**CA46728**
**Supreme Court File No.: 144097**
**Supreme Court Registry: Victoria**
**Heard before: Madam Justice Winteringham and Jury**

# COURT OF APPEAL

**BETWEEN:**

**PATRICIA DAWN ELLIOTT**

**RESPONDENT (PLAINTIFF)**

**AND**

**RYAN McCLIGGOT and SLEGG CONSTRUCTION MATERIALS LTD.**

**APPELLANTS (DEFENDANTS)**

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# APPELLANTS' BOOK OF AUTHORITIES

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## APPELLANTS'

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# INDEX

## APPELLANTS'

## BOOK OF AUTHORITIES (i)

# 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

**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

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

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***

***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

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

> 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,

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]

[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

# 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

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

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

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,

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.

[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

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.

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

> 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

# 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<br>A.E. Jackson |
| Counsel for the Defendants: | A. Du Plessis<br>M. Jeftic |
| Place and Dates of Trial: | Vancouver, B.C.<br>April 16-20 and 23-27, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 25, 2018 |

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.



## 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

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:

*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

> 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

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

# 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

**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.

[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.

[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.

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.

[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.

[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

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].



[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"

# 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<br>October 12, 2016 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>December 1, 2016 |

**Written Reasons by:**
The Honourable Mr. Justice Willcock

**Concurred in by:**
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Goepel

***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.*



**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.

[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.



## 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.

[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),

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

> 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

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.

[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

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.

[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.)).



[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.*

> *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].

[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.

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.

**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:

> [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.

[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

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.

[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"

# 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

**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-

> 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

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.

[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"

# 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<br>C. Caldwell |
| Counsel for the Defendants: | L. Kompa<br>M. Reynolds |
| Place and Date of Trial: | Vancouver, B.C.<br>July 15-19, July 30-31 and<br>August 1, 2019 |
| Place and Date of Judgment: | Vancouver, B.C.<br>October 17, 2019 |

## 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.

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.



## 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

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,

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.



[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.

# 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

| | |
|---|---|
| Place and Date of Hearing: | Vancouver, British Columbia<br>December 1, 2009 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>December 29, 2009 |

**Written Reasons by**:
The Honourable Mr. Justice Tysoe

**Concurred in by:**
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Frankel

**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

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.

[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

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.



[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

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

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:

> 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.]



[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.



**(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 <u>certain</u> 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.

[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

$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.]

[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,

> 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

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

> 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.

[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

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

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"

# 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).

## 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<br>December 15, 2020 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>December 18, 2020 |

***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.*



[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.

[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

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

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

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"

**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*

*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

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

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*

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).
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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.

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

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 9e année et a été expulsée de l'école en 10e 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 Mme 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

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

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

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?

(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.

(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

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.

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.

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.

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.

(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

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.

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

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

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

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.

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.

49 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 :

[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.]

50 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.

51 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.

(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.

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

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.

. . .

(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.*

# 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<br>R. Bacha |
| Counsel for the Defendants/Third Parties Stephen Patrick Pearson and Lidia Diana Pearson: | J.A. Doyle<br>J.G. Smith |
| Place and Date of Trial: | Vancouver, B.C.<br>February 19-21, 24-28, 2020<br>March 2-4, 6, 10, 13, 2020 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 12, 2020 |

> 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.

# 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<br>Chelsea C. Caldwell |
| Counsel for the Defendants in both actions: | Oliver L. Wilson |
| Place and Dates of Trial: | Vancouver, B.C.<br>April 4-8 and 11-13, 2016 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 27, 2016 |

[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.

[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.

[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

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

# 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.<br>December 2-5, 2014 |
| Place and Date of Judgment: | New Westminster, B.C.<br>May 13, 2015 |

## 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.

### 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.

[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.

[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.

[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.

## 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.

[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.

[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

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.

[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.

[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

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

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.

