages-intérêts « généraux » et que les cours d'appel « disposent d'une latitude et d'une discrétion beaucoup plus grandes » (*Hill*, précité, par. 197) à l'égard des premiers qu'à l'égard des seconds. Si le tribunal estime que la décision d'accorder des dommages-intérêts punitifs ou le quantum de ceux-ci est irrationnel, il lui incombe d'intervenir.

134 This was the view taken by the majority judgment of Finlayson J.A. The appellant complains

C'est l'opinion qu'a exprimée la majorité de la Cour d'appel sous la plume du juge Finlayson.

2002 SCC 18 (CanLII)

that Finlayson J.A. applied a standard of "simply too high" (p. 661). It is true that he thought the award was too high, but that observation must be understood in light of other comments made in the course of his reasons. Finlayson J.A. concluded there was "no justification for such a radical departure from precedent" (pp. 661-62), which revealed awards in the range of $7,500 to $15,000. In his view, an appropriate figure for quantum requires a "balancing of factors such as those enumerated by Blackmun J." (p. 667) in *Pacific Mutual Life Insurance*, *supra*. Finlayson J.A. looked at "the degree of reprehensibility of the defendant's conduct" (p. 666) and concluded that "[t]his case does not demonstrate that there was such insidious, pernicious and persistent malice as would justify an award of this magnitude" (p. 666).

L'appelante reproche au juge d'avoir appliqué un critère fondé sur l'idée que les dommages-intérêts étaient [TRADUCTION] « tout simplement trop élevé[s] » (p. 661). Il est vrai qu'il estimait leur quantum trop élevé, mais cette observation doit être interprétée au regard des autres commentaires qu'il a faits dans ses motifs. Le juge Finlayson a conclu [TRADUCTION] « que rien ne justifiait de s'écarter si radicalement des précédents » (p. 661-662), dans lesquels les sommes accordées allaient de 7 500 $ à 15 000 $. Selon lui, la détermination de la somme appropriée à accorder au titre des dommages-intérêts punitifs nécessite la « mise en balance de facteurs tels ceux énumérés par le juge Blackmun » (p. 667) dans l'arrêt *Pacific Mutual Life Insurance*, précité. Le juge Finlayson a examiné [TRADUCTION] « l'étendue du caractère répréhensible de la conduite de la défenderesse » (p. 666) et il a conclu ainsi à cet égard : « [l]a présente affaire ne révèle pas la présence d'une malveillance insidieuse, pernicieuse et obstinée au point de justifier une somme aussi considérable » (p. 666).

With respect to precedent, it must be remembered that the respondent's trial counsel objected to any range or "bracket" of appropriate figures being given to the jury. Had the jury been given the information, it may have influenced their views. The respondent itself appears to have been unimpressed by the size of prior awards of punitive damages. In its factum, commenting on Crabbe's letter of June 9, 1994, counsel states, "However, it should also be noted that Mr. Crabbe was clearly attempting to allay Pilot's concern about the Whiten's bad faith claim at a time when punitive damage awards against insurers were in the range of $7,500.00 - $15,000.00." Pilot's concern may have been easy to allay when the expected exposure to punitive damages was only $15,000.

135 Relativement aux précédents jurisprudentiels, il faut se rappeler que l'avocat qui représentait l'intimée en première instance s'est opposé à ce qu'on mentionne au jury quelque échelle ou « fourchette » de sommes appropriées. Peut-être de tels renseignements auraient-ils influé sur l'opinion du jury. L'intimée elle-même semble avoir été peu impressionnée par les sommes accordées antérieurement au titre des dommages-intérêts punitifs. Dans le mémoire soumis par son avocat, on peut lire ceci, au sujet de la lettre de M. Crabbe datée du 9 juin 1994 : [TRADUCTION] « Toutefois, il convient également de signaler que M. Crabbe tentait clairement de dissiper les inquiétudes de Pilot au sujet de la prétention de mauvaise foi formulée par les Whiten, à une date où les sommes que des sociétés d'assurance avaient été condamnées à verser au titre des dommages-intérêts punitifs allaient de 7 500 et 15 000 $. » Il est possible que les inquiétudes de Pilot aient été faciles à dissiper, puisque le risque envisagé au titre des dommages-intérêts punitifs s'élevait seulement à 15 000 $.

The respondent objects that, prior to this judgment, the highest previous award in an insurer

136 L'intimée oppose que, avant le jugement rendu dans la présente affaire, la somme la plus élevée

2002 SCC 18 (CanLII)

bad faith case was $50,000. However, prior to the $800,000 award of punitive damages upheld in *Hill*, *supra*, the highest award in punitive damages in a libel case in Canada was $50,000: *Westbank Band of Indians v. Tomat*, [1989] B.C.J. No. 1638 (QL) (S.C.). One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.

137 Finlayson J.A.'s central point was the need to pay close attention to the "balancing of factors" (p. 667), and in particular, the "reprehensibility of the defendant's conduct" (p. 666). There was evidence to support the view expressed by Finlayson J.A., but there was also evidence to support the contrary view of Laskin J.A., in dissent (at p. 659):

> . . . Pilot acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whiten's rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout the nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights.

138 It seems to me, with respect, that this disagreement among very senior appellate judges turns on precisely the factual issues and inferences that were remitted to the jury for its determination. I would hesitate to characterize the considered opinion of any experienced and learned appellate judge as not only wrong but "irrational".

139 Moreover, the trial judge, who sat through the evidence, went out of his way to comment that the

à laquelle un assureur avait été condamné pour cause de mauvaise foi était 50 000 $. Toutefois, avant la confirmation de la somme de 800 000 $ accordée au titre des dommages-intérêts punitifs dans l'arrêt *Hill*, précité, la somme la plus élevée qui avait été versée jusque-là en matière de diffamation se chiffrait à 50 000 $: *Westbank Band of Indians c. Tomat*, [1989] B.C.J. No. 1638 (QL) (C.S.). L'un des avantages de l'institution du jury est qu'elle permet au droit d'être en prise directe sur la réalité, notamment la réalité économique.

L'aspect central des motifs du juge Finlayson était la nécessité de prêter attention à la [TRADUCTION] « mise en balance des facteurs » (p. 667), en particulier « l'étendue du caractère répréhensible de la conduite de la défenderesse » (p. 666). Il y avait des éléments de preuve étayant cette opinion, mais il y en avait aussi au soutien de l'opinion contraire exprimée en dissidence par le juge Laskin (à la p. 659) :

> [TRADUCTION] . . . Pilot a agi de façon malveillante et méchante en maintenant pendant deux ans une grave accusation d'incendie criminel, malgré l'opinion de l'expert en sinistres et des autres experts qu'elle avait engagés selon laquelle l'incendie était accidentel. Elle a abusé du rapport de force manifestement inégal qui caractérisait sa relation avec l'assurée en refusant de régler une demande d'indemnité qu'elle savait ou aurait certainement dû savoir valide, allant même jusqu'à cesser de payer le loyer afférent au chalet loué par les Whiten. Elle s'est servie de sa situation financière dominante pour tenter de forcer les Whiten à accepter un compromis ou même à abandonner leur demande. De fait, pendant les deux années ou presque que la demande d'indemnité est demeurée impayée, Pilot a fait fi des droits des Whiten.

En toute déférence, il me semble que cette divergence d'opinions entre trois juges de cour d'appel très expérimentés porte précisément sur les questions de fait et inférences à en tirer qui ont été laissées à l'appréciation du jury. J'hésiterais à qualifier non seulement d'erronée, mais également d'« irrationnelle », l'opinion mûrement réfléchie de tout juge d'appel éminent et expérimenté.

De plus, le juge de première instance qui a entendu toute la preuve s'est évertué à expliquer

2002 SCC 18 (CanLII)

award, while high, was reasonable. It was rational. He then added to Pilot's burden an award of over $320,000 in solicitor-client costs.

Having accepted with some hesitation the adequacy of the trial judge's instructions to the jury, and there being no convincing demonstration that the jury's subsequent imposition and assessment of punitive damages were irrational, I would affirm the award of punitive damages.

IV. Conclusion

I would allow the appeal and restore the jury award of $1 million in punitive damages, with costs in this Court on a party-and-party basis.

The respondent's cross-appeal against the award of any punitive damages is dismissed with costs to the appellant, also on a party-and-party basis.

The following are the reasons delivered by

LeBel J. (dissenting on the appeal) — This case raises important issues about the proper functions of tort law, the role of punitive damages within it and the control of jury awards. In the end, I respectfully disagree with Binnie J.'s reasons and proposed disposition of the appeal. Although I agree that the bad faith of the Pilot Insurance Company ("Pilot" or "Pilot Insurance") in its handling of the claim, up to and during the trial, amply justifies awarding punitive damages, an award of $1 million goes well beyond a rational and appropriate use of this kind of remedy, especially in what began as a problem of contract law. The majority of the Court of Appeal for Ontario set the amount of punitive damages at a sum which was consistent with the nature and purpose of punitive damages in the law of torts and had sufficient reasons to interfere with the jury's verdict. I find myself in

que, bien qu'élevée, la somme accordée était raisonnable. Elle était rationnelle. Il a ensuite ajouté au fardeau de Pilot une somme de plus de 320 000 $ au titre des dépens calculés sur la base procureur-client.

140 Ayant conclu, non sans certaines hésitations, que les directives du juge de première instance au jury avaient été adéquates et, compte tenu du fait qu'il n'a pas été démontré de façon convaincante que la décision subséquente du jury d'accorder des dommages-intérêts punitifs et le quantum de ceux-ci étaient irrationnels, je confirmerais la somme adjugée à ce titre.

IV. Conclusion

141 Je suis d'avis d'accueillir le pourvoi principal et de rétablir la somme de un million de dollars accordée par le jury au titre des dommages-intérêts punitifs, avec dépens devant notre Cour et devant la Cour d'appel sur la base partie-partie.

142 Le pourvoi incident de l'intimée contestant l'attribution de toute somme au titre des dommages-intérêts punitifs est rejeté avec dépens en faveur de l'appelante, également sur la base partie-partie.

Version française des motifs rendus par

143 Le juge LeBel (dissident quant au pourvoi principal) — Le présent pourvoi soulève d'importantes questions relativement aux fonctions que doit jouer le droit de la responsabilité civile délictuelle, au rôle des dommages-intérêts punitifs dans cette branche du droit et à la révision des sommes accordées par les jurys à ce titre. En toute déférence, je ne peux souscrire aux motifs du juge Binnie et à la solution qu'il propose à l'égard du pourvoi principal. Je reconnais que la mauvaise foi dont la société Pilot Insurance Company (ci-après « Pilot » ou « Pilot Insurance ») a fait preuve dans le traitement de la demande d'indemnité jusqu'au procès et durant celui-ci justifie amplement d'accorder des dommages-intérêts punitifs, mais une somme de un million de dollars dépasse de beaucoup les limites rationnelles et appropriées de ce type de sanction, en particulier dans une affaire qui était initialement un

2002 SCC 18 (CanLII)

substantial agreement in this respect with Finlayson J.A.'s reasons in the Court of Appeal.

problème de droit des contrats. Les juges majoritaires de la Cour d'appel de l'Ontario ont fixé les dommages-intérêts punitifs à une somme compatible avec la nature et l'objet de cette sanction en droit de la responsabilité civile délictuelle et ils étaient amplement justifiés de modifier le verdict du jury. À cet égard, je souscris substantiellement aux motifs exposés par le juge Finlayson de la Cour d'appel.

144 In these reasons, I will not attempt a full review of the facts that gave rise to this litigation. My colleague has made a careful review of them and I will refer to them only inasmuch as may be required by some particular aspect of this appeal.

Je n'entends pas, dans les présents motifs, passer en revue tous les faits générateurs du présent litige. Mon collègue les a exposés de façon détaillée et je n'en ferai mention que lorsqu'un aspect particulier du pourvoi l'exigera.

1. Punitive Damages and the Functions of Tort Law

1. Les dommages-intérêts punitifs et les fonctions du droit de la responsabilité civile délictuelle

145 In this case, the plaintiff took action in order to claim compensation for a loss of about $345,000 under a residential and home insurance policy. The plaintiff did not ask for aggravated damages, but sought punitive damages. At the end of the trial, she was awarded the full amount of her actual loss, her costs on a solicitor-client basis and punitive damages amounting to about three times her losses.

En l'espèce, la demanderesse a pris action afin d'être indemnisée, en application d'une police d'assurance-habitation, à l'égard d'une perte d'environ 345 000 $. Elle n'a pas demandé de dommages-intérêts majorés, mais elle a réclamé des dommages-intérêts punitifs. À l'issue du procès, elle a obtenu le montant intégral de la perte réellement subie, ainsi que ses dépens établis sur la base procureur-client et des dommages-intérêts punitifs équivalant à peu près au triple de sa perte.

146 Tort law fulfills diverse functions. While deterrence and denunciation both still play a role, since it broke away from criminal law in the Middle Ages, in its core function, tort law has been compensatory or corrective. (See A. M. Linden, *Canadian Tort Law* (6th ed. 1997), at pp. 4-7.)

Le droit de la responsabilité civile délictuelle remplit diverses fonctions. Bien que la dissuasion et la dénonciation jouent encore un rôle dans cette branche du droit, la fonction principale du droit de la responsabilité civile délictuelle, depuis qu'il s'est détaché du droit pénal au Moyen-Âge, a été l'indemnisation ou la réparation (voir A. M. Linden, *La responsabilité civile délictuelle* (6e éd. 2001), vol. 1, p. 4-8).

147 The purpose of this part of our legal system remains to make good the loss suffered, no less, no more:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award.

L'objet de cette partie de notre système juridique demeure l'indemnisation des pertes subies et rien d'autre :

> Il ressort des principes généraux sous-jacents à notre système d'attribution de dommages-intérêts qu'un demandeur devrait être dédommagé pleinement et équitablement de manière à le mettre dans la situation où il se serait trouvé n'eût été la perpétration du délit civil, pour autant que cela puisse se faire pécuniairement.

2002 SCC 18 (CanLII)

(*Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 981, *per* McLachlin J. (as she then was); see also *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, at para. 70, *per* Binnie J.)

The award of punitive damages in discussion here leads us far away from this principle. It tends to turn tort law upside down. It transmogrifies what should have remained an incident of a contracts case into the central issue of the dispute. The main purpose of the action becomes the search for punishment, not compensation. Perhaps, at some time in the future, this will be viewed as part of a broad intellectual and social movement of privatization of criminal justice, consonant with the general evolution of society. For the time being, without using *in terrorem* arguments, such an award has a potential to alter significantly what would appear to have been the proper function of tort law.

It would be useless, within the limits of these reasons, to review the controversies surrounding punitive damages. Whatever the doubts raised at times by academic or judicial opinion about their place in the law of torts, Canadian tort law now accepts that a private action in torts may give rise, in the proper cases, to an award of punitive damages. They may even be awarded in a contracts case, provided an independent actionable wrong is made out. (See *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at p. 1104; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 79, *per* Iacobucci J.)

The use of this remedy appears to be flexible. Nevertheless, if necessary, punitive damages must be granted and assessed in such a way that they serve rational purposes and represent a proportionate response to the behaviour of defendants and the harm caused. Also, as can be seen in this case, when

(*Ratych c. Bloomer*, [1990] 1 R.C.S. 940, p. 981, madame le juge McLachlin (maintenant Juge en chef de notre Cour); voir aussi *Jacobi c. Griffiths*, [1999] 2 R.C.S. 570, par. 70, le juge Binnie.)

148 En l'espèce, la somme accordée au titre des dommages-intérêts déroge considérablement à ce principe. Elle tend à bouleverser le droit de la responsabilité civile délictuelle. Elle fait d'un point qui aurait dû demeurer un aspect incident d'une affaire contractuelle la question centrale du litige. La punition, et non plus l'indemnisation, devient l'objet principal de l'action. Peut-être qu'à quelque moment dans le futur un tel changement s'inscrira dans un vaste mouvement social et intellectuel de privatisation du droit criminel, en harmonie avec l'évolution générale de la société. Pour le moment, toutefois, sans vouloir être alarmiste, l'attribution d'une telle somme risque de modifier sensiblement ce qui paraît avoir été jusqu'ici le rôle approprié du droit de la responsabilité civile délictuelle.

149 Il ne servirait à rien, dans les présents motifs, d'examiner les controverses qui entourent la question des dommages-intérêts punitifs. Malgré les réserves qui ont pu à l'occasion être émises dans la doctrine ou la jurisprudence sur la place de cette sanction en droit de la responsabilité civile délictuelle, le droit canadien en la matière reconnaît maintenant qu'une action privée en responsabilité peut, dans les cas appropriés, entraîner une condamnation au versement de dommages-intérêts punitifs. De tels dommages-intérêts peuvent même être accordés en matière contractuelle, si on établit l'existence d'une faute indépendante donnant ouverture à action. (Voir *Vorvis c. Insurance Corp. of British Columbia*, [1989] 1 R.C.S. 1085, p. 1104; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, par. 79, le juge Iacobucci.)

150 Bien que le recours à cette réparation semble admettre une certaine souplesse, lorsque la décision d'accorder des dommages-intérêts punitifs s'impose, cette décision et la détermination du quantum doivent néanmoins servir des fins rationnelles et constituer une réponse proportionnée à la conduite

2002 SCC 18 (CanLII)

the matter comes up before a civil jury, jurors must be instructed properly as to the nature and purposes of punitive damages and the conditions under which they may be awarded.

des défendeurs et au préjudice qu'elle a causé. De plus, comme on le voit en l'espèce, lorsque cette question est soumise au jury dans une affaire civile, celui-ci doit être adéquatement instruit de la nature et des objectifs des dommages-intérêts punitifs, ainsi que des conditions qui doivent être réunies pour qu'ils puissent être accordés.

2. Rationality and Proportionality

2. Rationalité et proportionnalité

151 I agree with Binnie J. on the core principles governing the award of punitive damages. The key considerations remain the rationality and proportionality of the award. The concept of rationality remains grounded in the nature of tort law, its historical development and the functions it is now playing in modern society. First and foremost, the assessment of damages should not lead, in some cases, to a confusion of criminal law and private law principles, given that punitive damages and criminal punishment target primarily the conduct of the respondent or accused and are not primarily concerned with making good the loss or harm suffered by victims. The main concern of punitive damages remains the preservation of public order, and the assuaging of such harm as may have been done to the public good and to the social peace.

Je partage l'opinion du juge Binnie au sujet des principes fondamentaux qui régissent les dommages-intérêts punitifs. Les considérations clés demeurent la rationalité et la proportionnalité de la décision accordant de tels dommages-intérêts. La notion de rationalité tire son fondement de la nature du droit de la responsabilité civile délictuelle, de son évolution historique et des fonctions que remplit ce droit aujourd'hui dans la société moderne. D'abord et avant tout, il ne faudrait pas que, dans certains cas, la détermination du quantum des dommages-intérêts entraîne la confusion des principes du droit criminel et de ceux du droit privé, étant donné que les dommages-intérêts punitifs et les sanctions criminelles s'attachent principalement à la conduite du défendeur ou de l'accusé. L'objectif premier des dommages-intérêts punitifs demeure non pas la réparation de la perte ou du préjudice subi par la victime, mais le maintien de l'ordre et la réparation du tort causé au bien public et à la paix sociale.

152 At a time when the King's writ did not always run throughout the realm, losses or harm to a person or property were made good by punishment or alternative measures, which were usually payment or compensation. For example, in early Anglo-Saxon England, the law knew very few strictly capital crimes. In most cases, two sets of punishment were available. On the one hand, the law allowed for a system of revenge. The victim, when possible, or the kin, would exact retribution on something like an "eye for an eye" principle. On the other hand, it was often seen as undesirable to permit blood feuds to go on endlessly. Thus there emerged a system of compensation by which crimes could be atoned for, by paying a victim or the victim's kin some sum, dependent upon the

À l'époque où la justice du roi ne s'appliquait pas toujours dans l'ensemble du royaume, la réparation en cas de préjudice ou dommages causés, selon le cas, à une personne ou un bien était soit l'infliction d'un châtiment soit la condamnation à une sanction substitutive, habituellement le paiement d'une indemnité. À titre d'exemple, pendant la période anglo-saxonne en Angleterre, le droit comptait peu de crimes entraînant uniquement la peine capitale. Dans la plupart des cas, deux types de sanction s'appliquaient. D'une part, le droit prévoyait un régime de vengeance autorisant la victime ou, à défaut, sa famille à exercer des représailles contre l'auteur du tort, en application d'un principe analogue à la loi du talion (« œil pour œil, dent pour dent »). D'autre part,

2002 SCC 18 (CanLII)

type of act committed and the class or status of the victim. These sums were even codified and often known as wergeld or blood money. (See C. Hibbert, *The Roots of Evil: A Social History of Crime and Punishment* (1963), at pp. 3-5; W. J. V. Windeyer, *Lectures on Legal History* (2nd ed. rev. 1957), at p. 17.) During the Middle Ages, a clear distinction was drawn between pleas of the Crown which gave rise to a criminal law action and common pleas which were actions for damages. The merger of criminal law and the law of civil responsibility thus came to an end. (See Windeyer, *supra*, at p. 63.) One branch of the law aimed at punishment and preservation of the public; the other sought to make good losses suffered by the victim of some specific tort. Since then, in the common law, tort law has been viewed primarily as a mechanism of compensation. Its underlying organizing structure remains grounded in the principle of corrective justice, although policy concerns may play at times a considerable part in determining the outcome of a particular case, as, for example, in actions based on the tort of negligence. (See, for example, *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2.)

comme on considérait généralement peu souhaitable de laisser des vendettas se poursuivre indéfiniment, il s'est élaboré un système d'indemnisation pourvoyant à la réparation des crimes par le versement d'une somme d'argent à la victime ou à sa famille, en fonction du genre d'acte commis et de la classe sociale de la victime ou de son rang. Les sommes à payer étaient même codifiées et souvent appelées wergeld ou prix du sang (voir C. Hibbert, *The Roots of Evil : A Social History of Crime and Punishment* (1963), p. 3-5; W. J. V. Windeyer, *Lectures on Legal History* (2e éd. rév. 1957), p. 17). Au Moyen-Âge, une distinction claire s'est établie entre les plaids de la Couronne (*pleas of the Crown*), qui donnaient lieu à une action criminelle, et les plaids communs (*common pleas*), qui étaient des actions en dommages-intérêts. C'est ainsi que s'est opérée la séparation du droit criminel et du droit de la responsabilité civile (voir Windeyer, *op. cit.*, p. 63), le premier étant axé sur la répression du crime et la protection du public et le second sur la réparation des pertes subies par la victime d'un délit civil déterminé. Depuis, en common law, la responsabilité civile délictuelle est considérée principalement comme un mécanisme d'indemnisation. Sa structure fondamentale demeure néanmoins fondée sur le principe de la justice réparatrice, bien que des questions de politique générale puissent quelquefois peser assez lourd dans l'issue d'une affaire donnée, par exemple si celle-ci met en cause le délit civil de négligence. (Voir, par exemple, *Edwards c. Barreau du Haut-Canada*, [2001] 3 R.C.S. 562, 2001 CSC 80; *Cooper c. Hobart*, [2001] 3 R.C.S. 537, 2001 CSC 79; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2.)

A private tort action usually focusses on undoing the wrong perpetrated by a specific defendant against a particular plaintiff. For this reason, in the law of tort, "[p]roof of negligence in the air, so to speak, will not do" (Pollock, *Torts*, 11th ed., p. 455, quoted in *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), *per* Cardozo C.J.). The liability of the defendant and the right of recovery of the plaintiff do not exist independently. In this respect, an obligation arising out of torts remains as relational as in the law of contracts: "not only must the contractually

153

Une action privée en responsabilité civile délictuelle vise ordinairement à réparer le tort causé à un demandeur déterminé par un défendeur donné. Voilà pourquoi, en droit de la responsabilité civile délictuelle, [TRADUCTION] « [d]e simples rumeurs de négligence, si l'on peut dire, ne suffisent pas » (Pollock, *Torts*, 11e éd., p. 455, cité dans *Palsgraf c. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), le juge en chef Cardozo). La responsabilité du défendeur et le droit du demandeur à une indemnité n'existent pas de manière indépendante. À cet égard, une

2002 SCC 18 (CanLII)

bound defendant perform the promised act, but that performance is owed to a particular plaintiff" (E. Weinrib, *The Idea of Private Law* (1995), at p. 52).

obligation d'origine délictuelle possède un caractère tout aussi relationnel qu'une obligation contractuelle : [TRADUCTION] « non seulement le défendeur lié par contrat doit-il exécuter l'acte qu'il s'est engagé à accomplir, mais cette exécution est due à un demandeur donné » (E. Weinrib, *The Idea of Private Law* (1995), p. 52).

154 Given the relational nature of the wrong committed by this defendant against the plaintiff, the remedies chosen by the court must remain consistent with this basic characteristic. The defendant must pay damages to the plaintiff in order to undo, inasmuch as can be done, the wrong caused. This principle governs the assessment of the quantum of damages as a rule. Within the limits set by principles of legal policy or by such conditions as specific torts may attach to their recovery, damages should correspond to the amount required to put the plaintiff in the position he or she would have been in, but for the wrong committed by the defendant. This principle of corrective justice will be implemented more easily in situations where a loss is fairly easy to ascertain. In other fields of the law, compensation remains at best an approximation, grounded, as it must often be, on a reasonable guess as to the nature or extent of the impact of a particular wrong. In the case of personal injury, the problem is well known but has defied just about every effort to find clear and logical solutions. Even in such cases, the concern remains the same. If the ultimate goal of perfect justice remains beyond the reach of the courts, tort law seeks to compensate as fully as possible an actual loss caused by a specific defendant to a particular plaintiff.

Compte tenu de la nature relationnelle de la faute commise par le défendeur à l'endroit du demandeur, les mesures de réparation choisies par les tribunaux doivent être compatibles avec cette caractéristique fondamentale. Le défendeur doit verser des dommages-intérêts au demandeur afin de réparer, dans toute la mesure du possible, le tort qu'il lui a causé. En règle générale, ce principe régit la détermination du quantum des dommages-intérêts. Eu égard aux limites prévues par les principes de politique juridique pertinents ou les conditions applicables au recouvrement de dommages-intérêts pour certains délits civils particuliers, la somme accordée doit correspondre à ce qui est nécessaire pour replacer le demandeur dans la situation où il se serait trouvé, n'eût été la faute du défendeur. Ce principe de justice réparatrice s'applique plus facilement dans les affaires où la perte est relativement facile à quantifier. Dans d'autres domaines du droit, l'indemnisation demeure, au mieux, une approximation fondée le plus souvent sur une estimation raisonnable de la nature ou de l'étendue des conséquences d'une faute donnée. En matière de préjudice corporel, ce problème est bien connu et il continue de défier à peu près tous les efforts déployés pour trouver des solutions claires et logiques. Même dans de tels cas cependant, la préoccupation principale reste la même. Si la justice parfaite reste un idéal hors d'atteinte pour les tribunaux, le droit de la responsabilité civile tend néanmoins à indemniser aussi complètement que possible les pertes réelles causées par un défendeur déterminé à un demandeur donné.

155 In the development of the principles governing the compensation of economic loss, the analytical methods adopted by the Court since *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, reflect the relational nature of torts at common law. The concern to control recovery through the concepts of proximity and

Dans l'élaboration des principes régissant l'indemnisation des pertes économiques, les méthodes analytiques adoptées par la Cour depuis l'arrêt *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, reflètent la nature relationnelle des délits civils en common law. Le souci d'encadrer l'indemnisation

2002 SCC 18 (CanLII)

foreseeability signals the importance of this key principle that tort law is not grounded in responsibility at large to society or to indeterminate classes of plaintiffs, but on obligations to compensate adequately victims standing in a close enough relationship with a tortfeasor.

By reason of the relational nature of private tort law, punitive damages do not fit easily into its overall scheme, such as it may be. They are considered at a point in a suit when, in principle, the complainant has suffered a wrong but has been granted compensation as complete as the law allows in order to put him or her back in his or her former position. Hence, punitive damages come on top of everything else and carry no particular price tag. At the same time, an award of punitive damages may reflect broader and different societal concerns. These concerns reflect their position in the law: they are designed to punish, not to compensate. An award of compensatory damages may, in a way, punish the defendant due to the very fact that he or she has been found in breach of some legal duty, that he or she is ordered to indemnify a plaintiff and that he or she has had to go through the inconvenience of a trial and also sometimes the humiliation of adverse publicity attached to legal action. Indeed, by itself, an award of general damages may be punishment enough. It does not mean, though, that an action is primarily punishment: the compensatory nature of the claim remains. Punitive damages differ strikingly from all other damages as the sole reason for awarding them is to punish, as Professor Feldthusen has pointed out. Even aggravated damages differ in this respect from punitive damages (see B. Feldthusen, "Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 *Can. Bus. L.J.* 241).

des pertes en recourant aux concepts du lien étroit et de la prévisibilité fait ressortir l'importance du principe fondamental selon lequel le droit de la responsabilité civile délictuelle ne repose pas sur une responsabilité générale envers la société ou envers des catégories indéterminées de demandeurs, mais sur l'obligation d'indemniser adéquatement les victimes qui établissent un lien suffisamment étroit avec l'auteur du délit.

156 En raison de cette nature relationnelle du droit de la responsabilité civile délictuelle, il n'est pas aisé d'intégrer les dommages-intérêts punitifs au cadre général de cette branche du droit, quel qu'il soit. La question des dommages-intérêts punitifs est prise en considération à un stade de l'action où, en principe, le plaignant a prouvé avoir subi un tort et a été indemnisé aussi complètement que le droit le permet, en vue de le replacer dans la situation où il se trouvait avant le délit. Les dommages-intérêts punitifs s'ajoutent donc aux autres réparations sans qu'il soit besoin de les rattacher à un chef de réclamation précis. Par ailleurs, ils peuvent refléter des préoccupations sociales différentes et plus larges, lesquelles reflètent à leur tour le rôle de ce type de dommages-intérêts dans le droit, rôle qui consiste à punir et non à indemniser. D'une certaine manière, les dommages-intérêts compensatoires peuvent avoir pour effet de punir le défendeur, du fait qu'il a été jugé coupable d'un manquement à une obligation légale, qu'on lui ordonne d'indemniser le demandeur et qu'il a dû subir les inconvénients d'un procès et, dans certains cas, l'humiliation attachée à la publicité négative qui accompagne une action en justice. De fait, une condamnation à des dommages-intérêts généraux peut en soi constituer une punition suffisante. Il ne s'ensuit toutefois pas qu'une action en justice agit au premier chef comme une sanction, sa nature compensatoire demeure. Les dommages-intérêts punitifs diffèrent de façon marquée des autres formes de dommages-intérêts en ce que, comme l'a souligné le professeur Feldthusen, leur seule raison d'être est de punir. À cet égard, même les dommages-intérêts majorés se distinguent des dommages-intérêts punitifs (voir B. Feldthusen, « Recent Developments in the Canadian Law of Punitive Damages » (1990), 16 *Rev. can. d. comm.* 241).

2002 SCC 18 (CanLII)

2002 SCC 18 (CanLII)

157 Aggravated damages served the traditional corrective purpose of the common law: to make the plaintiff whole for injuries to interests that are not properly compensable by ordinary damages. Punitive damages target not loss, but conduct. (See *Vorvis*, *supra*, at pp. 1098-99; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.) The defendant's wrong must then be considered directly and separately in order to assess its severity and, accordingly, the appropriate degree of punishment. The other forms of damages look to the loss of the plaintiff, but punitive damages refer essentially to the degree of culpability of the defendant's action.

Les dommages-intérêts majorés servent l'objectif réparateur classique de la common law, savoir la réparation intégrale des atteintes qui ont été portées aux intérêts du demandeur et qui ne sont pas compensables adéquatement par des dommages-intérêts ordinaires. Les dommages-intérêts punitifs ne visent pas la perte mais la conduite. (Voir *Vorvis*, précité, p. 1098-1099; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196.) Il faut donc examiner la faute du défendeur directement et séparément, pour en apprécier la gravité et déterminer, en conséquence, la sévérité de la sanction requise. Les autres formes de dommages-intérêts s'attachent à la perte subie par le demandeur, alors que les dommages-intérêts punitifs visent essentiellement l'étendue du caractère répréhensible des actes du défendeur.

158 The difficulties inherent in the nature of punitive damages have given rise to doubts as to their proper place in the law of torts. Some critics have indeed opined that they have no place in the proper structure of tort law, equating it with some form of "palm tree justice". (See *Cassell & Co. v. Broome*, [1972] A.C. 1027 (H.L.), at p. 1087, *per* Lord Reid.) Under the pine trees of this country, as we know, punitive damages have found a place in the law of torts. Nevertheless, as with any legal institution, punitive damages must address some identifiable purpose and concern in order to define their proper role. An overriding objective of general deterrence remains problematic, if punitive damages are to remain a useful incident of tort law. Otherwise, their use may turn some parts of the law of tort into a sort of private criminal law, devoid of all the procedural and evidentiary constraints which have come to be associated with the criminal justice system.

Les difficultés inhérentes à la nature des dommages-intérêts punitifs ont fait naître des doutes quant au rôle qui leur revient dans le droit de la responsabilité civile délictuelle. Certains critiques ont d'ailleurs estimé qu'ils n'y avaient pas leur place, les assimilant à une certaine forme de justice primitive. (Voir *Cassell & Co. c. Broome*, [1972] A.C. 1027 (H.L.), p. 1087, lord Reid.) Au Canada, dans notre système de justice moderne, les dommages-intérêts punitifs jouent, on le sait, un rôle dans le droit de la responsabilité civile. Néanmoins, comme toute autre institution juridique, les dommages-intérêts punitifs doivent répondre à une fin et à une préoccupation déterminables, qui permettent de définir le rôle qui leur revient. Le fait d'attribuer à ces dommages-intérêts un objectif central de dissuasion générale pose problème si cette forme de réparation est appelée à rester un élément utile du droit de la responsabilité civile délictuelle, car leur utilisation pourrait transformer certaines parties de ce droit en une sorte de droit criminel privé, qui ne serait pas assorti de toutes les garanties procédurales et exigences en matière de preuve que l'on est venu à associer avec le temps au système de justice pénale.

3. The Context of the Award of Punitive Damages

159 At this point, I must turn from principle to some particular facts of this case. I will try to identify

3. Le contexte de l'attribution des dommages-intérêts punitifs

À ce stade-ci de mes motifs, je dois délaisser l'analyse des principes pour examiner certains

2002 SCC 18 (CanLII)

which broad social purpose could be addressed by a large punitive damages award. This case started as litigation based on a home insurance contract. The insured had the misfortune to run across what might be characterized as the insurer from hell. Far from finding peace of mind and receiving a settlement in a fair and diligent manner, the claimant faced obduracy and bad faith. No evidence has been offered, though, that such conduct was a regular incident of Pilot Insurance's way of running its business. It looks more like a rogue file mishandled by an overeager manager, aided and abetted by counsel who seemed to have misunderstood the nature of his duties as an officer of the court and as a member in good standing of the Law Society of Upper Canada. Indeed, what is referred to at para. 16, in the reasons of my colleague, as a concession in respondent's factum that the upper management of the insurer was fully apprised of what was going on in the Whiten file, describes a line of reporting authority. Neither the so-called concession nor the evidence referred to in para. 17 of Pilot's factum establishes that the upper management of the company had acquired actual knowledge of the mishandling of the Whiten claim by its local manager and the lawyer he had retained. In addition, no suggestion has been made that such behaviour is widespread in the insurance industry in Ontario or elsewhere in Canada.

What, then, are the purposes of an award of punitive damages in this context? Once the purposes are determined, what should be a reasonable and proportionate award? Some might think that the prospect of punitive damages could perhaps strike fear into the hearts of cold-blooded bean counters lurking somewhere in the basement of insurance companies' head offices. The terrible swift sword of the law might draw blood from a company used to turning a blind eye to abuses by its middle managers. In the absence of evidence about the flaws of the entrepreneurial culture of Pilot Insurance, the situations or the particular evils rampant in the

faits de l'affaire. Je vais essayer de déterminer quel objectif social général pourrait servir l'attribution d'une somme substantielle au titre des dommages-intérêts punitifs. À l'origine, la présente affaire était un litige fondé sur un contrat d'assurance-habitation. L'assurée a eu la malchance de tomber sur un assureur infernal. Loin de trouver auprès de celui-ci la tranquillité d'esprit et d'obtenir un règlement juste et rapide de sa demande d'indemnité, elle s'est plutôt heurtée à l'entêtement et à la mauvaise foi. Il n'a toutefois été produit aucune preuve indiquant que cette conduite survient régulièrement dans le cours des activités de Pilot. Il semble s'agir davantage d'un dossier isolé mal mené par un gestionnaire trop zélé, secondé par un avocat qui ne paraît pas avoir bien compris la nature des obligations qui lui incombent en qualité d'officier de justice et de membre en règle du Barreau du Haut-Canada. De fait, ce qu'on désigne au par. 16 des motifs de mon collègue comme étant une concession, dans le mémoire de l'intimée, que la haute direction de l'assureur était parfaitement au fait de ce qui se passait dans la réclamation présentée par les Whiten est la description de la filière hiérarchique. Ni cette soi-disant concession ni la preuve évoquée au par. 17 du mémoire de Pilot n'établissent que la haute direction de l'entreprise savait concrètement que la réclamation des Whiten était mal menée par le gestionnaire local de Pilot et par l'avocat retenu par celui-ci. On n'a pas non plus prétendu qu'un tel comportement serait monnaie courante dans le secteur de l'assurance en Ontario ou ailleurs au Canada.

160 Quelles fins serviraient donc des dommages-intérêts punitifs dans un tel contexte et, une fois ces fins déterminées, quelle serait la somme raisonnable et proportionnée? D'aucuns peuvent penser que la perspective d'une condamnation à des dommages-intérêts punitifs aurait pour effet d'inspirer la crainte aux obsédés du bilan qui pourraient hanter les sous-sols des sièges sociaux des sociétés d'assurance. Le terrible glaive de la justice pourrait s'abattre promptement sur une entreprise habituée de fermer les yeux sur les abus de ses cadres intermédiaires. En l'absence d'éléments de preuve relatifs à quelque faille de

insurance industry, if any, what is left is a desire to punish adequately acts of bad faith and unfair dealing by a manager and counsel of an insurance company. (As my colleague indicates, this remark does not apply to counsel who represented Pilot in the Court of Appeal and in this Court.)

161 In this case, the sole narrow purpose of an award for punitive damages appears to be the punishment of the bad faith of the insurer in the discharge of its duties under what should be a good faith contract on both sides. The insurer must compensate in a timely manner. It has the right, even the duty, to investigate claims, but must do so fairly and diligently. For his or her part, the insured must file his or her claims promptly and assess his or her losses as accurately as he or she can. Given the nature of the contract, bad faith may constitute an actionable wrong and attract the sting of punitive damages. The challenge remains to assess them properly, in a manner consistent with the basic purposes of tort law. In the present appeal, an award of damages must reflect first of all the narrow objective defined by the facts of this case; as well, it must also reflect the relational nature of tort law, although, at times, such an award may be viewed as a deterrent to others. (See *Hill*, *supra*, at para. 196, *per* Cory J.; *Vorvis*, *supra*, at p. 1108, *per* McIntyre J.) But the need for general deterrence is far from clear in the present case. The requirement of a proper connection between award and conduct requires a close fit between the amount of the award and the misbehaviour of the respondent. An important consideration remains the nature of the dispute, which arose in the context of a contractual relationship concerning well-defined economic interests and not with respect to moral or dignity interest as in the case of an action for defamation. In addition, concerns about industry practices should mainly be addressed through the appropriate regulatory and penal regimes, rather than through haphazard punitive damages awards. (See Ontario Law Reform

la culture d'entreprise de Pilot ou aux problèmes ou maux particuliers, s'il en est, qui affligeraient le secteur de l'assurance, il ne reste que le désir de punir adéquatement certains actes — mauvaise foi et traitement inéquitable — d'un gestionnaire d'une société d'assurance et d'un avocat représentant celle-ci. (Comme le souligne également mon collègue, cette observation ne s'applique pas à l'avocat qui a représenté Pilot devant la Cour d'appel et devant notre Cour.)

En l'espèce, il semble que les dommages-intérêts punitifs aient pour seule fin, de surcroît restreinte, de punir la mauvaise foi dont l'assureur a fait montre dans l'exécution des obligations qui lui incombaient en vertu d'un contrat requérant la bonne foi réciproque des parties. L'assureur doit indemniser ses assurés dans les meilleurs délais. Il a certes le droit, et même le devoir, de faire enquête sur ces demandes, mais il doit le faire de façon équitable et diligente. L'assuré, quant à lui, doit produire sa demande d'indemnité rapidement et déterminer ses pertes aussi précisément que possible. Compte tenu de la nature du contrat, la mauvaise foi peut constituer une faute donnant ouverture à action et exposer son auteur à la rigueur d'une condamnation au versement de dommages-intérêts punitifs. La difficulté consiste à fixer adéquatement le quantum de tels dommages-intérêts, d'une manière compatible avec les objectifs fondamentaux du droit de la responsabilité civile délictuelle. Dans le présent pourvoi, les dommages-intérêts punitifs doivent avant tout refléter l'objectif limité que circonscrivent les faits particuliers de l'affaire. Il faut également qu'ils reflètent la nature relationnelle du droit de la responsabilité civile délictuelle, bien que, à l'occasion, de tels dommages-intérêts puissent être envisagés comme une mesure de dissuasion générale. (Voir *Hill*, précité, par. 196, le juge Cory; *Vorvis*, précité, p. 1108, le juge McIntyre.) Toutefois, le besoin de dissuasion générale est loin d'être évident en l'espèce. Comme il doit exister un lien suffisant entre la conduite reprochée et les dommages-intérêts, le montant de ceux-ci doit correspondre étroitement à la conduite répréhensible de l'intimée. Une considération importante en l'espèce est la nature du litige, qui a pris naissance dans le contexte de rapports contractuels concernant des intérêts

2002 SCC 18 (CanLII)

Commission, *Report on Exemplary Damages* (1991), at p. 37.)