## 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"

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Moskaleva v. Laurie***,
2009 BCCA 260

Date: 20090610
Docket: CA034897



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.<br>W.M. Finch |
| Counsel for the Respondent: | D.G. Cowper, Q.C. |
| Place and Date of Hearing: | Vancouver, British Columbia<br>September 5, 2008 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>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

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).



[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.

[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,

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

# 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.<br>April 23-27 and 30,<br>May 1-4, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 3, 2018 |

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.

[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:

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.

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.

# 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<br>M. A. Sandor |
| Counsel for Defendant and Third Party: | T. A. Hulley |
| Place and Date of Trial: | New Westminster, B.C.<br>February 27 – 29, 2012<br>March 1, 2, 5, 6, 8 and 9, 2012 |
| Place and Date of Judgment: | New Westminster, B.C.<br>April 16, 2012 |

[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.

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

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

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.

[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.

**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:

> 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

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:

> 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.

[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

> 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.

> …
>
> 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.

[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.

> 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;

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.

[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.

[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."

# 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)

[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

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.

[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

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

(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

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

# 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

**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 |

| | |
|---|---|
| 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.

[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

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

> 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

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:

> 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

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.]

[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

*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.

[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

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

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.



[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.

[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.

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.

**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"

# 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.<br>F. Lin |
| Place and Date of Hearing: | Vancouver, British Columbia<br>September 16, 2020 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>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

***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:**

## 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

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.

[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

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.

[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,

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".

[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

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

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

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.

[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:

> 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

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

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

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:

> … 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

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

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

$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

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

> 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).

[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

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"

# 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<br>May 23, 2007 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 29, 2007 |

**Written Reasons by**:
The Honourable Madam Justice Prowse

**Concurred in by:**
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

**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.

[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.



## 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:

> [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

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***

(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

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.

[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.

[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

> 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

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.

[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"

# 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)



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<br>16 June 2004 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>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)

[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)?

[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,

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]

[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 . . ."

# CIVJI 3.01

# ABBREVIATED INSTRUCTIONS

## REGARDING THIS INSTRUCTION [§3.01.A]

User Note: These condensed final jury Instructions are meant for use in a one to three-day jury trial arising out of a motor vehicle accident where the issues are relatively simple and only concern liability, contributory negligence, and damages. They will need modification to meet the circumstances of a particular case. The inapplicability of the full CIVJI instructions should be considered before relying entirely on the abbreviated instructions.[1]

They are not annotated in the same way as other CIVJI Instructions. However, they usually refer to the more complete CIVJI Instructions where appropriate annotations can be found.

If the issues are more complex, consult the CONTENTS tab to locate the relevant Instructions.

## PART I—INTRODUCTORY INSTRUCTIONS [§3.01.1]

### WRITTEN INSTRUCTIONS [§3.01.2]

User Note: If the judge provides the jury with a written copy of the Instructions, read the paragraph below. For more depth, see CIVJI 4.01.2. This Instruction assumes the court officer will first hand out the charge to the jury before the judge starts reading.

**1. To assist you in your deliberations, I have prepared a written copy of my charge. I will then read it to you and you can follow along. During the reading, I may discover some minor errors in the charge that I did not catch when I checked**

**it over. The official charge you must follow will be the one I give orally and not the one that is written, should there be any differences between them.**

## INTRODUCTION [§3.01.3]

User Note: See CIVJI 4.01 (Outline of Instructions), §4.01.1 and §4.01.5.

**2. You heard all of the evidence and the addresses of counsel as to why their clients should succeed or the opponent fail in this action. I will now instruct you on the law. You must accept the law as I give it to you. If either counsel said anything about the law that differs from what I tell you, you must accept my version. You must consider my instructions as a whole. Do not single out some parts and ignore others. Your duty is to decide** [FOR EXAMPLE]**:**

**(1) Whether** [THE PLAINTIFF] **proved that** [THE DEFENDANT] **was negligent.**[2]

**(2) If so, at what amount** [THE PLAINTIFF'S] **damages are assessed.**

**(3) Whether** [THE DEFENDANT] **proved that** [THE PLAINTIFF] **was contributorily negligent.**

**(4) If so, how liability is apportioned between** [THE PLAINTIFF] **and** [THE DEFENDANT]**.**

## JUDGES OF THE FACTS [§3.01.4]

User Note: See CIVJI 4.02 (Functions of a Judge and Jury), §4.02.3 and §4.02.4.