économiques bien définis et non, comme ce serait le cas dans une action en diffamation, des intérêts d'ordre moral ou ayant trait à la dignité de la personne. De plus, les solutions aux pratiques inquiétantes observées dans un secteur d'activités donné devraient être apportées par le truchement des régimes de réglementation ou régimes pénaux applicables et non en accordant au hasard des dommages-intérêts punitifs. (Voir Commission de réforme du droit de l'Ontario, *Rapport sur les dommages-intérêts exemplaires* (1991), p. 37.)

In the case of disputes concerning damage to property or economic interests, the retributive aspect of the law should not play a major role in litigation. Granting an indemnity of about three times the compensation for loss of property under an insurance policy fulfills no rational function. Despite the moral satisfaction we may derive from giving a good whack to an insurance company and some misguided middle managers, the verdict of the jury does not much advance the case of sound and fair management in the insurance industry. The award fails the rationality test because its sole purpose remains to punish adequately bad faith and unfair dealing by employees of Pilot and its counsel. It does not address any widespread practice in the insurance industry. It does not pretend to effect a disgorgement of unfairly acquired profit. The punishment far exceeds whatever property or economic losses may have been caused by the nonperformance of the contract. In such cases, the criterion of proportionality requires that the use of punitive damages remain carefully controlled and that punitive damages should not significantly exceed the amount of damages to property, or economic interests, including aggravated damages, if any are claimed.

162 La fonction punitive du droit ne devrait pas jouer un rôle important dans les litiges portant sur des dommages causés à des biens ou à des intérêts économiques. L'attribution d'une somme égale au triple environ du montant de l'indemnité accordée pour la perte d'un bien visé par un contrat d'assurance ne remplit aucune fonction rationnelle. Malgré la satisfaction morale susceptible de découler du rappel à l'ordre bien senti qui est donné à une société d'assurance et à quelques cadres intermédiaires malavisés, la décision du jury ne favorise pas vraiment l'application de pratiques de gestion saines et équitables dans le secteur de l'assurance. Cette décision ne satisfait pas au critère de la rationalité, étant donné qu'elle a pour seule fin de punir adéquatement la mauvaise foi et le traitement inéquitable dont se sont rendus coupables des employés de Pilot ainsi que l'avocat de celle-ci. Elle ne corrige aucune pratique répandue dans le secteur de l'assurance, pas plus qu'elle ne tend à la restitution de profits injustement réalisés. La punition excède de beaucoup les pertes économiques ou matérielles susceptibles d'avoir été causées par l'inexécution du contrat. Dans des affaires de ce genre, le critère de la proportionnalité exige que les tribunaux recourent avec circonspection aux dommages-intérêts punitifs et que le quantum de ceux-ci n'excède pas de façon substantielle les dommages-intérêts accordés au titre du préjudice causé aux biens ou aux intérêts économiques, y compris les dommages-intérêts majorés réclamés.

4. Control of Awards

4. Modération du quantum

163 While Canadian courts have not imposed formal caps on punitive damages, the discretionary

Bien que les tribunaux canadiens n'aient pas imposé formellement des plafonds à l'égard

2002 SCC 18 (CanLII)

nature of such awards and the difficulties of setting amounts in a rational manner indicate that proper instructions should be given to juries about factors and methods to be used in the difficult task of assessing punitive damages. In my respectful view, that is exactly the concern that the Ontario Court of Appeal attempted to address. Finlayson J.A. not only found that the award was too high, but that it was so high as to be unreasonable and to require interference by the Court of Appeal. The majority adopted a figure which appears reasonable and proportionate. It imposed significant punishment for the bad faith of Pilot without upsetting the proper balance between the compensatory and punitive functions of tort law.

164 Moreover, flexibility and discretion are not the only values at stake in the development of legal rules in the law of damages. Some degree of predictability and consistency should also be factored into situations where the nature of the damages suffered makes it difficult for a jury to determine a proper quantum, as in the case of non-monetary losses and personal injury litigation. In this area, it should be remembered that our Court deemed it necessary to impose formal caps or a "bright line". In the 1978 trilogy *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287, at p. 334, the Court set a cap of $100,000 for damages which were intended as restitution for non-monetary losses after adjustment for inflation; our Court has kept this cap in place ever since. Indeed, in 1995, Sopinka J. wrote that the "trilogy has imposed as a rule of law a legal limit to non-pecuniary damages". (See *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 114.) In *Andrews*, *supra*, at p. 261, Dickson J.) (as he then was) found that some kind of fair and reasonable limit should be imposed

des dommages-intérêts punitifs, la nature discrétionnaire de la décision d'accorder de tels dommages-intérêts et la difficulté de fixer rationnellement le quantum de ceux-ci indiquent qu'il y a lieu de fournir aux jurys des directives adéquates sur les facteurs et méthodes à utiliser pour s'acquitter de la difficile tâche d'arrêter la somme des dommages-intérêts punitifs. À mon humble avis, c'est exactement ce problème que la Cour d'appel de l'Ontario a cherché à régler. Le juge Finlayson a non seulement décidé que le quantum des dommages-intérêts punitifs était trop élevé, mais qu'il l'était au point d'être déraisonnable et de commander l'intervention de la Cour d'appel. La majorité de la Cour d'appel a arrêté une somme qui paraît raisonnable et proportionnée, et qui sanctionne de façon non négligeable la mauvaise foi de Pilot sans compromettre le juste équilibre entre les fonctions compensatoire et punitive du droit de la responsabilité civile délictuelle.

En outre, la souplesse et le pouvoir discrétionnaire ne sont pas les seuls facteurs pertinents dans l'élaboration des règles applicables en matière de dommages-intérêts. Lorsque, en raison de la nature des dommages subis, il est difficile pour le jury d'établir le quantum approprié, par exemple dans le cas des pertes non pécuniaires et des préjudices corporels, il faut également incorporer un certain degré de prévisibilité et de cohérence à l'analyse. À cet égard, il convient de rappeler que notre Cour a jugé nécessaire d'imposer des plafonds formels ou, si l'on peut dire, une « ligne de démarcation nette ». Dans la trilogie jurisprudentielle de 1978 — *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229, *Thornton c. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 R.C.S. 267, et *Arnold c. Teno*, [1978] 2 R.C.S. 287, p. 334 —, la Cour a imposé un plafond de 100 000 $, indexé sur l'inflation, à l'égard des dommages-intérêts accordés pour compenser les pertes non pécuniaires. La Cour a maintenu ce plafond depuis. De fait, en 1995, le juge Sopinka a écrit que « la trilogie a fixé, en tant que règle de droit, une limite aux dommages-intérêts non pécuniaires » (voir l'arrêt *ter Neuzen c. Korn*, [1995] 3 R.C.S. 674, par. 114). Dans l'affaire *Andrews*, précitée, p. 260-261, le juge

2002 SCC 18 (CanLII)

given the difficulty of putting a price on non-pecuniary losses:

> [T]he problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

(See also *Arnold*, *supra*, at p. 331, *per* Spence J.)

In the end, imposing limits on such claims was not viewed as working an injustice on claimants. Setting punitive damages at amounts which do not exceed significantly the real economic loss, where the loss suffered concerns mainly property and economic interests, would leave them in their proper place within the scheme of the law of torts. At the same time, this approach would avoid undermining the structure of the law of torts and its core function.

5. Function of the Jury

In the circumstances of this case, the fact that the award was made by a jury does not make it more immune to appellate review; as appears from the record, the jurors were themselves uncomfortable with the problem of determining the proper quantum of punitive damages. They sought further instructions, but the trial judge left them with the "skeletal instructions" given during the charge. Hence, they ended up with an award which my colleague would not have given, and which he says stands at the outer limits of the reasonable, but within it. The Court of Appeal did only its duty when it reviewed this award. A verdict which breaches the requirements of proportionality and rationality required appellate review.

Dickson (plus tard Juge en chef de notre Cour) a conclu que la difficulté que présentait la détermination des pertes non pécuniaires exigeait l'établissement d'une limite juste et raisonnable :

> Mais cette réparation diffère qualitativement de l'indemnisation des pertes pécuniaires. Le bonheur et la vie n'ont pas de prix. L'évaluation monétaire des pertes non pécuniaires est plus un exercice philosophique et social qu'un exercice juridique ou logique. L'indemnité doit être équitable et raisonnable, l'équité étant mesurée à l'aide des décisions antérieures; mais l'indemnité est aussi nécessairement arbitraire ou conventionnelle. Le préjudice n'est pas intégralement réparable en argent.

(Voir également l'arrêt *Arnold*, p. 331, le juge Spence.)

165 En définitive, on a considéré que la fixation de limites à l'égard de telles réclamations ne constituait pas une injustice à l'endroit des demandeurs. Le fait d'accorder, au titre des dommages-intérêts punitifs, une somme qui n'excède pas de façon substantielle la perte économique réelle, lorsque cette perte vise principalement des biens et des intérêts économiques, conserve à cette forme de dommages-intérêts la place qui lui revient au sein du droit de la responsabilité civile délictuelle. Cette façon de faire permet en outre d'éviter de porter atteinte à la structure de cette branche du droit et à sa fonction essentielle.

5. Le rôle du jury

166 Dans les circonstances de la présente affaire, le fait que ce soit un jury qui ait accordé les dommages-intérêts punitifs ne soustrait pas cette décision au pouvoir de contrôle des juridictions d'appel. Comme le dossier l'indique, les jurés eux-mêmes éprouvaient de la difficulté à déterminer la somme appropriée à accorder au titre des dommages-intérêts punitifs. Ils ont demandé des directives supplémentaires, mais le juge de première instance s'en est tenu aux « directives sommaires » qu'il leur avait données dans son exposé. En conséquence, le jury a abouti à une somme que n'aurait pas accordée mon collègue mais qui, d'affirmer ce dernier, serait en deçà de la limite supérieure acceptable. La Cour d'appel n'a fait que s'acquitter de son devoir en modifiant cette somme. Un verdict qui ne respecte pas les conditions de proportionnalité et de rationalité doit être révisé en appel.

2002 SCC 18 (CanLII)

167 Some problems may arise also from aspects of the practice followed at trial. According to the present Ontario practice, if one counsel objects, the presiding judge will not instruct the jury as to the range of awards save in the case of personal injuries. (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 118; *Holmested and Watson: Ontario Civil Procedure* (loose-leaf ed.), vol. 1, at p. CJA-242; *Caron v. Chodan Estate* (1992), 58 O.A.C. 173, at p. 175, *per* Arbour J.A. (as she then was); P. G. Vogel, *Cohen Melnitzer's Civil Procedure in Practice* (loose-leaf ed.), vol. 1, at p. 12-20; *Gray v. Alanco Developments Ltd.*, [1967] 1 O.R. 597 (C.A.); *Howes v. Crosby* (1984), 45 O.R. (2d) 449 (C.A.).)

Certaines règles de pratique qui ont été appliquées en l'espèce au procès peuvent également se révéler sources de problèmes. En effet, sauf dans les affaires portant sur des lésions corporelles, conformément à la pratique actuellement suivie en Ontario le juge n'informe pas le jury de la fourchette des sommes déjà accordées au titre des dommages-intérêts si un des avocats s'y oppose. (*Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, art. 118; *Holmested and Watson : Ontario Civil Procedure* (éd. feuilles mobiles), vol. 1, p. CJA-242; *Caron c. Chodan Estate* (1992), 58 O.A.C. 173, p. 175, madame le juge Arbour (maintenant juge de notre Cour); P. G. Vogel, *Cohen Melnitzer's Civil Procedure in Practice* (éd. feuilles mobiles), vol. 1, p. 12-20; *Gray c. Alanco Developments Ltd.*, [1967] 1 O.R. 597 (C.A.); *Howes c. Crosby* (1984), 45 O.R. (2d) 449 (C.A.).)

168 The problems that occurred in the present case demonstrate that some sort of instruction on the range of punitive damages awards, even without counsel's agreement, would have been useful. Without removing the jury's discretion, it would at least communicate to them some idea of past figures and of guidelines that may be found in appellate or Supreme Court of Canada judgments. They should also be instructed clearly that an award of general damages may also amount to all the punishment that is necessary in a given case. Failing this, and in the absence of a proper application of the rationality and proportionality criteria, problematic awards are bound to happen. Courts should take care that they do not alter the nature of tort law by turning the focus of civil litigation away from compensation of a claim to punishment of defendants.

Les problèmes qui sont survenus dans la présente affaire démontrent qu'il aurait été utile de renseigner les jurys sur la fourchette des sommes déjà accordées au titre des dommages-intérêts punitifs, et ce même si les avocats ne sont pas d'accord pour le faire. Sans avoir pour effet d'enlever aux jurés leur pouvoir discrétionnaire sur la question, de telles directives pourraient à tout le moins les renseigner sur les sommes accordées jusque-là et sur les indications données en la matière dans les arrêts de notre Cour et des cours d'appel. Il faut, en outre, préciser clairement aux jurés que, dans une affaire donnée, des dommages-intérêts généraux peuvent également constituer une sanction suffisante. En l'absence de telles directives et si les critères de rationalité et de proportionnalité sont mal appliqués, des jurys rendront inévitablement des décisions problématiques. Les tribunaux doivent veiller à ce que de telles décisions n'altèrent pas la nature du droit de la responsabilité civile en faisant porter l'accent des actions civiles non plus sur l'indemnisation du préjudice mais sur le châtiment des défendeurs.

169 For these reasons, I would dismiss the appeal without costs and the cross-appeal with costs.

Appeal allowed with costs, LeBel J. *dissenting. Cross-appeal dismissed with costs.*

Pour ces motifs, je rejetterais le pourvoi principal sans dépens et le pourvoi incident avec dépens.

Pourvoi principal accueilli avec dépens, le juge LeBel *est dissident. Pourvoi incident rejeté avec dépens.*

2002 SCC 18 (CanLII)

Solicitors for the appellant/respondent on cross-appeal: MacMillan Rooke Boeckle, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Lerner & Associates, Toronto.

Solicitors for the intervener the Insurance Council of Canada: Davies, Phillips & Vineberg, Toronto.

Solicitors for the intervener the Ontario Trial Lawyers Association: Ross & McBride, Hamilton.

Procureurs de l'appelante/intimée au pourvoi incident : MacMillan Rooke Boeckle, Toronto.

Procureurs de l'intimée/appelante au pourvoi incident : Lerner & Associates, Toronto.

Procureurs de l'intervenant le Conseil d'assurances du Canada : Davies, Phillips & Vineberg, Toronto.

Procureurs de l'intervenante l'Ontario Trial Lawyers Association : Ross & McBride, Hamilton.

2002 SCC 18 (CanLII)

Wanda Young *Appellant*

v.

Leslie Bella, William S. Rowe and Memorial University of Newfoundland *Respondents*

and

Child Welfare League of Canada *Intervener*

Wanda Young *Appelante*

c.

Leslie Bella, William S. Rowe et Memorial University of Newfoundland *Intimés*

et

Ligue pour le bien-être de l'enfance du Canada *Intervenante*

2006 SCC 3 (CanLII)

INDEXED AS: YOUNG *v.* BELLA

Neutral citation: 2006 SCC 3.

File No.: 30670.

2005: October 20; 2006: January 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Torts — Negligence — Duty of care — University professors — Report of suspected ill-treatment of children — Student of social work submitting as an appendix attached to term paper an unattributed first person account of woman sexually abusing children — Professor speculating that account autobiographical but not seeking explanation from student — Professor taking her concerns to Director who, without inquiring further, sent report to Child Protection Services — Student red-flagged as potential child abuser — Investigation by Child Protection Services two years later quickly determining that student's account had been copied from textbook and suspicion baseless — Student bringing action in negligence against professor, Director and University — Whether all elements of tort of negligence established — Whether action barred by child welfare legislation, which protects informants who report child abuse unless report is done "maliciously or without reasonable cause" — Child Welfare Act, R.S.N. 1990, c. C-12, s. 38(1), (6).

RÉPERTORIÉ : YOUNG *c.* BELLA

Référence neutre : 2006 CSC 3.

N^{o} du greffe : 30670.

2005 : 20 octobre; 2006 : 27 janvier.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Responsabilité délictuelle — Négligence — Obligation de diligence — Professeurs d'université — Signalement de cas de maltraitance soupçonnée d'enfants — Étudiante en service social annexant à un travail écrit un récit anonyme dans lequel une femme s'exprimant à la première personne relate des agressions sexuelles d'enfants — Professeure supposant que le récit est autobiographique, mais ne demandant aucune explication à l'étudiante — Professeure faisant part de ses inquiétudes au directeur qui, sans poser d'autres questions, effectue un signalement au service de protection de l'enfance — Étudiante signalée comme étant un agresseur d'enfant potentiel — Enquête du service de protection de l'enfance, menée deux ans plus tard, permettant de constater rapidement que le récit de l'étudiante est tiré d'un manuel et que les soupçons sont dépourvus de fondement — Étudiante intentant une action pour négligence contre la professeure, le directeur et l'Université — A-t-on établi l'existence de tous les éléments du délit de négligence? — L'action est-elle irrecevable en vertu de la loi sur le bien-être de l'enfance, qui protège les personnes qui signalent des cas de violence envers un enfant, sauf si le signalement est effectué « de façon malveillante ou sans raison valable »? — Child Welfare Act, R.S.N. 1990, ch. C-12, art. 38(1), (6).

2006 SCC 3 (CanLII)

Damages — Jury award — Whether evidence at trial supported jury's award of damages.

Damages — Non-pecuniary damages — Jury awarding $430,000 in non-pecuniary damages in negligence case — Whether jury award should be set aside — Whether cap should be applied to non-pecuniary damage awards outside catastrophic personal injury context.

The appellant was a university student taking courses toward her goal of being admitted to the School of Social Work and becoming a social worker. As a result of a missing footnote to her term paper, professor B speculated that the case study attached as an appendix might be a personal confession to having sexually abused children (a "cry for help"). In fact the case study had been taken from a textbook listed in the bibliography attached to the term paper. B also suspected the term paper itself to be plagiarized. She wrote a letter to the appellant raising the issue of plagiarism, but did not mention to the appellant her concerns about suspected child abuse or request an explanation regarding the appendix. B later took her concerns to R, the Director of the School of Social Work, who, without seeking an explanation from the appellant, sent a "suspected ill-treatment" report to the Child Protection Services ("CPS"). Consequently, unbeknownst to the appellant, the suggestion that she was a suspected child sex abuser was discussed amongst three university professors, communicated to the RCMP, and disclosed to a minimum of ten social workers in several communities, many of whom knew the appellant through her summer employment and one of whom was her boyfriend's sister. More than two years after the initial report a CPS staff worker belatedly sought a meeting with the appellant where, for the first time, the appellant learned of the long-standing "report". She delivered the relevant textbook to CPS the next day. It was immediately obvious to CPS that the appendix had been copied from the textbook listed in the bibliography and was not in the least autobiographical. By letter of September 13, 1996, CPS acknowledged that "When explored it was immediately clear that the information did not relate to you. Rather, the information provided was an excerpt from a book."

Dommages-intérêts — Dommages-intérêts accordés par un jury — La preuve étaye-t-elle les dommages-intérêts accordés par le jury?

Dommages-intérêts — Dommages-intérêts non pécuniaires — Jury accordant des dommages-intérêts non pécuniaires de 430 000 $ dans une affaire de négligence — Y a-t-il lieu d'annuler les dommages-intérêts accordés par le jury? — Y a-t-il lieu d'appliquer un plafond à l'attribution de dommages-intérêts non pécuniaires dans d'autres contextes que celui des blessures corporelles catastrophiques?

L'appelante était une étudiante universitaire qui suivait des cours en vue d'être admise à l'École de service social et de devenir travailleuse sociale. À la suite de l'omission de l'appelante d'inscrire une note en bas de page dans un travail écrit, la professeure B a supposé que l'étude de cas jointe en annexe pouvait être un aveu personnel dans lequel l'appelante reconnaissait avoir agressé sexuellement des enfants (un « appel à l'aide »). En réalité, l'étude de cas était tirée d'un manuel mentionné dans la bibliographie jointe au travail en question. B soupçonnait également que le travail était plagié. Elle a adressé à l'appelante une lettre dans laquelle elle soulevait la question du plagiat, mais elle ne lui a pas fait part de ses craintes qu'un enfant ait été victime de violence et ne lui a demandé aucune explication concernant l'annexe. B a, par la suite, fait part de ses inquiétudes à R, le directeur de l'École de service social, qui, sans chercher à obtenir une explication de l'appelante, a effectué un signalement de « cas de maltraitance soupçonnée » auprès du service de protection de l'enfance (« SPE »). En conséquence, sans que l'appelante le sache, l'idée qu'elle puisse être un agresseur sexuel d'enfant a fait l'objet de discussions entre trois professeurs d'université, a été communiquée à la GRC et a été révélée à au moins 10 travailleurs sociaux de plusieurs collectivités, dont plusieurs avaient connu l'appelante au cours de ses emplois d'été et dont l'un était la sœur de son petit ami. Plus de deux ans après le signalement initial, un membre du personnel du SPE a fini par solliciter une rencontre avec l'appelante et c'est au cours de cette rencontre que l'appelante a appris, pour la première fois, l'existence de ce « signalement » effectué depuis longtemps. Celle-ci a fourni le manuel pertinent au SPE le lendemain. Le SPE a immédiatement constaté que l'annexe était un extrait du manuel mentionné dans la bibliographie et n'avait rien d'autobiographique. Dans une lettre en date du 13 septembre 1996, le SPE a reconnu ceci : « L'examen de ces renseignements a permis de constater immédiatement qu'ils ne vous concernaient pas. Ces renseignements étaient plutôt tirés d'un manuel. »

2006 SCC 3 (CanLII)

The appellant then sued the respondents complaining that their actions "combined to put in motion a series of events that would forever shape the course of [her] future by affecting her reputation in the community, her ability to complete her education and by reducing her income-earning capacity". A jury found the University's treatment of the appellant to be negligent and further found that as a result of this negligence her chosen career prospects had been destroyed; it awarded $839,400 in damages, including $430,000 in non-pecuniary damages. A majority of the Court of Appeal set aside the jury award, concluding that the action was barred by s. 38(6) of the *Child Welfare Act*, which provided that an action did not lie against an informant of ill-treatment against a child "unless the making of the report is done maliciously or without reasonable cause".

Held: The appeal should be allowed and the trial judgment should be restored.

Everyone is required by s. 38(1) of the *Child Welfare Act* to report "information that a child has been, is or may be in danger of abandonment, desertion, neglect, physical, sexual or emotional ill-treatment or has been, is or may be otherwise in need of protection". Those who are subject to a statutory duty to report must be protected from any adverse legal consequences flowing from compliance with that duty, but here the university professors acted on conjecture and speculation which fell short of the required "reasonable cause" to make a report to CPS required by s. 38(6). They did not even have misinformation (for which protection will be available unless reported maliciously or without reasonable cause). They acted in a way the jury found to be without any reasonable cause even to make a report. [3] [44]

There was evidence before the jury capable of establishing all the elements of the tort of negligence. In the present case, proximity was not simply grounded in a misguided report to CPS but was rooted in the broader relationship between the University's professors and their students, which gave rise to a duty of care. The standard of care that ought to be met by professors in respect of their students required them to take the necessary care to get their facts straight before taking a potential career-ending action. Here, both B and R failed to seek an explanation from the appellant. In light of the evidence, it was open to the jury to

L'appelante a alors intenté contre les intimés une action dans laquelle elle affirmait que leurs actes avaient « déclenché ensemble une suite d'événements qui a[vait] irrémédiablement façonné [son] avenir [. . .] en portant atteinte à sa réputation au sein de la collectivité et à sa capacité de terminer ses études, et en diminuant ainsi sa capacité de gagner un revenu ». Un jury a conclu que l'Université avait fait montre de négligence envers l'appelante et, en outre, qu'en raison de cette négligence cette dernière avait vu s'envoler ses chances de faire carrière dans le domaine de son choix; il a accordé des dommages-intérêts de 839 400 $, dont des dommages-intérêts non pécuniaires de 430 000 $. Les juges majoritaires de la Cour d'appel ont écarté la décision du jury d'accorder des dommages-intérêts, concluant que l'action en question était irrecevable en vertu du par. 38(6) de la *Child Welfare Act*, qui prévoyait qu'aucune action ne pouvait être intentée contre une personne qui signale un cas de maltraitance d'un enfant « sauf si le signalement est effectué de façon malveillante ou sans raison valable ».

Arrêt : Le pourvoi est accueilli et le jugement de première instance est rétabli.

Le paragraphe 38(1) de la *Child Welfare Act* oblige à communiquer les « renseignements indiquant qu'un enfant a été, est ou risque d'être victime d'abandon, de délaissement, de négligence, de mauvais traitements physiques, sexuels ou affectifs, ou qu'il a ou peut avoir par ailleurs besoin de protection ». Il faut protéger contre toute conséquence juridique défavorable les personnes qui s'acquittent de leur obligation de communiquer des renseignements. En l'espèce, les professeurs de l'Université ont cependant agi sur la foi d'hypothèses et de suppositions n'ayant rien de commun avec l'obligation, imposée par le par. 38(6), d'avoir une « raison valable » d'effectuer un signalement auprès du SPE. Ils ne disposaient même pas de renseignements inexacts (à l'égard desquels s'applique la protection, sauf s'ils sont communiqués de façon malveillante ou sans raison valable). Le jury a conclu qu'ils n'avaient aucune raison valable même d'effectuer un signalement. [3] [44]

La preuve présentée au jury permettait d'établir l'existence de tous les éléments du délit de négligence. En l'espèce, la proximité découlait non pas simplement d'un malencontreux signalement effectué auprès du SPE, mais du lien général qui existait entre les professeurs de l'Université et leurs étudiants, lequel lien donnait naissance à une obligation de diligence. La norme de diligence que les professeurs devaient respecter à l'égard de leurs étudiants les obligeait à prendre les précautions requises pour s'assurer de l'exactitude des faits avant de prendre des mesures susceptibles de mettre fin à une carrière. Dans le cas qui nous occupe,

2006 SCC 3 (CanLII)

conclude that their behaviour fell markedly short of the standard of care professors are required to meet in respect of their students. There is no basis for an appellate court to intervene with the jury's findings in this respect. [27-43]

Section 38(6) does not bar the appellant's action. Under s. 38(1), information that a child "may be" in danger or in need of protection suffices to trigger the duty to report. The respondents were not obliged to conduct their own investigation of the suspected abuse, nor were they required to have reasonable cause to believe abuse had in fact occurred before making a report. They were, however, obliged to have reasonable cause to make a report to CPS, i.e. to possess information that CPS reasonably ought to be asked to look into, even if it turned out to be misinformation. It is the absence of reasonable cause even to make a report that lay at the heart of the appellant's allegation of negligence. [34] [49]

Section 38(6) offers no protection to the respondents because the case study contained in the appendix was not information that a child was in danger or in need of protection from the appellant. So far as the respondents were concerned, its date and authorship were simply unknown. There was nothing that tied the experiences it related to the appellant. R acted on nothing more than speculation and conjecture. It appears the jury concluded that he must have known that simply making a report would have serious consequences, especially for someone in the appellant's position, and in particular that a report by a prominent individual such as the Director of the School of Social Work would likely cause the appellant's name to be placed on the Child Abuse Registry. [42] [51]

There is no basis for an appellate court to interfere with the jury's award of damages. There were many contingencies built into the damage calculations, all of which were laid out before the jury by the parties. The jury chose to resolve those contingencies in favour of the appellant. It was within their province, as the triers of fact, to do so. The respondents' argument that the appellant's claim is really an action for defamation, dressed up as a negligence action, must be rejected. The possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out. [54-56]

B et R ont tous les deux omis de demander une explication à l'appelante. Compte tenu de la preuve, le jury pouvait conclure que le comportement des professeurs dérogeait sensiblement à la norme de diligence qu'ils sont tenus de respecter à l'égard de leurs étudiants. Rien ne justifie une cour d'appel de modifier les conclusions du jury à cet égard. [27-43]

Le paragraphe 38(6) ne rend pas irrecevable l'action de l'appelante. Aux termes du par. 38(1), les renseignements indiquant qu'un enfant est en situation de « risque » ou peut avoir besoin de protection suffisent pour donner naissance à l'obligation de signalement. Les intimés n'avaient pas à mener leur propre enquête sur le cas de violence soupçonnée et n'étaient pas non plus tenus d'avoir une raison valable de croire qu'une agression avait vraiment eu lieu avant d'effectuer un signalement. Ils devaient toutefois avoir une raison valable d'effectuer un signalement auprès du SPE : en d'autres termes, ils devaient posséder des renseignements qui pouvaient raisonnablement justifier une demande d'enquête au SPE, même si ces renseignements se sont avérés inexacts. C'est l'absence de raison valable même d'effectuer un signalement qui est au cœur de l'allégation de négligence de l'appelante. [34] [49]

Le paragraphe 38(6) n'offre aucune protection aux intimés parce que l'étude de cas figurant à l'annexe ne constituait pas un renseignement indiquant qu'un enfant était en situation de risque ou avait besoin d'être protégé contre l'appelante. Quant aux intimés, ils ne connaissaient ni la date ni l'auteur de l'étude de cas. Rien ne liait l'appelante aux expériences relatées. R n'a agi que sur la foi de suppositions et d'hypothèses. Il appert que le jury a conclu que R devait savoir que le seul fait d'effectuer un signalement aurait de graves conséquences, surtout pour quelqu'un comme l'appelante, et, en particulier, qu'un signalement par une personne en vue comme le directeur de l'École de service social entraînerait probablement l'inscription du nom de l'appelante au registre de l'enfance maltraitée. [42] [51]

Rien ne justifie une cour d'appel de modifier les dommages-intérêts accordés par le jury. De nombreuses éventualités étaient incorporées dans les calculs des dommages-intérêts, lesquelles ont toutes été exposées au jury par les parties. Le jury a opté pour les éventualités favorables à l'appelante. Il pouvait le faire en sa qualité de juge des faits. Il faut rejeter l'argument des intimés selon lequel l'action fondée sur la négligence intentée par l'appelante est en réalité une action pour diffamation. La possibilité d'intenter une action pour diffamation n'empêche pas d'invoquer une cause d'action fondée sur la négligence lorsque les éléments nécessaires sont établis. [54-56]

2006 SCC 3 (CanLII)

There was also evidence to permit the jury to find that there was a causal connection between the University's breach of duty and the damages suffered by the appellant, that the damage sustained by the appellant was foreseeable, and that contributory negligence on the part of the appellant had not been proved. Finally, the jury's award for non-pecuniary damages cannot, in light of the evidence, be said to be wholly disproportionate or so shockingly unreasonable so as to justify appellate interference. Nor is the case for imposing a cap in respect of negligence causing economic loss made out here. The issue of whether and in what circumstances a cap applies to non-pecuniary damage awards outside the catastrophic personal injury context is left open for consideration in another case. [59-66]

Cases Cited

Applied: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; **distinguished:** *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287; **referred to:** *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Fulton v. Globe and Mail* (1996), 194 A.R. 254, aff'd (1997), 53 Alta. L.R. (3d) 212; *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677, aff'd (1995), 25 O.R. (3d) 302; *Spring v. Guardian Assurance plc*, [1994] 3 All E.R. 129; *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601; *S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209.

Statutes and Regulations Cited

Child Welfare Act, R.S.N. 1990, c. C-12, s. 38(1), (6).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Roberts, Welsh and Rowe JJ.A.) (2004), 241 Nfld. & P.E.I.R. 35, 716 A.P.R. 35, 8 C.P.C. (6th) 131, [2004] N.J. No. 338 (QL), 2004 NLCA 60, setting aside a jury award. Appeal allowed.

Gillian D. Butler, Q.C., and *Kimberley M. McLennan*, for the appellant.

R. Wayne Bruce and *Susan E. Norman*, for the respondents.

La preuve était également suffisante pour permettre au jury de conclure qu'il existait un lien causal entre le manquement de l'Université à son obligation et le préjudice subi par l'appelante, que ce préjudice était prévisible et que l'existence de négligence contributive de la part de l'appelante n'avait pas été établie. Enfin, compte tenu de la preuve, on ne saurait affirmer que le montant accordé par le jury est tout à fait disproportionné ou terriblement déraisonnable au point de justifier l'intervention d'une cour d'appel. La nécessité de fixer un plafond dans les cas de négligence causant une perte économique n'est pas établie en l'espèce non plus. L'examen de la question de savoir si et dans quelles circonstances ce plafond s'applique à l'attribution de dommages-intérêts non pécuniaires dans d'autres contextes que celui des blessures corporelles catastrophiques est reporté à une autre occasion. [59-66]

Jurisprudence

Arrêt appliqué : *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; **distinction d'avec les arrêts :** *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *Thornton c. School District No. 57 (Prince George)*, [1978] 2 R.C.S. 267; *Arnold c. Teno*, [1978] 2 R.C.S. 287; **arrêts mentionnés :** *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *Cooper c. Hobart*, [2001] 3 R.C.S. 537, 2001 CSC 79; *Martel Building Ltd. c. Canada*, [2000] 2 R.C.S. 860, 2000 CSC 60; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Fulton c. Globe and Mail* (1996), 194 A.R. 254, conf. par (1997), 53 Alta. L.R. (3d) 212; *Elliott c. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677, conf. par (1995), 25 O.R. (3d) 302; *Spring c. Guardian Assurance plc*, [1994] 3 All E.R. 129; *Nance c. British Columbia Electric Railway Co.*, [1951] A.C. 601; *S.Y. c. F.G.C.* (1996), 78 B.C.A.C. 209.

Lois et règlements cités

Child Welfare Act, R.S.N. 1990, ch. C-12, art. 38(1), (6).

POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (les juges Roberts, Welsh et Rowe) (2004), 241 Nfld. & P.E.I.R. 35, 716 A.P.R. 35, 8 C.P.C. (6th) 131, [2004] N.J. No. 338 (QL), 2004 NLCA 60, qui a annulé une décision d'un jury. Pourvoi accueilli.

Gillian D. Butler, c.r., et *Kimberley M. McLennan*, pour l'appelante.

R. Wayne Bruce et *Susan E. Norman*, pour les intimés.

Michael E. Barrack and *Christopher A. Wayland*, for the intervener.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND BINNIE J. —

I. Introduction

The appellant, Wanda Young, was a student at Memorial University of Newfoundland in 1994, taking courses toward her goal of being admitted to the School of Social Work and becoming a social worker. Because of a bizarre misunderstanding between her and one of her professors over a missing footnote to a term paper, a misunderstanding that was not brought to the appellant's attention until more than two years after her paper was submitted, she was reported in May 1994 by the respondent William Rowe, the then Director of the School of Social Work, to the provincial Child Protection Services ("CPS") as a potential child abuser. When the report was belatedly "investigated" by CPS in 1996, the misunderstanding was cleared up within 24 hours. The suspicion of child abuse was found by CPS to be without a shred of reality. As a result of the Director's report, however, the appellant (unbeknownst to her) had been placed on the provincial Child Abuse Registry and her name was "red flagged" in the police and social work communities in Newfoundland and Labrador where, as an aspiring social worker, she might have hoped to obtain employment. A Newfoundland jury found the University's treatment of her to be negligent, and further found (more controversially) that as a result of this negligence, her chosen career prospects had been destroyed. The jury awarded her damages of $839,400.

It is important that suspected child abuse be promptly reported. But, as this case illustrates, it is also important that persons in positions of authority (such as university professors in relation to their students) act responsibly and avoid unfounded and

Michael E. Barrack et *Christopher A. Wayland*, pour l'intervenante.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF ET LE JUGE BINNIE —

I. Introduction

En 1994, l'appelante Wanda Young était étudiante à l'Université Memorial de Terre-Neuve où elle suivait des cours en vue d'être admise à la School of Social Work (« École de service social ») et de devenir travailleuse sociale. En mai 1994, à cause d'un étrange malentendu entre l'appelante et l'un de ses professeurs au sujet de l'absence d'une note en bas de page dans un travail écrit — malentendu dont l'appelante n'a pris connaissance que plus de deux ans après avoir remis le travail en question —, l'intimé William Rowe, alors directeur de l'École de service social, l'a dénoncée au service de protection de l'enfance (« SPE ») de la province comme étant un agresseur d'enfant potentiel. Lorsque le SPE a fini par « enquêter » sur ce signalement en 1996, le malentendu a été dissipé en moins de 24 heures. Le SPE a conclu que les soupçons de violence envers un enfant n'avaient aucun fondement. Cependant, à la suite du signalement effectué par le directeur, l'appelante a été inscrite (à son insu) au registre provincial de l'enfance maltraitée et son nom a été signalé aux corps policiers et au milieu des services sociaux de Terre-Neuve et du Labrador où, en tant qu'aspirante travailleuse sociale, elle aurait pu espérer obtenir un emploi. Un jury de Terre-Neuve a conclu que l'Université avait fait montre de négligence envers l'appelante et, en outre (de façon plus controversée), qu'en raison de cette négligence cette dernière avait vu s'envoler ses chances de faire carrière dans le domaine de son choix. Le jury lui a accordé des dommages-intérêts de 839 400 $.

Il est important de signaler sans délai les cas de violence soupçonnée envers un enfant. Toutefois, comme l'illustre la présente affaire, il importe également que les personnes en situation d'autorité (comme les professeurs d'université par rapport à

2006 SCC 3 (CanLII)

damaging reports of suspicion. Section 38(6) of the *Child Welfare Act*, R.S.N. 1990, c. C-12, requires there to be "reasonable cause" to make the report, thus striking an appropriate balance between the protection of children, the protection of third parties against unfounded allegations, and the protection of informants.

3 A majority of the Newfoundland Court of Appeal overturned the jury award because it considered the appellant's action to be barred by s. 38(6), which protects individuals from legal action who report "information that a child has been, is or may be in danger" of abuse. We agree, of course, that those who are subject to a duty to report information must be protected from any adverse legal consequences flowing from compliance with that duty, but here the university professors acted on conjecture and speculation which fell far short of the required "reasonable cause" to make a report to CPS required by s. 38(6). They did not even have misinformation (for which protection will be available unless reported maliciously or without reasonable cause). They acted in a way the jury found to be without any reasonable cause to make a report. In our view, s. 38(6) does not bar relief to the appellant in these circumstances. The cause of the action of negligence was properly put to the jury. The defence's evidence, as well as the plaintiff's evidence, was clearly laid out by the trial judge. It was open to the jury, as the finder of facts, to reach the conclusions it did on the evidence put before it. We would allow the appeal, set aside the decision of the Court of Appeal, and restore the jury's verdict.

II. The Facts

4 In 1994, the appellant, then 23 years old, lived in Spaniard's Bay, a community about a hundred

leurs étudiants) agissent de manière responsable et se gardent de signaler des soupçons d'une manière non fondée et préjudiciable. Le paragraphe 38(6) de la *Child Welfare Act*, R.S.N. 1990, ch. C-12, requiert l'existence d'une [TRADUCTION] « raison valable » d'effectuer le signalement et établit ainsi un juste équilibre entre la protection des enfants, la protection des tiers contre des allégations non fondées et la protection des dénonciateurs.

Les juges majoritaires de la Cour d'appel de Terre-Neuve ont écarté la décision du jury d'accorder des dommages-intérêts parce qu'ils considéraient que l'action intentée par l'appelante était irrecevable en vertu du par. 38(6), qui soustrait aux poursuites en justice les personnes qui communiquent [TRADUCTION] « des renseignements indiquant qu'un enfant a été, est ou risque d'être victime » de violence. Certes, nous reconnaissons la nécessité de protéger contre toute conséquence juridique défavorable les personnes qui s'acquittent de leur obligation de communiquer des renseignements. En l'espèce, les professeurs de l'Université ont cependant agi sur la foi d'hypothèses et de suppositions n'ayant rien de commun avec l'obligation, imposée par le par. 38(6), d'avoir une « raison valable » d'effectuer un signalement auprès du SPE. Ils ne disposaient même pas de renseignements inexacts (à l'égard desquels s'applique la protection, sauf s'ils sont communiqués de façon malveillante ou sans raison valable). Le jury a conclu qu'ils n'avaient aucune raison valable d'effectuer un signalement. À notre avis, le par. 38(6) n'empêche pas l'appelante d'obtenir réparation dans ces circonstances. La cause de l'action fondée sur la négligence a été soumise, comme il se devait, à l'appréciation du jury. Le juge de première instance a clairement exposé la preuve de la défense de même que celle de la demanderesse. En tant que juge des faits, le jury pouvait tirer les conclusions auxquelles il est arrivé compte tenu de la preuve qui lui avait été présentée. Nous sommes d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir le verdict du jury.