**3. You are the sole judges of the evidence and the facts that arise from that evidence. The evidence you heard becomes fact when you decide a particular piece of evidence is more probably true than not.**

**SYMPATHY** [§3.01.5]

User Note: See CIVJI 4.02 (Functions of a Judge and Jury), §4.02.5.

**4. You should not base your decision on sympathy for** [THE PLAINTIFF] **or** [THE DEFENDANT]**. Nor should it be based upon any emotional feelings against** [THE PLAINTIFF] **or** [THE DEFENDANT] **or any witness.**

**MEMORY OF THE EVIDENCE** [§3.01.6]

User Note: See CIVJI 4.02 (Functions of a Judge and Jury), §4.02.6.

**5. It is your memory and opinion of the evidence that counts, not the memory or opinion of counsel or me.**

**CREDIBILITY OF WITNESSES** [§3.01.7]

User Note: See CIVJI 4.02 (Functions of a Judge and Jury), §4.02.7, and CIVJI 4.05 (Credibility of Witnesses), §4.05.3.

**6. You must decide what witnesses you believe and what witnesses you do not believe. In doing so, you should consider all the evidence. Use your common sense as men and women of the community. You may believe all of what a witness says, part of what a witness says, or none of what a witness says.**

**BURDEN AND STANDARD OF PROOF** [§3.01.8]

User Note: See CIVJI 4.07 (Preponderance of Evidence and Burden of Proof), §4.07.1, §4.07.2, §4.07.4, and §4.07.5.

**7.** [THE PLAINTIFF] **has the burden of proving the accident of** [E.G., 31 AUGUST 2001] **caused (him/her) injury. (He/She) must prove this on a balance of probabilities. If the evidence is evenly balanced, so that you are unable to say where the probabilities lie, then (he/she) has not proven (his/her) claim against** [THE DEFENDANT]**.**

**PRIOR CONTRADICTORY STATEMENTS—PARTY** [§3.01.9]

User Note: See CIVJI 4.11.

**PRIOR CONTRADICTORY STATEMENTS—WITNESS** [§3.01.10]

User Note: See CIVJI 4.12.

**EXPERT EVIDENCE** [§3.01.11]

**8. Before you are a number of reports from experts. The Supreme Court Civil Rules allow experts to file their reports without testifying unless the opposite party wishes to cross-examine them. You do not have to accept the opinion of an expert if you do not find it worthy of belief. When deciding how much weight you should give to an expert's report, you should look at three things. First, examine the qualifications of the expert. Second, consider whether the facts upon which the expert based (his/her) opinion were proven by other evidence in this trial. Statements made to an expert upon which an expert relies must be proven by evidence given at this trial. If the person who made those statements to the expert did not testify, or if (he/she) did testify and you do not believe (him/her), that will necessarily affect the weight you may choose to give to the expert's opinion. Third, examine the whole of the opinion and decide whether the opinion seems reasonable.**

**CONFLICT IN THE OPINION OF EXPERTS** [§3.01.12]

User Note: See CIVJI 4.20 (Expert Evidence—General), §4.20.12.

**9. In this case there was a conflict between the opinions of** [EXPERT]**, who filed a report (and testified) on behalf of** [THE PLAINTIFF]**, and** [EXPERT]**, who filed a report (and testified) on behalf of the** [THE DEFENDANT]**. It is for you to decide how much**

**weight you will give to the opinion of one expert compared to that of another. You must resolve that conflict as best you can. You should accept the opinion of the expert witness whose evidence you believe is entitled to greater weight.**

## PART II—LIABILITY—NEGLIGENCE [§3.01.13]

### WHETHER DEFENDANT NEGLIGENT [§3.01.13A]

User Note: See CIVJI 5.01 (Negligence—Common Law), §5.01.1 and §5.01.2.