II. Les faits

En 1994, l'appelante, alors âgée de 23 ans, vivait à Spaniard's Bay, une collectivité située à une

2006 SCC 3 (CanLII)

2006 SCC 3 (CanLII)

kilometres from St. John's. Although a full-time fee-paying student, she subscribed to "distance courses" taught largely by conference calls and correspondence. Her interaction with her professors in St. John's was limited. Her grades were marginal, and in 1993, her application to pursue a specialized course of study at the School of Social Work was rejected. Nevertheless, she soldiered on and took what courses in social work she was eligible to take.

centaine de kilomètres de St. John's. Bien qu'elle fût une étudiante à temps plein qui payait des frais de scolarité, l'appelante s'est inscrite à des « cours de formation à distance » donnés pour la plupart par conférence téléphonique ou par correspondance. Ses échanges avec les professeurs de St. John's étaient limités. Ses notes étaient faibles et, en 1993, sa demande d'admission à un programme d'études spécialisées à l'École de service social a été rejetée. Elle a malgré tout persévéré et suivi les cours de service social auxquels elle était admissible.

In April 1994, the appellant submitted her final assignment in Social Work 5614, entitled "Social Work in Rural Newfoundland and Northern Labrador". The appellant said she met with her professor, the respondent Professor Leslie Bella, only once during the term. She said she obtained prior approval of the topic for her paper entitled "Juvenile Sex Offenders — Treatment and Counselling Techniques". The paper was eventually submitted over two weeks late.

5 En avril 1994, l'appelante a remis son dernier travail pour le cours de service social 5614 intitulé « Social Work in Rural Newfoundland and Northern Labrador ». L'appelante a dit n'avoir rencontré sa professeure, l'intimée Leslie Bella, qu'une seule fois pendant la session. Elle a ajouté que le sujet de son travail intitulé « Juvenile Sex Offenders — Treatment and Counselling Techniques » avait été préalablement autorisé. Le travail a finalement été remis avec plus de deux semaines de retard.

Her term paper included the uncontroversial observation that abused children may themselves go on to become abusers. To illustrate this observation, the appellant attached as Appendix A a case study copied from a textbook. The case study was a woman's "first person" account of being sexually abused as a child, then sexually abusing children in her care as an adult babysitter. The textbook from which the case study was taken was listed in the appellant's bibliography. However, the Appendix was not footnoted in the body of the text in accordance with proper practice, a requirement of which the appellant was apparently oblivious. In light of subsequent events, it is convenient to reproduce the portion of her term paper that referred to Appendix A:

6 Dans son travail, l'appelante faisait incontestablement remarquer que les enfants victimes de violence peuvent à leur tour devenir des agresseurs. Pour illustrer cette remarque, elle avait joint en annexe A une étude de cas tirée d'un manuel. Dans cette étude de cas, une femme s'exprimant à la première personne racontait avoir été victime d'abus sexuels durant son enfance et avoir ensuite, à l'âge adulte, agressé sexuellement des enfants qu'elle gardait. Le manuel d'où provenait l'étude de cas était mentionné dans la bibliographie de l'appelante. Toutefois, contrairement à la pratique habituelle, l'annexe ne faisait l'objet d'aucune note en bas de page dans le corps du texte, exigence que l'appelante ne connaissait manifestement pas. Compte tenu des événements subséquents, il convient de reproduire la partie de son travail qui renvoyait à l'annexe A :

From an early age, generally around the ages of eleven or twelve, many sex offenders develop specific interest in various sexual behaviours. Many agree that these behaviours are learned primarily through observation and by direct experience. These experiences are often the result of sexual abuse. In the majority of cases, juvenile sex offenders are themselves victims of sexual

[TRADUCTION] De nombreux délinquants sexuels développent à un très jeune âge, généralement vers onze ou douze ans, un intérêt particulier pour divers comportements sexuels. Bien des gens reconnaissent que ces comportements s'acquièrent principalement par l'observation et l'expérience directe. Ces expériences découlent souvent d'abus sexuels. Dans la majorité des

2006 SCC 3 (CanLII)

abuse (See appendix A). Sexual abuse occurs in a cycle that is repeated over and over, so if we could get to these offenders at an early age we would prevent a lot of this abuse. [Emphasis added.]

cas, les délinquants sexuels mineurs sont eux-mêmes victimes d'abus sexuels (voir l'annexe A). L'agression sexuelle s'inscrit dans un cycle continu. Il nous serait donc possible de prévenir un bon nombre de ces abus si nous pouvions nous occuper de ces délinquants lorsqu'ils sont encore très jeunes. [Nous soulignons.]

Appendix A itself did not contain any identifying details of dates, places or the names of people implicated in the confession. In particular, there was nothing to link the experiences it related to the appellant herself.

L'annexe A elle-même ne comportait aucune précision particulière concernant les dates, les lieux ou les noms des personnes visées par l'aveu. Plus particulièrement, rien ne reliait les expériences relatées à l'appelante elle-même.

7 Professor Bella testified that she was taken aback to read a case study written in a confessional style by a woman, which in those days she considered unusual. Instead of accepting Appendix A as illustrative of the point being made in the term paper, Professor Bella speculated that perhaps it was autobiographical, a personal confession by the appellant of having sexually abused children she babysat, or as Professor Bella put it, a "cry for help". Professor Bella also suspected the term paper was plagiarized.

La professeure Bella a témoigné qu'elle avait été étonnée de lire une étude de cas présentée sous la forme d'un aveu par une femme, ce qu'elle estimait inhabituel à l'époque. Au lieu d'admettre que l'annexe A illustrait le thème du travail en question, la professeure Bella a supposé qu'il pouvait s'agir d'un récit autobiographique, d'un aveu personnel de l'appelante, dans lequel celle-ci reconnaissait avoir agressé sexuellement des enfants qu'elle gardait, ou d'un [TRADUCTION] « appel à l'aide », pour reprendre l'expression de la professeure Bella. Elle soupçonnait également que le travail était plagié.

8 On April 26, 1994, Professor Bella shared her concerns with the Acting Director of the School of Social Work and Chair of the School's Admissions Committee, Professor Jane Dempster. Professor Bella showed Professor Dempster Appendix A of the term paper, without the paper itself, and did not mention that the appendix had been attached to a paper on juvenile sex offenders. Based on what she was told, Professor Dempster (who did not read the term paper) testified that she suggested Professor Bella meet with the appellant to discuss the appendix, and, if the meeting did not resolve her concerns, to call CPS. In the meantime, Professor Dempster undertook to consult the appellant's personal file to see if perhaps a letter of reference or other document disclosed the name of a child or children babysat by the appellant that could lead to further inquiries. The search apparently yielded nothing of interest.

Le 26 avril 1994, la professeure Bella a fait part de ses inquiétudes à la directrice intérimaire de l'École de service social et présidente du comité d'admission de l'École, la professeure Jane Dempster. La professeure Bella a montré à la professeure Dempster l'annexe A du travail écrit, sans toutefois lui montrer le travail lui-même ni lui préciser que l'annexe avait été jointe à un travail portant sur les délinquants sexuels mineurs. La professeure Dempster (qui n'a pas lu le travail) a témoigné que, compte tenu de ce qu'on lui avait dit, elle avait recommandé à la professeure Bella de rencontrer l'appelante pour parler de l'annexe, et de communiquer avec le SPE si elle n'était pas rassurée à l'issue de la rencontre. Entre-temps, la professeure Dempster a consulté le dossier personnel de l'appelante pour vérifier si une lettre de recommandation ou un autre document indiquait le nom d'un enfant ou de plusieurs enfants gardés par celle-ci, qui pourrait inciter à poser d'autres questions. Cette recherche n'a apparemment donné aucun résultat intéressant.

2006 SCC 3 (CanLII)

Instead of meeting with the appellant and asking her to explain where Appendix A came from, Professor Bella decided her plagiarism inquiry should proceed entirely separately from the abuse inquiry which she thought should go directly to CPS. Accordingly, her letter of April 28, 1994 to the appellant said nothing about Appendix A, the "footnote issue" or Professor Bella's speculation about its autobiographical nature. After stating that the topic of juvenile sex offenders was not appropriate for the course (although as stated the appellant testified the topic had been approved in advance), Professor Bella's letter went on to suggest the appellant's paper might have been written for another course ("self-plagiarism") or by somebody else ("[t]he style of presentation in your paper is very different from the work in your examination"). Professor Bella then wrote:

Please consider my comments, and decide if you can give me evidence that the paper was (i) written for this course, (ii) was your own work (iii) and that its submission was delayed for reasons that are not your own fault. . . .

Please note that if I do proceed to mark this paper I will also check your references and other related sources, to confirm that you have not plagiarised sections of the paper.

Without waiting to hear back from the appellant, Professor Bella placed an informal telephone call on April 28, 1994 to CPS for advice. She was told that as she was unable to provide any information about a specific child at risk, there was nothing for CPS to inquire into. CPS also advised Professor Bella to speak to the appellant to obtain some clarification. Professor Bella did not accept this advice. Nothing was ever said by any of the professors to the appellant about the footnote issue or their suspicions that Appendix A was autobiographical.

9 Au lieu de rencontrer l'appelante et de lui demander d'expliquer d'où provenait l'annexe A, la professeure Bella a décidé que son enquête portant sur le plagiat devrait être menée séparément de celle portant sur les abus, qui selon elle devrait être confiée directement au SPE. C'est pourquoi la lettre du 28 avril 1994 que la professeure Bella avait adressée à l'appelante ne mentionnait rien au sujet de l'annexe A, du [TRADUCTION] « problème de note en bas de page » ou de sa supposition concernant la nature autobiographique de l'annexe. Après avoir affirmé, dans sa lettre, que les délinquants sexuels mineurs ne représentaient pas un sujet approprié pour le cours (bien que, comme nous l'avons vu, l'appelante ait témoigné que ce sujet avait été préalablement autorisé), la professeure Bella a ajouté qu'il se pouvait que le travail de l'appelante ait été destiné à un autre cours (« autoplagiat ») ou rédigé par quelqu'un d'autre ([TRADUCTION] « [l]e style de présentation de votre travail diffère sensiblement de celui de votre test »). La professeure Bella a ensuite écrit ceci :

[TRADUCTION] Je vous prierais de réfléchir à mes remarques et de voir si vous pouvez me prouver que (i) ce travail était destiné uniquement à mon cours, (ii) que vous en êtes l'auteure et (iii) que vous l'avez remis en retard pour des raisons indépendantes de votre volonté. . .

Veuillez noter que si je décide d'évaluer votre travail, je vérifierai également vos sources bibliographiques et autres afin de m'assurer qu'aucune partie du travail n'est plagiée.

10 Sans laisser à l'appelante le temps de répondre à sa lettre, la professeure Bella a téléphoné officieusement au SPE, le 28 avril 1994, pour demander conseil. On lui a répondu que, puisqu'elle n'était pas en mesure de fournir des renseignements indiquant qu'un certain enfant était en situation de risque, il n'y avait pas matière à enquête pour le SPE. Le SPE a également conseillé à la professeure Bella de parler à l'appelante afin d'obtenir des explications. La professeure Bella n'a pas suivi ce conseil. Aucun des professeurs n'a mentionné quoi que ce soit à l'appelante à propos du problème de note en bas de page ou de leurs soupçons que l'annexe A était autobiographique.

2006 SCC 3 (CanLII)

11 Professor Bella's notes confirmed that she heard from the appellant shortly after dispatch of the letter, and the appellant testified that she provided Professor Bella with all the documents requested to rebut the suspicion of plagiarism. In the end, Professor Bella declined to mark the paper (ostensibly because of its lateness) and gave the appellant a zero.

12 Although Professor Bella did not raise the issue of the case study and possible child abuse with the appellant (as she considered that it was not her proper role to "investigate"), she did not let the matter rest. She took her concerns to the Director of the School of Social Work, Dr. William Rowe. She told Dr. Rowe the appendix "was neither referenced nor had any explanation in terms of paper". Dr. Rowe, making no other inquiries, then attached Appendix A to a report he sent to Paula Burt of CPS dated May 25, 1994, which read in its entirety as follows:

> Further to our conversation, please find enclosed an item submitted by Wanda Young [address omitted] who was a student in one of our distance education courses this past term.
>
> The paper, while competently written, had little, if anything, to do with the assignment and the case study was attached without explanation. The material in the case study is alarming and it maybe [*sic*] appropriate for someone from your office or from the RCMP detachment responsible for Spaniard's Bay to follow up.
>
> Please inform me of your decision. If I can be of any assistance, please do not hesitate to call me. [Emphasis added.]

The community of social workers in Newfoundland is very small. There is only one School of Social Work. For example Paula Burt, while working at CPS, was also continuing courses at the school, and was therefore a fellow student of the appellant. Dr. Rowe did not disclose to Paula Burt that the case study was provided in the context of a paper on juvenile sex offenders. Dr. Rowe knew, as a specialist in the field of child abuse, it was quite foreseeable that his report would result in the

Les notes de la professeure Bella confirment qu'elle a eu des nouvelles de l'appelante peu après lui avoir envoyé la lettre, et l'appelante a témoigné qu'elle avait fourni à la professeure Bella tous les documents requis pour dissiper les soupçons de plagiat. En définitive, la professeure Bella a refusé d'évaluer le travail (apparemment à cause de sa remise tardive) et a donné un zéro à l'appelante.

Bien qu'elle n'ait pas porté à l'attention de l'appelante la question de l'étude de cas et la possibilité de violence envers un enfant (parce qu'elle considérait qu'il ne lui appartenait pas de [TRADUCTION] « faire enquête »), la professeure Bella n'en est pas restée là. Elle a fait part de ses inquiétudes au directeur de l'École de service social, M. William Rowe. Elle lui a dit que l'annexe ne comportait [TRADUCTION] « aucun renvoi ni aucune explication la rattachant au travail ». Sans poser d'autres questions, M. Rowe a alors joint l'annexe A au signalement en date du 25 mai 1994 qu'il a transmis à Paula Burt du SPE, et dont voici le texte intégral :

> [TRADUCTION] Pour donner suite à notre conversation, veuillez trouver sous pli un texte présenté par Wanda Young [adresse omise], étudiante inscrite à l'un de nos cours à distance pendant la dernière session.
>
> Quoique bien rédigé, le travail a peu, sinon rien, à voir avec ce qui a été demandé et l'étude de cas a été jointe sans explication. Le contenu de l'étude de cas est alarmant et il peut convenir que quelqu'un de votre bureau ou du détachement de la GRC de Spaniard's Bay donne suite à l'affaire.
>
> Je vous saurais gré de m'informer de votre décision. N'hésitez pas à me téléphoner si vous jugez que je puis vous être utile. [Nous soulignons.]

Le milieu des travailleurs sociaux de Terre-Neuve est très restreint. Il n'y a qu'une seule école de service social. Par exemple, tout en travaillant au SPE, Paula Burt suivait également des cours à cette école et était, de ce fait, condisciple de l'appelante. M. Rowe n'a pas révélé à Paula Burt que l'étude de cas avait été fournie dans le contexte d'un travail écrit sur les délinquants sexuels mineurs. En tant que spécialiste en matière de violence envers les enfants, M. Rowe savait qu'il était tout à fait

appellant's name being placed on the Child Abuse Registry. Dr. Rowe testified:

Q. Okay. You mentioned a Child Abuse Registry. What Child Abuse Registry?

A. When someone has been, when a complaint has been sent to Social Services, or to Child Protection, their, if it's found out to be a reasonable complaint, even if it isn't a situation where someone has been found guilty, their name is placed on the Registry.

Officials from CPS testified that Dr. Rowe's stature in the field of child abuse lent significant credibility to his report.

Dr. Rowe rejected any suggestion that he ought to have raised his concern with the appellant before sending the letter. That, he told the jury, was a job best left to CPS. He also said he had copyright concerns about sharing the appellant's paper with CPS.

In the meantime, the University had written to the appellant on May 11, 1994, rejecting her request for reconsideration of her application to pursue a degree in social work. Saying she was disheartened, the appellant approached Professor Jane Dempster (whose roles at the School of Social Work included guidance counselling) to see how she might improve her chances of acceptance. Professor Bella had already shared with Professor Dempster her concerns about suspected child abuse but the appellant was not told about this or the reason why the School had decided she was irredeemably unfit for social work. Professor Dempster was "cold" (according to the appellant) and flatly advised her that the faculty did not think she had what it took to be a social worker and that she should look elsewhere for a career.

prévisible que ce signalement entraînerait l'inscription du nom de l'appelante au registre de l'enfance maltraitée. Dans son témoignage, il a affirmé ce qui suit :

[TRADUCTION]

Q. Bien. Vous avez parlé d'un registre de l'enfance maltraitée. De quel registre de l'enfance maltraitée s'agit-il?

R. Quand une personne a été, lorsqu'une plainte a été envoyée aux Services sociaux ou à la Protection de l'enfance, alors si la plainte est jugée raisonnable, même s'il ne s'agit pas d'un cas où quelqu'un a été reconnu coupable, son nom est inscrit au registre.

Des agents du SPE ont témoigné que la notoriété de M. Rowe dans le domaine de la violence envers les enfants rendait son signalement d'autant plus crédible.

13 M. Rowe a rejeté toute idée qu'il aurait dû faire part de ses inquiétudes à l'appelante avant d'envoyer sa lettre. Il a dit au jury qu'il incombait davantage au SPE de le faire. Il a ajouté qu'il craignait qu'il y ait atteinte au droit d'auteur si le SPE prenait connaissance du travail rédigé par l'appelante.

14 Pendant ce temps, le 11 mai 1994, l'Université avait informé par écrit l'appelante de son refus de réexaminer sa demande d'admission au programme d'études menant à un diplôme en travail social. Se disant découragée, l'appelante s'est adressée à la professeure Jane Dempster (dont l'un des rôles à l'École de service social était celui de conseiller d'orientation professionnelle) pour voir comment elle pourrait augmenter ses chances d'admission. La professeure Bella avait déjà fait part à la professeure Dempster de ses craintes qu'un enfant ait été victime de violence, mais l'appelante n'en a rien su et n'a pas été informée de la raison pour laquelle l'École avait décidé qu'elle était irrémédiablement inapte au travail social. La professeure Dempster l'a accueillie [TRADUCTION] « froidement » (selon l'appelante) et lui a dit sans ambages que la faculté ne croyait pas qu'elle avait ce qu'il fallait pour être une travailleuse sociale, et qu'elle devrait se destiner à une autre carrière.

2006 SCC 3 (CanLII)

15 Professor Dempster said she had no recollection of such a meeting, and that the remarks attributed to her sounded unlike the things she would normally say to a student in such circumstances.

16 The evidence for the respondents was that there were numerous reasons why the appellant was rejected quite apart from suspicions about child abuse. Admission to the course, they told the jury, was highly competitive (three applicants for each acceptance) and the appellant's grades were low. (The fact that Professor Bella gave her zero on her final assignment on juvenile sex offenders did not help matters.) The evidence also suggested, however, that some students with low marks were counselled to take further courses. The advice to the appellant, on the contrary, was to leave the field.

17 Saying that she was demoralized by the peremptory tone of Professor Dempster's message, the appellant took a summer job in Quebec and did not return to Memorial University in September. Instead, she sought and accepted whatever casual employment she could obtain as a youth care worker at various facilities. Unbeknownst to her, the suggestion that she was a potential child sex abuser had been discussed amongst three university professors, communicated to the RCMP, and disclosed to a minimum of ten social workers in several communities, many of whom knew the appellant through her summer employment and one of whom was her boyfriend's sister.

18 More than two years after the initial referral to CPS, a staff worker sought a meeting with the appellant, which belatedly took place on September 9, 1996. There, for the first time, the appellant learned of the long-standing "report". The appellant responded by delivering the relevant textbook to CPS the next day. It was immediately obvious to CPS that Appendix A had been copied from the textbook and was not in the least autobiographical. By letter of

La professeure Dempster a affirmé qu'elle n'avait aucun souvenir de cette rencontre et que les remarques qu'on lui attribuait ne ressemblaient pas aux propos qu'elle tiendrait normalement à un étudiant en pareil cas.

Selon la preuve des intimés, de nombreuses autres raisons n'ayant rien à voir avec les soupçons de violence envers un enfant expliquaient le refus d'admettre l'appelante. Ils ont informé le jury que les candidats à l'admission étaient très nombreux (trois demandes pour chaque admission) et que les notes de l'appelante étaient faibles. (Le zéro que lui a donné la professeure Bella pour son dernier travail sur les délinquants sexuels mineurs n'a pas amélioré la situation.) Toutefois, la preuve indiquait également qu'on avait conseillé à des étudiants dont les notes étaient faibles de suivre d'autres cours. Par contre, l'appelante s'était vu conseiller de quitter le domaine.

Se disant démoralisée par le ton péremptoire du message de la professeure Dempster, l'appelante a accepté un emploi d'été au Québec et n'est pas retournée à l'Université Memorial en septembre. Elle a plutôt occupé tous les emplois occasionnels d'intervenante auprès des jeunes qu'elle a pu obtenir dans différents établissements. Sans que l'appelante le sache, l'idée qu'elle puisse être un agresseur sexuel d'enfant avait fait l'objet de discussions entre trois professeurs d'université, avait été communiquée à la GRC et avait été révélée à au moins 10 travailleurs sociaux de plusieurs collectivités, dont beaucoup d'entre eux avaient connu l'appelante au cours de ses emplois d'été et dont l'un était la sœur de son petit ami.