**10. Was the defendant negligent? Negligence means that the defendant owed the plaintiff a duty of care, and breached that duty of care, so that the defendant's breach caused loss or injury to the plaintiff.**

**As a matter of law, I have determined that** [THE DEFENDANT] **owed** [THE PLAINTIFF] **a duty of care. It is for you to decide whether** [THE DEFENDANT] **breached that duty of care by failing to exercise the standard of care required of a reasonable and careful driver in the circumstances (for example, the defendant drove through a stop sign).**

**If you find that** [THE DEFENDANT] **breached the duty of care owed to** [THE PLAINTIFF] **at the time of the accident, then you must also determine if** [THE PLAINTIFF] **was injured. If so, the you must decide if** [THE DEFENDANT'S] **breach caused or contributed to** [THE PLAINTIFF'S] **damages.**

## PART III—DEFENCE—CONTRIBUTORY NEGLIGENCE [§3.01.14]

### DEFENCE OF CONTRIBUTORY NEGLIGENCE [§3.01.14A]

User Note: See CIVJI 8.01 (Contributory Negligence—General), §8.01.2, §8.01.3, and §8.01.6.

**11. You may find that** [THE PLAINTIFF] **contributed to (his/her) own damages by failing to use reasonable care and take proper precautions for (his/her) own safety. (For example,** [THE DEFENDANT] **alleges** [THE PLAINTIFF] **was contributorily negligent by failing to use a seat belt.) If you do so, that contributory negligence will reduce the amount of damages that** [THE DEFENDANT] **must pay to** [THE PLAINTIFF]**.**

**12. Since** [THE DEFENDANT] **raised this defence, the burden of proof is on (him/her) to prove, on a balance of probabilities, first that** [THE PLAINTIFF] **failed to take reasonable care, and second, the degree of blame that should then be assigned to** [THE PLAINTIFF]**.**

**13. It is for you to decide the degree of blame, if any, between the parties. Whatever apportionment you make must add up to 100%. If you conclude that both parties contributed to** [THE PLAINTIFF'S] **injuries but you cannot decide how to divide the blame, you should find each of them 50% responsible.**

## PART IV—DAMAGES [§3.01.15]

### ASSESSMENT OF DAMAGES [§3.01.16]

User Note: See CIVJI 12.01 (Assessment of Damages) and CIVJI 12.02 (Proof of Damages).

**14. I turn now to the assessment of damages. The amount of damages is a question of fact based upon the evidence you heard. If you find the conduct of** [THE DEFENDANT] **caused or contributed to the damages suffered by** [THE PLAINTIFF]**, you should then decide the amount of those damages. But if you find the conduct of** [THE DEFENDANT] **did not cause or contribute to** [THE PLAINTIFF'S] **damages then you must find for** [THE DEFENDANT] **and dismiss** [THE PLAINTIFF'S] **claim.**

**15.** [THE PLAINTIFF] **may only come to court once. If you decide to award damages, you must provide** [THE PLAINTIFF] **with reasonable and adequate compensation in an amount that is fair both to (him/her) and to** [THE DEFENDANT]**. Any amount you may choose to give** [THE PLAINTIFF] **should be rounded out to the nearest thousand dollars or to the nearest hundred dollars.**

**16. Here, the damages seem to fall under** [E.G., FIVE] **separate headings:**

**(1) Non-pecuniary damages for pain, injury, suffering, and loss of enjoyment of life;**

**(2) Damages for past loss of income;**

**(3) Damages for loss of future earning capacity;**

**(4) Damages for cost of future care;**

**(5) Special damages.**

**I will now discuss each of these heads of damages separately.**

## NON-PECUNIARY DAMAGES [§3.01.17]

User Note: See CIVJI 12.03 (Non-pecuniary Damages—Introduction), CIVJI 12.04 (Pain and Suffering and Loss of Enjoyment of Life), and CIVJI 12.06 (Quantifying Non-pecuniary Damages).