Plus de deux ans après le signalement initial effectué auprès du SPE, un membre du personnel a sollicité une rencontre avec l'appelante, laquelle rencontre a fini par avoir lieu le 9 septembre 1996. C'est alors que l'appelante a appris, pour la première fois, l'existence de ce « signalement » effectué depuis longtemps. L'appelante a réagi en fournissant le manuel pertinent au SPE le lendemain. Le SPE a immédiatement constaté que l'annexe A était un extrait de ce manuel et n'avait rien

2006 SCC 3 (CanLII)

2006 SCC 3 (CanLII)

September 13, 1996, CPS sent the following acknowledgment:

Dear Ms. Young:

As per your request, this is to confirm that the Department of Social Services was made aware of information which it was advised related to you and we felt required further clarification. When explored it was immediately clear that the information did not relate to you. Rather, the information provided was an excerpt from a book.

Thank you for your understanding and complete cooperation in this process. [Emphasis added.]

No explanation was offered as to why it had taken CPS more than two years to "investigate" a matter which, on being looked into, was shown to be completely baseless within 24 hours.

The University and its staff, however, refused to apologize, suggesting that because of the missing footnote, the appellant was the author of her own misfortune.

Concerns about whether the appellant was safe to hire continued to dog her in the years that followed. Evidence of her difficulty in finding work and attempts to mitigate it were put before the jury. As late as January 2001, seven years after the baseless report, the witness Andrew Caddigan told the jury that the appellant's application for a temporary job was openly questioned in his presence by others in the field on the mistaken belief that the appellant was "red-flagged" as a potential child abuser as a result of Dr. Rowe's "report".

III. The Legal Proceedings

The appellant's trial was heard before a civil jury. Counsel for the University made essentially the same submissions on the facts at trial as he made before us. He obtained a ruling from the trial judge that as a matter of law the words in Dr. Rowe's letter to CPS were not capable of being defamatory. The remaining claim, in negligence, proceeded.

d'autobiographique. Dans une lettre en date du 13 septembre 1996, le SPE a envoyé l'accusé de réception suivant :

[TRADUCTION] Madame Young,

À votre demande, la présente est pour confirmer que le département de service social a pris connaissance de renseignements qui, lui avait-on dit, vous concernaient et qui exigeaient à notre avis des explications. L'examen de ces renseignements a permis de constater immédiatement qu'ils ne vous concernaient pas. Ces renseignements étaient plutôt tirés d'un manuel.

Merci de votre compréhension et de votre entière collaboration à cet égard. [Nous soulignons.]

Rien n'a été fait pour expliquer pourquoi le SPE avait attendu plus de deux ans avant d'« enquêter » sur un dossier qui a été jugé complètement dépourvu de fondement dans les 24 heures de son examen.

19 L'Université et son personnel ont toutefois refusé de s'excuser, affirmant que l'appelante avait été l'artisan de son malheur en omettant d'inscrire la note en bas de page.

20 Au cours des années qui ont suivi, l'appelante a continué d'être la source d'inquiétudes quant à savoir si elle pourrait être embauchée sans risque. La preuve de sa difficulté à trouver un emploi et de ses tentatives de l'aplanir a été présentée au jury. Même en janvier 2001, sept ans après le signalement non fondé, le témoin Andrew Caddigan a dit au jury que d'autres gens du milieu avaient ouvertement exprimé des doutes, en sa présence, au sujet de la demande d'emploi temporaire présentée par l'appelante parce qu'ils croyaient à tort qu'elle était considérée comme un agresseur d'enfant potentiel à la suite du signalement effectué par M. Rowe.

III. Les procédures judiciaires

21 L'appelante a subi un procès civil devant jury. Les observations relatives aux faits que l'avocat de l'Université a présentées au procès sont essentiellement les mêmes qu'il a formulées devant nous. Il a obtenu du juge de première instance une décision selon laquelle les propos tenus par M. Rowe dans sa lettre au SPE ne pouvaient pas être diffamatoires

2006 SCC 3 (CanLII)

The jury found that Professor Bella and Dr. Rowe had breached the duty of care owed to the appellant as a student of the University both before and after reporting; that the report to CPS was made without reasonable cause; that the professors failed to meet the required standard of care; that the injury and loss the appellant suffered was a foreseeable consequence of their acts and omissions; and that the appellant had not contributed to her damages.

22 The jury heard medical and psychological evidence that the appellant had suffered anxiety, embarrassment, insomnia, paranoia and depression as a result of the allegations against her (both before and after the report) and their repercussions. It also received evidence of economic loss flowing from the University's termination of her hope of becoming a social worker. The jury went on to award damages as follows:

General non-pecuniary	$430,000
Past loss of income	$47,000
Future loss of income	$314,000
Past loss of sick leave	$13,000
Future loss of sick leave	$28,000
Cost of future care	$7,400
Total	$839,400

23 The Court of Appeal overturned the jury award, Roberts J.A. dissenting ((2004), 241 Nfld. & P.E.I.R. 35, 2004 NLCA 60). Writing for the majority, Welsh J.A. was of the view that s. 38(6) provided a complete defence to the entire claim. Roberts J.A., on the other hand, found no error by the trial judge, and concluded that there was ample evidence on which a jury, properly instructed, could reach the conclusions it did. Although strongly contested by the University, he thought the damages were not

sur le plan du droit. Restait donc à instruire l'action pour négligence. Le jury a conclu que la professeure Bella et M. Rowe avaient manqué, tant avant qu'après le signalement, à l'obligation de diligence qu'ils avaient envers l'appelante en tant qu'étudiante à l'Université, que le signalement avait été effectué auprès du SPE sans raison valable, que les professeurs n'avaient pas satisfait à la norme de diligence requise, que le préjudice et la perte subis par l'appelante étaient une conséquence prévisible de leurs actes et omissions, et que l'appelante n'avait pas contribué à ses dommages.

Le jury a entendu des témoignages de médecin et de psychologue selon lesquels l'appelante avait souffert d'anxiété, d'embarras, d'insomnie, de paranoïa et de dépression en raison des allégations formulées contre elle (à la fois avant et après le signalement) et de leurs répercussions. On lui a également présenté une preuve de la perte économique que l'appelante a subie après que l'Université eut mis fin à ses espoirs de devenir travailleuse sociale. Le jury a ensuite accordé les dommages-intérêts suivants :

Généraux non pécuniaires	430 000 $
Perte de revenus passée	47 000 $
Perte de revenus future	314 000 $
Perte de congés de maladie passée	13 000 $
Perte de congés de maladie future	28 000 $
Coût des soins futurs	7 400 $
Total	839 400 $

La Cour d'appel a écarté la décision du jury d'accorder des dommages-intérêts, le juge Roberts étant dissident ((2004), 241 Nfld. & P.E.I.R. 35, 2004 NLCA 60). S'exprimant au nom des juges majoritaires, la juge Welsh a estimé que le par. 38(6) offrait un moyen de défense suffisant pour contrer l'action au complet. Par contre, selon le juge Roberts, le juge de première instance n'avait commis aucune erreur et il y avait suffisamment d'éléments de preuve pour qu'un jury, ayant reçu

2006 SCC 3 (CanLII)

beyond the scope of what was reasonable, based on the evidence. Roberts J.A. would have dismissed the appeal and cross-appeal. Rowe J.A., while agreeing with Welsh J.A. that s. 38(6) of the *Child Welfare Act* shielded the University from liability relating to the report made to CPS, differed from Welsh J.A. on its scope. In his view, s. 38(6) provided no defence to Ms. Young's claim that the University, by its internal failures, had negligently and wrongfully denied her a career in social work. Concerns about what damages possibly flowed from these dealings led him to conclude that a new trial was necessary. The formal order of the Court of Appeal however simply allowed the appeal and dismissed the plaintiff's action, Roberts J.A. dissenting.

des directives appropriées, puisse conclure comme il l'avait fait. Malgré la vive opposition exprimée à ce sujet par l'Université, il était d'avis que, compte tenu de la preuve, les dommages-intérêts accordés ne dépassaient pas les limites de ce qui était raisonnable. Le juge Roberts aurait rejeté l'appel principal et l'appel incident. Tout en convenant avec le juge Welsh que le par. 38(6) de la *Child Welfare Act* exonérait l'Université de toute responsabilité liée au signalement effectué auprès du SPE, le juge Rowe ne partageait pas son avis quant à la portée de cette disposition. Selon lui, ce paragraphe ne pouvait être opposé comme moyen de défense à l'argument de M^me^ Young selon lequel l'Université, par ses manquements internes, avait agi de manière négligente et illicite en la privant d'une carrière en travail social. Des craintes que ces agissements aient causé un préjudice l'incitaient à conclure qu'un nouveau procès était nécessaire. Dans son ordonnance formelle, la Cour d'appel a simplement accueilli l'appel et rejeté l'action de la demanderesse, le juge Roberts étant dissident.

Ms. Young now appeals to this Court.

M^me^ Young se pourvoit maintenant devant notre Cour.

IV. Analysis

IV. Analyse

The issues raised in the appeal fall under the following main headings:

Les questions soulevées en l'espèce peuvent être réparties dans les trois principales catégories suivantes :

(1) The nature of the cause of action;

(2) The duty and protection accorded by s. 38 of the *Child Welfare Act*; and

(3) Whether the law and evidence support the jury's award of damages.

(1) La nature de la cause d'action;

(2) l'obligation et la protection prévues à l'art. 38 de la *Child Welfare Act*;

(3) la question de savoir si le droit et la preuve étayent les dommages-intérêts accordés par le jury.

In approaching these questions, we must bear in mind the principle that appellate courts should not overturn the verdict of a jury unless it is one that no reasonable jury, properly instructed, could reach: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25.

En examinant ces questions, nous devons nous rappeler du principe selon lequel les cours d'appel ne doivent écarter le verdict d'un jury que s'il s'agit d'un verdict qui n'aurait pas pu être rendu par un jury raisonnable ayant reçu des directives appropriées : *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25.

2006 SCC 3 (CanLII)

A. *The Nature of the Cause of Action*

27 The jury was asked whether Leslie Bella or William Rowe, by their acts or omissions, had breached the duty of care they owed to the appellant. This is the classic formulation of the cause of action in negligence. It is premised on a relationship between the plaintiff and the defendant, which in turn gives rise to a duty of care on the defendant toward the plaintiff. Breach of the standard of care imposed by that duty creates legal liability for damages caused by the breach. There was evidence before the jury capable of establishing all the elements of the tort of negligence.

(1) Existence of a Duty of Care

28 The Court recently affirmed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at para. 24, and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, at para. 46, that the "duty" analysis proceeds in two stages:

(a) Is there a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?

(b) If so, are there any considerations which ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?

29 The respondents assert that the duty of care in this case is negated for policy reasons under the second branch of the test. They argue that s. 38 of the *Child Welfare Act* establishes the policy that in the interests of protecting children, people should be encouraged to report suspicions of child abuse, free from fear of reprisal. The duty imposed by s. 38(1), they argue, should as a matter of policy negate any duty of care which might otherwise arise at common law.

A. *La nature de la cause d'action*

On a demandé au jury de décider si, par leurs actes ou omissions, Leslie Bella ou William Rowe avaient manqué à leur obligation de diligence envers l'appelante. C'est là la formulation classique de la cause d'action fondée sur la négligence. Elle repose sur l'existence d'un lien entre le demandeur et le défendeur, lequel lien engendre à son tour une obligation de diligence du défendeur envers le demandeur. La violation de la norme de diligence prescrite par cette obligation engage la responsabilité juridique pour le préjudice résultant de cette violation. La preuve présentée au jury permettait d'établir l'existence de tous les éléments du délit de négligence.

(1) L'existence d'une obligation de diligence

Dans les arrêts *Cooper c. Hobart*, [2001] 3 R.C.S. 537, 2001 CSC 79, par. 24, et *Martel Building Ltd. c. Canada*, [2000] 2 R.C.S. 860, 2000 CSC 60, par. 46, la Cour a récemment confirmé que l'analyse de cette « obligation » comporte deux étapes :

a) Existe-t-il entre les parties un lien de proximité suffisamment étroit pour que le défendeur ait pu raisonnablement prévoir que son manque de diligence pourrait causer un préjudice au demandeur?

b) Dans l'affirmative, existe-t-il des facteurs qui devraient annuler ou restreindre a) la portée de l'obligation, b) la catégorie de personnes qui en bénéficient, ou c) les dommages auxquels un manquement à l'obligation peut donner lieu?

Les intimés affirment qu'en l'espèce l'obligation de diligence est annulée pour des raisons de politique générale conformément au second volet du critère. Ils font valoir que l'art. 38 de la *Child Welfare Act* établit la politique générale selon laquelle la protection des enfants commande d'inciter les gens qui soupçonnent l'existence de violence envers un enfant à signaler cette situation sans crainte de représailles. L'obligation imposée par le par. 38(1), soutiennent-ils, devrait, pour des raisons de politique générale, annuler toute obligation de diligence qui pourrait par ailleurs prendre naissance en common law.

2006 SCC 3 (CanLII)

We discuss the Act in greater detail below. At this point, however, it suffices to note that the respondents' argument overlooks the fact that the appellant's claim in negligence was a broad one, encompassing not only the report made to CPS, but the University's dealings with the appellant generally. Paragraph 15(a) of her Amended Statement of Claim reads:

> The Plaintiff states that the actions of Dr. Bella, Dr. Rowe and other officials at Memorial University of Newfoundland combined to put in motion a series of events that would forever shape the course of the Plaintiff's future by affecting her reputation in the community, her ability to complete her education and by reducing her income-earning capacity.

In support of this broader claim the appellant led evidence of failure to mentor, failure to properly advise her on her future and negligent publication within the faculty, through means other than the report to CPS, of the suggestion that the appellant may have abused children.

In short, in the present case, proximity was not simply grounded in a misguided report to CPS, but was rooted in the broader relationship between the professors at Memorial University and their students. The appellant, even as a "distant" student, was a fee-paying member of the university community, and this fact created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

Whether or not a duty of care will be negatived where the parties are strangers linked only by the events surrounding a "report" is a question that should only be decided when it arises. Assuming that the policy expressed in the Act could countermand potential liability for a negligent report in such circumstances, as discussed below, it does

Nous examinerons la Loi en détail plus loin. Toutefois, il suffit de souligner, pour l'instant, que l'argument des intimés ne tient pas compte du fait que l'action de l'appelante fondée sur la négligence a une portée générale et vise non seulement le signalement effectué auprès du SPE, mais aussi la manière dont l'Université s'est généralement comportée avec l'appelante. Le paragraphe 15a) de sa déclaration modifiée se lit ainsi : 30

> [TRADUCTION] La demanderesse déclare que les actes de M^me^ Bella, de M. Rowe et d'autres dirigeants de l'Université Memorial de Terre-Neuve ont déclenché ensemble une suite d'événements qui a irrémédiablement façonné l'avenir de l'appelante en portant atteinte à sa réputation au sein de la collectivité et à sa capacité de terminer ses études, et en diminuant ainsi sa capacité de gagner un revenu.

À l'appui de cette action de portée générale, l'appelante a présenté des éléments de preuve établissant l'omission de l'encadrer et de la conseiller judicieusement au sujet de son avenir, ainsi que la diffusion négligente dans la faculté, par des moyens autres que le signalement effectué auprès du SPE, de l'idée que l'appelante pourrait avoir agressé des enfants.

Bref, en l'espèce, la proximité découlait non pas simplement d'un malencontreux signalement effectué auprès du SPE, mais du lien général qui existait entre les professeurs de l'Université Memorial et leurs étudiants. Même si elle étudiait « à distance », l'appelante était un membre de la communauté universitaire qui payait des frais de scolarité, ce qui avait pour effet de générer des droits et responsabilités mutuels. Le lien entre l'appelante et l'Université avait un fondement contractuel, ce qui donnait naissance à des obligations de nature à la fois contractuelle et délictuelle : *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147. 31

La question de savoir si une obligation de diligence sera annulée dans le cas où les parties sont des étrangers qui n'ont entre eux d'autre lien que les événements entourant un « signalement » ne devrait être tranchée que lorsqu'elle se posera. À supposer que la politique générale exprimée dans la Loi puisse, dans un tel cas, annuler la 32

2006 SCC 3 (CanLII)

not provide any policy reason to negative liability that would otherwise arise on the facts of this case. The scope of the s. 38(6) defence is restricted to the making of the CPS report and would not excuse the University and its employees from failure to live up to their broader responsibilities to the appellant as a member of the university community. The facts in this case do not trigger the protection of the Act because, quite simply, the respondent Dr. Rowe acted on nothing more than speculation and conjecture in making his report which, as Director of the School of Social Work, he must have known would have serious consequences within the small community of social workers in Newfoundland, including the likely posting of the appellant's name on the provincial Child Abuse Registry.

(2) The Standard of Care

33 The standard of care that ought to be exercised by professors towards their students was emphasized in the testimony of Dr. Wayne Ludlow who, during the relevant 1994-1996 period, was the Dean of Student Affairs at Memorial University. Dr. Ludlow testified:

> The relationship between the professor and the student is a special relationship . . . [I]t is an imbalanced relationship because professor is all knowing, and I can see now the fear and trembling of the young first-year students when they went to classes, someone in a flowing black robe. So the power balance was evident . . . .

34 Those whose professional responsibilities include the exercise of such power over the careers and future lives of fee-paying students are required to take the necessary care to get their facts straight before taking a potential career-ending action in relation to a student. While legislative and judicial policy mandates the quick reporting of information of suspected child abuse, it does not do so to the exclusion of consideration of the legitimate interests of the person named in the report, or the interests of informants. This is not at all to say that the respondents were obliged to conduct their own

responsabilité susceptible de résulter d'un signalement négligent, comme nous le verrons plus loin, cette politique ne justifie aucunement d'annuler la responsabilité qui serait par ailleurs engagée d'après les faits de la présente affaire. Le moyen de défense prévu au par. 38(6) ne s'applique qu'au signalement effectué auprès du SPE et n'excuserait pas l'Université et ses employés d'avoir omis de s'acquitter de leurs responsabilités générales envers l'appelante en tant que membre de la communauté universitaire. Les faits de la présente affaire ne déclenchent pas la protection de la Loi tout simplement parce que l'intimé M. Rowe n'a agi que sur la foi de suppositions et d'hypothèses en effectuant son signalement qui, devait-il le savoir en tant que directeur de l'École de service social, aurait de graves conséquences dans le milieu restreint des travailleurs sociaux de Terre-Neuve, dont l'inscription probable du nom de l'appelante au registre provincial de l'enfance maltraitée.

(2) La norme de diligence

Dans son témoignage, M. Wayne Ludlow, qui était directeur des Affaires étudiantes de l'Université Memorial pendant la période pertinente de 1994 à 1996, a attiré l'attention sur la norme de diligence que les professeurs devraient respecter à l'égard de leurs étudiants. Voici ce qu'a dit M. Ludlow :

> [TRADUCTION] La relation entre le professeur et l'étudiant est particulière. [. . .] [Elle] est inégale du fait que le professeur connaît tout, et je peux alors imaginer le sentiment de frayeur que cette personne drapée d'une toge suscitait chez les jeunes étudiants de première année qui se rendaient à leurs cours. Le rapport de force était donc évident . . .

Les personnes dont les responsabilités professionnelles comportent l'exercice d'un tel pouvoir sur les carrières et l'avenir des étudiants qui paient des frais de scolarité sont tenues de prendre les précautions requises pour s'assurer de l'exactitude des faits avant de prendre des mesures susceptibles de mettre fin à la carrière d'un étudiant. Bien qu'elle exige de communiquer promptement les renseignements concernant un cas de violence soupçonnée envers un enfant, la politique législative et judiciaire n'exclut pas pour autant la prise en considération de l'intérêt légitime de la personne signalée ou

2006 SCC 3 (CanLII)

investigation of the suspected abuse. Informants are *not* required to have reasonable cause to believe abuse has in fact occurred before making a report. They are, however, obliged to have *reasonable cause to make a report to CPS*, i.e. to possess information that CPS reasonably ought to be asked to look into, even if it turns out to be misinformation. It is the absence of reasonable cause *even to make a report* that lies at the heart of the appellant's allegation of negligence.

de celui des dénonciateurs. Cela ne signifie aucunement que les intimés devaient mener leur propre enquête sur le cas de violence soupçonnée. Les dénonciateurs *ne* sont *pas* tenus d'avoir une raison valable de croire qu'une agression a vraiment eu lieu avant d'effectuer un signalement. Ils doivent toutefois avoir *une raison valable d'effectuer un signalement auprès du SPE* : en d'autres termes, ils doivent posséder des renseignements qui peuvent raisonnablement justifier une demande d'enquête au SPE, même si ces renseignements s'avèrent inexacts. C'est l'absence de raison valable *même d'effectuer un signalement* qui est au cœur de l'allégation de négligence de l'appelante.