**17. Non-pecuniary damages are compensation to** [THE PLAINTIFF] **for personal injury losses that did not result in** [THE PLAINTIFF] **actually losing money. Their purpose is to compensate** [THE PLAINTIFF] **for (his/her) pain, injury, suffering, and loss of enjoyment of life arising out of the negligent conduct of** [THE DEFENDANT]**.**

**18. There is no formula for measuring such an award. Each award is custom-made for a particular individual plaintiff. These non-pecuniary damages must be proven by** [THE PLAINTIFF] **on a balance of probabilities.**

**19. You heard** [THE PLAINTIFF] **say how much physical pain and discomfort (he/she) experienced** [E.G., IN (HIS/HER) RIGHT NECK AREA] **following the accident. (He/She) says it is still with (him/her) today. (He/She) also told you how it has** [E.G., INTERFERED WITH (HIS/HER) MARRIAGE, (HIS/HER) ABILITY TO BRING UP (HIS/HER) CHILD, AND (HIS/HER) LOSS OF ENJOYMENT IN THE EVERYDAY ACTIVITIES (HE/SHE) USED TO PURSUE BEFORE THE ACCIDENT]**.**

**20. If you accept** [THE PLAINTIFF'S] **evidence, (he/she) is entitled to reasonable compensation for the loss (he/she) suffered to date and for that which (he/she) may suffer into the future.**

**LOSS OF INCOME TO THE DATE OF TRIAL** [§3.01.18]

User Note: See CIVJI 12.12 (Loss of Income to Date of Trial).

**21. You heard evidence that** [THE PLAINTIFF] **lost income as a result of the accident. (He/She) says the loss amounts to about $** [AMOUNT]**.**

**22. The burden of proof is on** [THE PLAINTIFF] **to prove on a balance of probabilities that the injuries (he/she) sustained as a result of the accident impaired (his/her) ability to earn that income. In other words,** [THE PLAINTIFF] **must prove that it is more likely than not that the injuries caused an impairment to (his/her) capacity to earn income in the past.**

**23. If you are satisfied on a balance of probabilities that the injuries sustained as a result of the accident caused such an impairment, you must go on to assess the likelihood that,**

**had the injuries not occurred,** [THE PLAINTIFF] **would have earned more income in the period between the accident and the trial than (he/she) actually earned and make an award for past loss of income using that assessment. The question of what the plaintiff would have earned in the period between the accident and the trial, had it not been for the injuries sustained in the accident, is a hypothetical question; as such, it need not be proven on a balance of probabilities, but, rather, it is given weight in accordance with its likelihood. Common events of life, or contingencies, such as sickness, layoffs, pay raises, and promotions, should be taken into account even when they cannot be proven on a balance of probabilities. If, after having considered all contingencies, you decide that there is a real and substantial possibility that the plaintiff would have earned more income in the period between the accident and the trial than (he/she) actually earned, then you must determine the likelihood of that occurring, and you should reflect that likelihood in the award of damages for past income loss.**

**24. When determining** [THE PLAINTIFF'S] **past loss of income, you must reduce it by the amount (he/she) would have had to pay in income taxes as shown by the evidence.**[3] **(Usually, counsel will agree to do this calculation.)**

**LOSS OF FUTURE EARNING CAPACITY** [§3.01.19]

**25. You heard evidence suggesting that** [THE PLAINTIFF] **will likely earn less income in the future from (his/her) occupation as** [E.G., A DENTIST]**. (He/She) intends to continue** [E.G., PRACTISING AS A DENTIST]**. If you accept that evidence, (he/she) is entitled to compensation for this loss from today until** [E.G., (HIS/HER) EXPECTED DATE OF RECOVERY] **or** [E.G., (HIS/HER) RETIREMENT]**. (He/She) needs to prove there is a real and**