(3) Breach of the Duty

(3) Manquement à l'obligation

There was evidence that the University had breached these duties through the negligence of its employees. The task of the reviewing court is not to agree or disagree with the jury's conclusions, but just to satisfy itself that there was evidence on which the jury, properly instructed, could reasonably conclude as it did. The issue for the jury was the failure of her professors even to *seek* from the appellant an explanation of a missing footnote before embarking on a course of action fraught with danger for her hoped-for-career.

35 Il a été établi que l'Université avait manqué à ces obligations en raison de la négligence de ses employés. Le rôle de la cour de révision consiste non pas à souscrire aux conclusions du jury ou de les rejeter, mais simplement à s'assurer qu'il existait une preuve sur laquelle le jury, ayant reçu des directives appropriées, pouvait raisonnablement se fonder pour conclure comme il l'a fait. La question que le jury devait examiner était l'omission des professeurs de l'appelante même de lui *demander* d'expliquer l'absence d'une note en bas de page avant d'adopter une ligne de conduite grandement susceptible de compromettre la carrière à laquelle elle aspirait.

As might be expected, the recollections of events of the various participants differed. There was no suggestion that any of the respondents had acted in bad faith.

36 Comme on pouvait s'y attendre, les divers participants n'avaient pas le même souvenir des faits. Personne n'a laissé entendre que l'un ou l'autre des intimés avait agi de mauvaise foi.

The jury clearly concluded that Professor Bella should have done what both Professor Dempster and officials at CPS recommended, namely check out the "footnote issue" with the appellant before proceeding on a course of action, in concert with Dr. Rowe, based on nothing more than speculation. Professor Karen Mitchell (who, as sessional lecturer, also taught the appellant) told the jury it was not uncommon for students to make errors in footnoting. Professor Dempster testified that in Professor Bella's position, in writing to the

37 Le jury a clairement conclu que la professeure Bella aurait dû suivre la recommandation de la professeure Dempster et des agents du SPE, c'est-à-dire aborder avec l'appelante le « problème de la note en bas de page » avant d'adopter, de concert avec M. Rowe, une ligne de conduite fondée sur rien de plus qu'une supposition. La professeure Karen Mitchell (chargée de cours à temps partiel qui a également enseigné à l'appelante) a dit au jury qu'il n'était pas inhabituel que les étudiants commettent des erreurs relatives aux notes en bas

2006 SCC 3 (CanLII)

appellant, she "would have made reference to appendix A, a clear reference".

38 Looking at the broader duty, the jury heard that Professor Dempster told the appellant, in effect, that she was unfit to be a social worker. The jury must have concluded that Professor Dempster knew of Professor Bella's speculation that Appendix A was autobiographical, but failed to check the facts before delivering a judgment on the appellant's career prospects.

39 The jury heard from the University's Dean of Student Affairs, Dr. Wayne Ludlow, that

> professors are mentors, that part of their whole philosophy for what they teach and what they espouse is to be able to allow young people to avail of their expertise and to learn and grow. [A.R., at p. 413]

40 The jury heard evidence that Dr. Rowe's report of speculation to CPS was itself negligent. Dr. Rowe, without looking at the term paper, assured CPS in his letter that the case study had been attached "without explanation". At trial, when confronted with the term paper itself, which clearly indicated the relevance of the case study, he retreated to the view that "it didn't seem like much of an explanation" (emphasis added). However, Elizabeth Crawford, the Director of CPS, testified that had she been given the full term paper she would have understood the context and looked at the situation differently. Paula Burt, the CPS official to whom Dr. Rowe sent the May 25 report, testified that when she eventually saw the term paper the Appendix seemed to her to have "some relevance" to the appellant's topic.

41 At trial, Dr. Rowe testified that he was reluctant to send the term paper to CPS because it might infringe the appellant's intellectual property rights but the jury appeared to conclude that it was unlikely someone reported for suspected sexual

de page. La professeure Dempster a témoigné que, si elle avait été à la place de la professeure Bella, elle [TRADUCTION] « aurait mentionné, clairement mentionné, l'annexe A » en écrivant à l'appelante.

Quant à l'obligation générale, le jury a appris qu'en fait la professeure Dempster avait dit à l'appelante qu'elle était inapte au travail social. Le jury doit avoir conclu que la professeure Dempster était au courant de la supposition de la professeure Bella que l'annexe A était autobiographique, mais n'avait pas vérifié les faits avant de se prononcer sur les perspectives de carrière de l'appelante.

Le jury a appris de M. Wayne Ludlow, directeur des Affaires étudiantes de l'Université, que

> [TRADUCTION] les professeurs jouent un rôle de mentor, que la philosophie globale de leur enseignement et des idées qu'ils préconisent est notamment de permettre aux jeunes de profiter de leur expertise, d'apprendre et de s'épanouir. [d.a., p. 413]

Le jury a entendu des témoignages selon lesquels le signalement de la supposition que M. Rowe a effectué auprès du SPE était négligent en soi. Sans même avoir examiné le travail, M. Rowe a, dans sa lettre, affirmé au SPE que l'étude de cas avait été jointe [TRADUCTION] « sans explication ». Au procès, lorsqu'on lui a présenté le travail même, qui indiquait clairement la pertinence de l'étude de cas, il s'est contenté de dire que « ce ne semblait pas terrible comme explication » (nous soulignons). Toutefois, Elizabeth Crawford, directrice du SPE, a témoigné que, si on lui avait remis le travail au complet, elle aurait saisi le contexte et perçu différemment la situation. Paula Burt, l'agente du SPE à qui M. Rowe a effectué le signalement du 25 mai, a témoigné que, lorsqu'elle avait fini par voir le travail, l'annexe lui avait semblé comporter un [TRADUCTION] « certain rapport » avec le sujet traité par l'appelante.

Lors du procès, M. Rowe a témoigné qu'il avait hésité à envoyer le travail au SPE à cause du risque d'atteinte aux droits de propriété intellectuelle de l'appelante, mais le jury a paru conclure qu'il était peu probable qu'une personne signalée comme

2006 SCC 3 (CanLII)

abuse would take a copyright objection to the handing over of exculpatory material that would show the suspicion to be unfounded.

Dr. Rowe also took the view that it was up to CPS, not him, to determine whether an investigation was appropriate, but the jury must have concluded that he failed to provide CPS with the proper information (e.g., the term paper as well as the Appendix) on which such an informed decision could properly be made. It appears the jury concluded that Dr. Rowe must have known that simply making a report would have serious consequences, especially for someone in the appellant's position, and in particular that a report by a prominent individual such as the Director of the School of Social Work would likely cause the appellant's name to be placed on the Child Abuse Registry.

It was open to the jury to accept the respondents' evidence if it found the professors to be persuasive, but it was equally open to the jury to conclude that the professors' behaviour fell markedly short of the standard of care professors should exercise towards their students. It was for the jury to make that determination. The jury concluded that the University and its employees did not do so and there is no basis for an appellate court to intervene with the jury's findings in that respect.

B. *The Duty and Protection under Section 38 of the Child Welfare Act*

The University and its employees argue that if they owed a duty of care to the appellant, this was negated by s. 38(6) of the *Child Welfare Act*. In their view, s. 38(6) bars any cause of action on the facts of this case. Section 38 provided:

38. (1) Where a person has information that a child has been, is or may be in danger of abandonment, desertion, neglect, physical, sexual or emotional ill-treatment or has been, is or may be otherwise in need of

étant soupçonnée d'agression sexuelle invoque le droit d'auteur pour s'opposer à la remise d'un document disculpatoire qui démontrerait que les soupçons ne sont pas fondés.

42 M. Rowe s'est dit également d'avis qu'il appartenait au SPE, plutôt qu'à lui, de déterminer si une enquête s'imposait, mais le jury doit avoir conclu que celui-ci n'avait pas fourni au SPE les renseignements (comme, par exemple, le travail ainsi que l'annexe) qui lui aurait permis de prendre une décision éclairée à cet égard. Il appert que le jury a conclu que M. Rowe devait savoir que le seul fait d'effectuer un signalement aurait de graves conséquences, surtout pour quelqu'un comme l'appelante, et, en particulier, qu'un signalement par une personne en vue comme le directeur de l'École de service social entraînerait probablement l'inscription du nom de l'appelante au registre de l'enfance maltraitée.

43 Le jury pouvait accepter le témoignage des intimés s'il jugeait les professeurs convaincants, mais il lui était également loisible de conclure que le comportement des professeurs dérogeait sensiblement à la norme de diligence qu'ils sont tenus de respecter à l'égard de leurs étudiants. Il appartenait au jury de prendre une décision à cet égard. Le jury a conclu que l'Université et ses employés n'avaient pas respecté cette norme, et rien ne justifie une cour d'appel de modifier les conclusions du jury à cet égard.

B. *L'obligation et la protection prévues à l'art. 38 de la Child Welfare Act*

44 L'Université et ses employés prétendent que, s'ils avaient une obligation de diligence envers l'appelante, cette obligation était annulée par le par. 38(6) de la *Child Welfare Act*. À leur avis, le par. 38(6) exclut toute cause d'action selon les faits de la présente affaire. L'article 38 se lisait ainsi :

[TRADUCTION]

38. (1) La personne qui possède des renseignements indiquant qu'un enfant a été, est ou risque d'être victime d'abandon, de délaissement, de négligence, de mauvais traitements physiques, sexuels ou affectifs, ou qu'il a ou

protection, the person shall immediately report the matter to the director, a social worker or a peace officer.

. . .

(6) This section applies notwithstanding that the information is confidential or privileged, and an action does not lie against the informant unless the making of the report is done maliciously or without reasonable cause.

45 The appellant argues that even if s. 38(6) applied, it would not furnish a complete defence, since her claim goes beyond the mere reporting of suspected abuse as required by the Act. The respondents contend that this broader context makes no difference. So strong is the policy of the Act that it overrides all other considerations.

46 The respondents' argument was accepted in the majority judgment of the Newfoundland Court of Appeal. Welsh J.A., speaking for herself and Rowe J.A., declined to interpret as disjunctive the test "unless the making of the report is done maliciously or without reasonable cause". In her view the phrase "without reasonable cause", while ambiguous, means in context "the absence of good faith" (para. 44). In other words s. 38(6), as interpreted, should read "maliciously or in the absence of good faith". In the result she found, "a report made in good faith, even if negligently made, is protected by subsection (6), precluding legal action against the reporter" (para. 53).

47 In our view, such an interpretation does not give effect to the legislator's specification of both a subjective element ("maliciously") and an objective element ("reasonable cause") to determine whether the report of "information" is to be protected from all legal consequences. The respondents and the intervener say that anything potentially relevant to child abuse that comes from an external source (i.e. eliminating only the product of the reporter's unaided imagination) should be reported. However,

peut avoir par ailleurs besoin de protection, est tenue de signaler sans délai la situation au directeur, à un travailleur social ou à un agent de la paix.

. . .

(6) Le présent article s'applique malgré le caractère confidentiel ou privilégié des renseignements, et nulle action ne peut être intentée contre le dénonciateur sauf si le signalement est effectué de façon malveillante ou sans raison valable.

L'appelante fait valoir que, même si le par. 38(6) s'appliquait, il n'offrirait pas un moyen de défense suffisant vu que son action vise davantage que le simple signalement du cas de violence soupçonnée, requis par la Loi. Les intimés prétendent que ce contexte général est sans importance. La politique de la Loi est si ferme qu'elle l'emporte sur tous les autres facteurs.

L'argument des intimés a été retenu dans le jugement majoritaire de la Cour d'appel de Terre-Neuve. La juge Welsh, s'exprimant en son propre nom et en celui du juge Rowe, a refusé de considérer disjonctif le critère [TRADUCTION] « sauf si le signalement est effectué de façon malveillante ou sans raison valable ». À son avis, l'expression « sans raison valable », bien qu'ambiguë, signifie dans ce contexte « l'absence de bonne foi » (par. 44). Autrement dit, selon cette interprétation, le par. 38(6) devrait se lire : « de façon malveillante ou en l'absence de bonne foi ». En définitive, la juge Welsh a conclu qu'[TRADUCTION] « un signalement effectué de bonne foi, même de manière négligente, est protégé par le par. (6), de sorte que le dénonciateur ne peut pas faire l'objet de poursuites judiciaires » (par. 53).

À notre avis, une telle interprétation ne tient pas compte du fait que le législateur établit à la fois un critère subjectif (« de façon malveillante ») et un critère objectif (« raison valable ») pour déterminer si la communication de « renseignements » doit être à l'abri de toute conséquence juridique. Les intimés et l'intervenante affirment qu'il y a lieu de signaler tout ce qui peut se rapporter à la violence envers un enfant et qui émane d'une source extérieure (c'est-à-dire d'éliminer seulement le fruit de

2006 SCC 3 (CanLII)

to construe s. 38(6) so broadly reads the words "reasonable cause" out of the section and fundamentally changes the legislative scheme.

We agree with Welsh J.A. that the duty to report "information" imposed by s. 38(1) and the protection against suits accorded by s. 38(6) are coextensive and must be read together. The legislature cannot have intended to impose a duty to report and leave the informant exposed to legal liability for complying with the statutory duty.

We also agree with Welsh J.A. that the duty to report under s. 38(1) should not be narrowly construed. The language of the section suggests as much. Information that a child "may be" in danger or in need of protection suffices to trigger the obligation. Moreover, the obligation is to report "immediately". This language suggests that there is no duty to investigate the information (where information exists) to ensure that it is accurate before reporting. The Act distinguishes between the stage of receiving information suggesting danger or need of protection, which is for the informant, and investigating the truthfulness of the information, which is for CPS. A broad duty to report information of possible abuse is consistent with the Act's goal of protecting children.

Where we disagree with Welsh J.A., however, is in our view that her interpretation of s. 38 evinces too little concern for third parties who may be adversely affected by irresponsible reports. Here Dr. Rowe had no data that, interpreted by a reasonable person, would suggest that a child has been, was, or may be in need of protection from Wanda Young. Foreseeable consequences such as placement on the Child Abuse Registry are serious matters. While the primary objective of the Act is to

l'imagination spontanée du dénonciateur). Toutefois, une interprétation aussi large du par. 38(6) fait abstraction de l'expression [TRADUCTION] « raison valable » qu'il comporte et modifie fondamentalement le régime législatif.

48 Nous convenons avec la juge Welsh que l'obligation de communiquer des « renseignements » imposée par le par. 38(1) et la protection contre les poursuites offerte par le par. 38(6) ont la même portée et doivent être interprétées ensemble. Le législateur ne peut pas avoir voulu imposer une obligation de signalement et laisser le dénonciateur courir le risque de voir sa responsabilité juridique engagée parce qu'il s'est conformé à cette obligation légale.

49 Nous convenons également avec la juge Welsh que l'obligation de signalement prévue au par. 38(1) ne devrait pas être interprétée de façon restrictive. C'est ce qui se dégage du texte même de la disposition. Les renseignements indiquant qu'un enfant est en situation de « risque » ou peut avoir besoin de protection suffisent pour donner naissance à l'obligation. En outre, il y a obligation de signaler « sans délai ». Cette formulation laisse entendre qu'il n'y a aucune obligation de vérifier les renseignements (si renseignements il y a) pour en assurer l'exactitude avant de les communiquer. La Loi établit une distinction entre l'étape de la réception de renseignements indiquant l'existence d'une situation de risque ou d'un besoin de protection — qui concerne le dénonciateur — et celle de l'examen de la véracité des renseignements — qui concerne le SPE. Une obligation générale de communiquer des renseignements indiquant une possibilité de mauvais traitements est compatible avec l'objectif de protection des enfants visé par la Loi.

50 Toutefois, notre désaccord avec la juge Welsh réside dans le fait que nous estimons que son interprétation de l'art. 38 témoigne de trop peu d'inquiétude pour les tiers auxquels les signalements irresponsables peuvent porter préjudice. En l'espèce, M. Rowe ne disposait d'aucune donnée qui, selon une personne raisonnable, indiquerait qu'un enfant avait ou pouvait avoir besoin d'être protégé contre Wanda Young. Les conséquences prévisibles, telle l'inscription au registre de l'enfance

2006 SCC 3 (CanLII)

2006 SCC 3 (CanLII)

protect children, it seeks to do so in a way that also takes into account the interests of the persons under suspicion and the interests of informants. The interest of the person suspected of abuse is protected by the inclusion of an objective "reasonable cause" standard in s. 38(6). These two components must be read together and the words used — "information" and "reasonable cause" — must together be given a purposive interpretation. "Information" in s. 38(1) is the partner of "reasonable cause" in s. 38(6). "Reasonable cause" does not mean reasonable grounds to believe that abuse has occurred, or is occurring, or will occur (which in certain legal contexts implies belief in the truthfulness of the information). Section 38(6) sets a lower threshold. The informant need only have "reasonable cause" to ask CPS to consider looking into the matter.

51 Section 38(6) offers no protection to the respondents here because, however it is viewed, the case study contained in Appendix A to the appellant's paper was not information that a child was in danger or in need of protection from Wanda Young. So far as the respondents are concerned, its date and authorship were simply unknown (and not asked about). There was nothing that tied the experiences it related to the appellant. If there was a "cry for help", there was nothing to indicate it originated with the appellant. The respondents' problem is that the jury, having heard conflicting versions of events, apparently concluded that the professors acted on speculation arising from their failure to properly consider the material before them. Had Professor Bella or Dr. Rowe come into possession of information that related to the appellant in a relevant way, their duty would have been to report immediately, without investigating its truth. In this case, they had no such information.

maltraitée, sont graves. Bien qu'elle ait pour objectif premier de protéger les enfants, la Loi tente de le faire d'une manière qui tient également compte de l'intérêt des personnes soupçonnées et de celui des dénonciateurs. L'intérêt de la personne soupçonnée d'actes de violence est protégé par l'inclusion du critère objectif de la « raison valable » au par. 38(6). Les deux éléments doivent être interprétés ensemble et les mots utilisés — « renseignements » et « raison valable » — doivent être interprétés ensemble de manière téléologique. Les « renseignements » visés au par. 38(1) vont de pair avec la « raison valable » mentionnée au par. 38(6). L'expression « raison valable » ne signifie pas avoir des motifs raisonnables de croire que des agressions ont été, sont ou seront commises (ce qui, dans certains contextes juridiques, laisse entendre que l'on tient pour véridiques les renseignements). Le paragraphe 38(6) établit un critère moins strict. Le dénonciateur doit seulement avoir une « raison valable » de demander au SPE d'envisager l'examen de l'affaire.

Le paragraphe 38(6) n'offre aucune protection aux intimés en l'espèce parce que, quelle que soit la façon de l'envisager, l'étude de cas figurant à l'annexe A du travail rédigé par l'appelante ne constituait pas un renseignement indiquant qu'un enfant était en situation de risque ou avait besoin d'être protégé contre Wanda Young. Quant aux intimés, ils ne connaissaient ni la date ni l'auteur de l'étude de cas (et n'avaient posé aucune question à ce sujet). Rien ne liait l'appelante aux expériences relatées. S'il y avait « appel à l'aide », rien n'indiquait qu'il provenait de l'appelante. Le problème des intimés est que le jury, qui a entendu les versions contradictoires des faits, aurait apparemment conclu que les professeurs avaient agi sur la foi de suppositions résultant de leur omission d'examiner dûment le document dont ils disposaient. Si la professeure Bella ou M. Rowe étaient entrés en possession de renseignements ayant un lien utile avec l'appelante, ils auraient été tenus d'effectuer un signalement sans délai, sans examiner la véracité de ces renseignements. En l'espèce, ils ne disposaient d'aucun renseignement de cette nature.

2006 SCC 3 (CanLII)

C. *Whether the Law and the Evidence Support the Jury's Award of Damages*

A number of issues arise relating to damages.

(1) Proof of Damages

The appellant called Cara Brown as an expert on damages. She laid out the calculations for four different "scenarios", the choice of which would depend on the version of the facts eventually accepted as correct by the jury. The respondents called no counter evidence to refute the calculations, although in his jury address their counsel urged the jury not to accept the factual assumptions that gave rise to the various calculations:

Don't judge damages on the fuss that's being made here, or the length of the trial, or the number of witnesses. It's very easy to claim huge losses, and it's very easy to make a mountain out of a mole-hill.

There were many contingencies built into the damage calculations, all of which were laid out before the jury by the contending parties. The jury chose to resolve those contingencies in favour of the appellant. It was within their province, as the triers of fact, to do so.

The respondents, however, also take an objection in law to the award. Starting from the fact, as stated, that the defamation issue was withdrawn from the jury by the trial judge because in his view the wording of Dr. Rowe's letter dated May 25, 1994 to CPS was not capable of giving rise to a defamatory meaning, they argue that the appellant's claim is really an action for defamation, dressed up as a negligence action. They say that her action is essentially for loss of reputation, and that damages for loss of reputation can only be claimed in a defamation action to which the issues of malice and qualified privilege are relevant. They say resort to negligence law interfered with the exercise of their freedom of expression of an opinion to CPS.

C. *La question de savoir si le droit et la preuve étayent les dommages-intérêts accordés par le jury*

Un certain nombre de questions se posent relativement aux dommages-intérêts. 52

(1) Preuve du préjudice

L'appelante a fait témoigner Cara Brown, à titre d'experte en matière de dommages-intérêts. Cette dernière a présenté des calculs relatifs à quatre « scénarios » différents, dont le choix dépendrait de la version des faits que le jury tiendrait ultérieurement pour exacte. Les intimés n'ont assigné personne à témoigner pour réfuter les calculs, bien qu'en s'adressant au jury leur avocat l'ait invité à rejeter les présomptions de fait sur lesquelles reposaient les différents calculs : 53

[TRADUCTION] Ne vous en remettez pas à toutes ces histoires qui vous sont maintenant présentées, ni à la longueur du procès, ni au nombre de témoins pour évaluer les dommages-intérêts. Il est très facile de réclamer des pertes énormes et de se faire une montagne d'un rien.

De nombreuses éventualités étaient incorporées dans les calculs des dommages-intérêts, lesquelles ont toutes été exposées au jury par les parties opposées. Le jury a opté pour les éventualités favorables à l'appelante. Il pouvait le faire en sa qualité de juge des faits. 54

Toutefois, les intimés soulèvent également une objection juridique aux dommages-intérêts accordés. Compte tenu du fait, comme nous l'avons vu, que le juge de première instance n'a pas soumis au jury la question de la diffamation parce qu'il était d'avis qu'un sens diffamatoire ne pouvait pas être dégagé du texte de la lettre du 25 mai 1994 que M. Rowe avait envoyée au SPE, ils prétendent que l'action fondée sur la négligence intentée par l'appelante est en réalité une action pour diffamation. Ils affirment qu'il s'agit essentiellement d'une action pour perte de réputation et que des dommages-intérêts pour perte de réputation ne peuvent être réclamés que dans le cadre d'une action pour diffamation où les questions de malveillance et 55

Negligence principles, they assert, do not strike the proper balance between free expression and the duty not to harm others.

56 We cannot accept the respondents' argument. The possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out. Freedom of expression and the policies underlying qualified privilege can be taken into account in determining the appropriate standard of care in negligence. Counsel for the University referred to a number of cases in support of the assertion that this action lies only in defamation: see, e.g., *Fulton v. Globe and Mail* (1996), 194 A.R. 254 (Q.B. (Master)), aff'd (1997), 53 Alta. L.R. (3d) 212 (Q.B.), and *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Gen. Div.), aff'd (1995), 25 O.R. (3d) 302 (C.A.). In fact, these were cases where the defendants' actions alleged to have caused the plaintiffs' loss of reputation fell entirely within the law of defamation and the basic elements of a negligence action, such as a duty of care owed to the plaintiffs, had not been established. There is no reason in principle why negligence actions should not be allowed to proceed where (a) proximity and foreseeability have been established, and (b) the damages cover more than just harm to the plaintiff's reputation (i.e. where there are further damages arising from the defendant's negligence): see *Spring v. Guardian Assurance plc*, [1994] 3 All E.R. 129 (H.L.). In fact, all of the cases cited by the respondents as standing for the proposition that defamation had "cornered the market" on reputation damages were cases in which (unlike here) there was no pre-existing relationship between the parties that gave rise to a duty of care.

d'immunité relative sont pertinentes. Selon les intimés, le recours au droit en matière de négligence compromettait l'exercice de leur liberté d'exprimer une opinion au SPE. Les principes en matière de négligence, prétendent-ils, ne permettent pas d'établir un juste équilibre entre la liberté d'expression et l'obligation d'éviter de nuire à autrui.

Nous ne pouvons retenir cet argument des intimés. La possibilité d'intenter une action pour diffamation n'empêche pas d'invoquer une cause d'action fondée sur la négligence lorsque les éléments nécessaires sont établis. La liberté d'expression et les principes qui sous-tendent l'immunité relative peuvent être pris en considération pour déterminer la norme de diligence appropriée en matière de négligence. L'avocat de l'Université a mentionné un certain nombre de décisions à l'appui de sa prétention qu'en l'espèce seule une action pour diffamation peut être intentée : voir, par exemple, les décisions *Fulton c. Globe and Mail* (1996), 194 A.R. 254 (B.R. (Protonotaire)), conf. par (1997), 53 Alta. L.R. (3d) 212 (B.R.), et *Elliott c. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Div. gén.), conf. par (1995), 25 O.R. (3d) 302 (C.A.). En fait, ce sont des affaires où les actes des défendeurs, qui auraient causé la perte de réputation des demandeurs, relevaient entièrement du droit applicable en matière de diffamation et où l'existence des éléments fondamentaux d'une action pour négligence, telle l'obligation de diligence envers des demandeurs, n'avait pas été établie. En principe, rien ne justifie l'irrecevabilité d'actions pour négligence dans les cas où a) le lien étroit et la prévisibilité ont été établis, et où b) le préjudice excède la simple atteinte à la réputation du demandeur (c'est-à-dire lorsque d'autres préjudices découlent de la négligence du défendeur) : voir l'arrêt *Spring c. Guardian Assurance plc*, [1994] 3 All E.R. 129 (H.L.). En fait, dans toutes les affaires que les intimés ont citées à l'appui de la proposition selon laquelle la diffamation avait [TRADUCTION] « accaparé le marché » en matière de dommages-intérêts pour atteinte à la réputation, il n'y avait entre les parties aucun lien préexistant qui donnait naissance à une obligation de diligence (contrairement à la situation en l'espèce).

2006 SCC 3 (CanLII)

In summary then, we conclude that the evidence at trial supported the jury's finding of negligence and the factual underpinnings of the appellant's claim to damages.

(2) Causation

The respondents argue that the failure of the appellant to be admitted to the School of Social Work cannot be attributed to their conduct. They point out that the appellant's average grades were below the cut-off for admission. Better qualified candidates were being turned away. On the other hand, the jury also heard that the appellant's position was not hopeless. It was, the appellant says, only Professor Dempster's advice, apparently fuelled by the baseless suspicions arising out of a missing footnote, that caused her to abandon steps that might have led to her improving her academic standing and gaining admission. The evidence was that some of the other students with low grades were counselled to take extra courses to improve their averages, and some succeeded. As well, the jury may have concluded that complete rejection of the appellant's assignment on juvenile sex offenders lowered her scores more for reasons (plagiarism and suspicion of abuse) that proved entirely groundless than for its lateness. The jury heard that marks were not the only criteria for admission. Professor Dempster said that a candidate's volunteer work and job experience are also relevant, the very experience which placement on the Child Abuse Registry jeopardized.

Whether we agree with all of the findings the jury was prepared to make in the appellant's favour on the question of damages is irrelevant. While the issue of causation was strongly contested, there was, in our view, sufficient evidence to permit the jury to find a causal connection between the University's breach of duty and the damages suffered by the appellant.

En résumé, nous concluons donc que la preuve produite au procès étayait la conclusion de négligence tirée par le jury et le fondement factuel de l'action en dommages-intérêts intentée par l'appelante. 57

(2) Lien de causalité

Les intimés prétendent que le fait que l'appelante n'a pas été admise à l'École de service social n'est pas attribuable à leur conduite. Ils soulignent que l'appelante avait des notes moyennes qui étaient inférieures au seuil établi pour l'admission. De meilleurs candidats étaient refusés. Par contre, on a également dit au jury que la situation de l'appelante n'était pas désespérée. L'appelante affirme que ce sont uniquement les conseils de la professeure Dempster, apparemment alimentés par les soupçons non fondés résultant de l'omission d'inscrire une note en bas de page, qui l'ont incitée à abandonner les démarches qui auraient pu lui permettre d'améliorer son dossier académique et d'être admise. La preuve établissait que l'on avait recommandé à d'autres étudiants dont les notes étaient faibles de suivre des cours supplémentaires afin d'augmenter leur moyenne, et que certains étaient parvenus à le faire. De même, il se peut que le jury ait conclu que le rejet total du travail de l'appelante portant sur les délinquants sexuels mineurs avait fait chuter ses notes davantage pour des motifs (plagiat et soupçons de violence) qui se sont révélés complètement non fondés que pour des motifs de remise tardive. Le jury a appris que les notes n'étaient pas le seul critère d'admission. La professeure Dempster a affirmé que les activités de bénévolat et l'expérience de travail d'un candidat sont aussi pertinentes, soit l'expérience même que l'inscription au registre de l'enfance maltraitée a compromise. 58

Il n'importe pas que nous partagions ou non les conclusions que le jury était disposé à tirer en faveur de l'appelante relativement aux dommages-intérêts. Malgré la vive contestation suscitée par la question du lien de causalité, nous estimons que la preuve était suffisante pour permettre au jury de conclure à l'existence d'un lien causal entre le manquement de l'Université à son obligation et le préjudice subi par l'appelante. 59

2006 SCC 3 (CanLII)

2006 SCC 3 (CanLII)

(3) Foreseeability of the Damage

60 It was argued that it was not foreseeable that communications among university staff would result in such damages to the appellant. Nor was it foreseeable, the respondents argue, that various officials at CPS would pass the file around from hand to hand and office to office for more than two years before actually picking up the phone to contact the appellant. Nevertheless, there was evidence before the jury of the profound risk of damage posed by the fanciful speculations of the professors, which gave rise to their actions against the appellant internally as well as to their report to CPS. The jury concluded that the professors' collective negligence destroyed the career prospects of the appellant as a social worker. The respondents strongly dispute such a conclusion and do so with some good reason, but it was open to the jury on the evidence to take that view, and to assess damages accordingly. Their decision was not so aberrant that it could be said that no reasonable jury, properly instructed, could have made it. Accordingly, we would not interfere.

(4) Contributory Negligence

61 The University argues that the appellant's loss was in part caused by her failure to footnote the Appendix and her failure to address the source of the Appendix after receiving Professor Bella's letter raising the issue of plagiarism. However, the onus was on the respondents to prove on a balance of probabilities that the appellant failed to take reasonable care and the extent to which this contributed to her loss. As earlier noted, Professor Bella's letter to the appellant did not even raise an issue about Appendix A. Moreover, the jury had Professor Mitchell's evidence that footnoting mistakes were commonplace. The jury must have found that contributory negligence on the part of the appellant had not been proved and that conclusion was open to it on the evidence. The respondents' argument on causation is little more than an

(3) Prévisibilité du préjudice

On a fait valoir qu'il était impossible de prévoir que les communications entre les membres du personnel de l'Université causeraient un tel préjudice à l'appelante. Il était également impossible de prévoir, selon les intimés, que divers agents du SPE feraient circuler le dossier d'une personne à l'autre et d'un bureau à l'autre pendant plus de deux ans avant de prendre le temps de téléphoner à l'appelante. Néanmoins, le jury disposait d'une preuve du grave risque de préjudice posé par les suppositions fantaisistes des professeurs, qui étaient à l'origine des mesures internes qu'ils avaient prises contre l'appelante et du signalement qu'ils avaient effectué auprès du SPE. Le jury a conclu que la négligence collective des professeurs avait détruit les perspectives de carrière de l'appelante à titre de travailleuse sociale. Les intimés contestent vivement cette conclusion et ont de bonnes raisons de le faire, mais la preuve permettait au jury d'adopter ce point de vue et d'évaluer les dommages-intérêts en conséquence. Leur décision n'était pas aberrante au point qu'il serait possible d'affirmer qu'aucun jury raisonnable, ayant reçu des directives appropriées, n'aurait pu la prendre. C'est pourquoi nous sommes d'avis de ne pas intervenir.

(4) Négligence contributive

L'Université fait valoir que la perte subie par l'appelante était partiellement due à son omission d'inscrire une note en bas de page dans l'annexe et de communiquer la source de l'annexe après avoir reçu la lettre de la professeure Bella, dans laquelle était soulevée la question du plagiat. Cependant, il appartenait aux intimés d'établir, selon la prépondérance des probabilités, l'absence de diligence raisonnable de la part de l'appelante et la mesure dans laquelle cela avait contribué à sa perte. Comme nous l'avons déjà souligné, la lettre que la professeure Bella a adressée à l'appelante ne soulevait même pas une question au sujet de l'annexe A. De plus, le jury disposait du témoignage de la professeure Mitchell selon lequel les erreurs concernant les notes en bas de page étaient courantes. Le jury a dû conclure que l'existence

2006 SCC 3 (CanLII)

invitation to this Court to retry the case. We cannot accept this argument.

(5) Quantification of Damages

As discussed, there was evidence to support the claims for loss of income and cost of future care. This leaves non-pecuniary damages and the issue of whether a judicially imposed cap on them is appropriate in this type of case.

The respondents argue that the assessment of $430,000 for non-pecuniary damages must be set aside because the loss suffered by the appellant is not of such magnitude to justify "one of the largest non-pecuniary general damage awards . . . ever awarded in this country and it is therefore appropriate for this Court to exercise its discretion in adjusting same".

This is not the test for appellate interference with a jury award. As mentioned earlier, the appellant called expert evidence (which was uncontradicted), laying out a number of scenarios based on different potential findings of fact for the jury's consideration. Damage assessments are questions of fact for the jury. Jury awards of damages may only be set aside for palpable and overriding error. It is a long-held principle that "when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone": *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.), at p. 614. On this test, we cannot conclude that the award for non-pecuniary damages should be set aside. In light of the evidence, the jury's award cannot be

de négligence contributive de la part de l'appelante n'avait pas été établie, et il pouvait le faire compte tenu de la preuve. L'argument des intimés concernant le lien de causalité n'est guère plus qu'une invitation faite à notre Cour à juger l'affaire de nouveau. Nous ne pouvons retenir cet argument.

(5) Évaluation quantitative des dommages-intérêts

62 Comme nous l'avons vu, il y avait des éléments de preuve étayant les demandes d'indemnité au titre de la perte de revenu et du coût des soins futurs. Il ne reste plus qu'à examiner les dommages-intérêts non pécuniaires et à se demander si, dans ce genre d'affaire, il convient que les tribunaux fixent un plafond à cet égard.

63 Les intimés prétendent qu'il faut annuler les dommages-intérêts non pécuniaires de 430 000 $ parce que la perte subie par l'appelante n'est pas assez importante pour justifier [TRADUCTION] « un montant de dommages-intérêts généraux non pécuniaires qui compte parmi les plus élevés [. . .] qui ont été consentis dans notre pays, c'est pourquoi il convient que la Cour exerce son pouvoir discrétionnaire de le rajuster ».

64 Il ne s'agit pas là du critère applicable pour justifier la modification, par une cour d'appel, d'une indemnité accordée par un jury. Comme nous l'avons vu, l'appelante a présenté une preuve d'expert (non contredite) exposant un certain nombre de scénarios fondés sur diverses conclusions de fait possibles qui seraient soumises à l'appréciation du jury. Les évaluations de dommages-intérêts sont des questions de fait qui relèvent du jury. Les dommages-intérêts accordés par un jury ne peuvent être annulés que pour cause d'erreur manifeste et dominante. Un principe de longue date veut que [TRADUCTION] « lorsqu'un jury établit le montant à accorder après avoir reçu des directives appropriées, la différence entre le chiffre auquel il est arrivé et celui auquel il aurait pu légitimement arriver doit, pour justifier une modification par une cour d'appel, être encore plus grande que dans le cas où le chiffre a été fixé par un juge seul » : *Nance c. British Columbia Electric Railway Co.*, [1951] A.C. 601 (C.P.), p. 614. D'après

said to be wholly disproportionate or shockingly unreasonable.

65 The respondents also argue that the cap on non-pecuniary damages imposed in catastrophic personal injury cases should be imposed in cases such as this: see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 265; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287. The very different context of the "trilogy" is illustrated by the following passage from *Andrews*, at p. 262:

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

The respondents have not established why the policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, should be extended to cap a jury award in a case such as the present. The argument was rejected in relation to damages for defamation in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 170-76. In our view, the case for imposing a cap in cases of negligence causing economic loss is not made out here either. As Macfarlane J.A. commented in *S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209:

ce critère, nous ne pouvons pas conclure qu'il y a lieu d'annuler le montant accordé au titre des dommages-intérêts non pécuniaires. Compte tenu de la preuve, on ne saurait affirmer que le montant accordé par le jury est tout à fait disproportionné ou terriblement déraisonnable.

Les intimés prétendent également que le plafond auquel les dommages-intérêts non pécuniaires sont assujettis dans les cas de blessures corporelles catastrophiques devrait s'appliquer en l'espèce : voir les arrêts *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229, p. 265, *Thornton c. School District No. 57 (Prince George)*, [1978] 2 R.C.S. 267, et *Arnold c. Teno*, [1978] 2 R.C.S. 287. Le passage suivant tiré de la p. 262 de l'arrêt *Andrews* illustre le contexte de la « trilogie » qui est fort différent :

> Si l'on considère l'indemnisation des pertes non pécuniaires selon la conception « fonctionnelle », il va de soi qu'on ne peut allouer un montant élevé à la victime qui a été convenablement indemnisée, en termes de soins futurs, pour ses blessures et son invalidité. Les sommes allouées pour les soins futurs assureront à la victime l'aide, l'équipement et les installations rendus nécessaires par ses blessures. Toute somme additionnelle visant à rendre la vie plus supportable est alors consacrée à d'autres moyens matériels plus généraux d'organiser la vie de la victime. Le concept d'indemnisation sous ses divers aspects repose ainsi sur des principes équilibrés et interdépendants et il en résulte une justification plus logique de l'indemnisation des pertes non pécuniaires.

Les intimés n'ont pas démontré pourquoi les considérations de politique générale que soulève la négligence causant des blessures corporelles catastrophiques, dans le contexte d'un accident ou d'une faute professionnelle médicale, devraient s'appliquer pour limiter les dommages-intérêts que le jury peut accorder dans un cas comme la présente affaire. Dans l'arrêt *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 170-176, cet argument a été rejeté relativement aux dommages-intérêts pour diffamation. À notre avis, la nécessité de fixer un plafond dans les cas de négligence causant une perte économique n'a pas été établie en l'espèce non plus. Comme l'a fait observer le juge Macfarlane dans l'arrêt *S.Y. c. F.G.C.* (1996), 78 B.C.A.C. 209 :

2006 SCC 3 (CanLII)

There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums. [para. 30]

We leave open for consideration in another case (where the policy considerations supporting a cap are more fully developed in evidence and argument) the issue of whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context. While the damages are higher than we would have awarded in the circumstances, the law assigns the task of that assessment to the jury. Given our conclusion that the cap does not apply in this case, the principle enunciated in *Hill* that an appellate court should not interfere with a jury assessment of non-pecuniary damages unless it "shocks the conscience of the court" (para. 163) precludes reduction of the award for non-pecuniary damages in this case.

V. Conclusion

We find no basis upon which to interfere with the jury's verdict, and accordingly we would set aside the judgment of the Court of Appeal and restore the trial judgment with costs to the appellant on a party-and-party basis here and in the courts below.

Appeal allowed with costs.

Solicitor for the appellant: Gillian D. Butler, St. John's.

Solicitors for the respondents: Stewart McKelvey Stirling Scales, St. John's.

Solicitors for the intervener: McCarthy Tétrault, Toronto.

[TRADUCTION] Nous ne disposons d'aucune preuve que ce type d'affaire peut avoir quelque incidence sur le trésor public, ou qu'une crise résulte de l'ampleur et de la disparité des évaluations. Il n'est pas nécessaire de fixer un plafond pour éviter à la population générale un lourd fardeau social, comme des primes d'assurance élevées. [par. 30]

66 Nous reportons à une autre occasion (où les considérations de politique générale justifiant un plafond seront traitées plus à fond dans la preuve et l'argumentation) l'examen de la question de savoir si et dans quelles circonstances ce plafond s'applique à l'attribution de dommages-intérêts non pécuniaires dans d'autres contextes que celui des blessures corporelles catastrophiques. Bien que le montant des dommages-intérêts soit plus élevé que celui que nous aurions accordé dans les circonstances, la loi confie au jury la tâche de l'évaluer. Compte tenu de notre conclusion que le plafond ne s'applique pas en l'espèce, le principe énoncé dans l'arrêt *Hill*, selon lequel une cour d'appel ne devrait modifier l'évaluation des dommages-intérêts non pécuniaires effectuée par un jury que si « elle choque la conscience de la cour » (par. 163), empêche de réduire le montant de dommages-intérêts non pécuniaires accordé en l'espèce.

V. Conclusion

67 Nous ne voyons aucune raison de modifier le verdict du jury et, par conséquent, nous sommes d'avis d'annuler le jugement de la Cour d'appel et de rétablir le jugement de première instance avec dépens partie-partie en faveur de l'appelante devant notre Cour et devant les tribunaux d'instance inférieure.

Pourvoi accueilli avec dépens.

Procureure de l'appelante : Gillian D. Butler, St. John's.

Procureurs des intimés : Stewart McKelvey Stirling Scales, St. John's.

Procureurs de l'intervenante : McCarthy Tétrault, Toronto.

2006 SCC 3 (CanLII)