**substantial possibility of a future event leading to a loss of income. Because this is a future loss, its assessment depends on two hypotheticals: namely, what** [THE PLAINTIFF] **would have done in the future had (he/she) not been injured, and what** [THE PLAINTIFF] **will do in the future given that (he/she) has been injured. For example, the plaintiff needs to prove there is a real and substantial possibility that (he/she) would have** [E.G., CONTINUED TO PRACTICE DENTISTRY ON A FULL-TIME BASIS UNTIL RETIREMENT] **but for the injuries sustained in the accident, and that there is a real and substantial possibility that because of the injuries sustained in the accident, (he/she) will not do so. If you choose to make an award under this head of damages, it should be based upon the evidence you heard and should reflect the relative likelihood of these possibilities.**

**CONTINGENCIES** [§3.01.20]

User Note: See CIVJI 12.11 (Loss of Future Earning Capacity), §12.11.6.

**26. When assessing the amount of this loss, you should take into account the contingencies of life. For example, in the future** [THE PLAINTIFF] **might acquire some other illness or disability unrelated to (his/her) present complaints that will prevent (him/her) from working. On the other hand, had the accident not happened, (he/she) might have received unpredictable promotions and raises or other forms of good fortune.**

### COST OF FUTURE CARE [§3.01.21]

User Note: See CIVJI 12.10 (Cost of Future Care).

**27.** [THE PLAINTIFF] **says (he/she) will need** [E.G., FURTHER PHYSIOTHERAPY TO CONTROL (HIS/HER) RIGHT NECK PAIN FROM TODAY INTO THE FORESEEABLE FUTURE]**. If you find there is a real possibility this will occur, you should award (him/her) a reasonable amount to compensate (him/her) for these expenses.**

### SPECIAL DAMAGES [§3.01.22]

User Note: See CIVJI 12.14 (Special Damages).

**28. The parties agree that the special damages by way of out-of-pocket expenses that** [THE PLAINTIFF] **incurred up to the date of trial on account of the accident come to the sum of** [E.G., $3,149.15]**. If you find** [THE DEFENDANT] **negligent, you must award** [THE PLAINTIFF] **that sum.**

### COUNSEL'S SUBMISSIONS AS TO THE AMOUNT OF DAMAGES [§3.01.23]

User Note: See the commentary in CIVJI 12.06 (Quantifying Non-pecuniary Damages), note (2).

**29. In counsel's helpful submissions to you, they suggested certain dollar figures you might choose to award** [THE PLAINTIFF] **for the various heads of damages that are in issue at this trial—except for damages for pain, injury, suffering, and loss of enjoyment of life, for which counsel may not suggest dollar figures. Because the amount of damages is a question of fact for you to decide, you are not bound by these suggestions. The arguments of counsel are not evidence from which you can find facts. You may only find facts from the evidence you heard. Where justified, you should award** [THE PLAINTIFF] **reasonable compensation arising from those facts.**

## PART V—SUMMARY AND CLOSING REMARKS [§3.01.24]

### POSITION OF THE CASE FOR THE PLAINTIFF [§3.01.25]

User Note: See CIVJI 14.01 (Summary of Submissions of Counsel).

**30. As I understand it, counsel for** [THE PLAINTIFF] **contends** [E.G.]**:**

**(1)** [THE PLAINTIFF] **is** [E.G., A CREDIBLE WITNESS; (HE/SHE) DOES NOT HAVE A HISTORY OF BEING A WHINER AND COMPLAINER]**.**

**(2) Although the collision was slight, it caused injury to** [E.G., (HIS/HER) NECK]**.**

**(3) (He/She) has done (his/her) best to overcome the pain but it lingers on.**

**(4)** [ETC.]**.**

### POSITION OF THE CASE FOR THE DEFENDANT [§3.01.26]

User Note: See CIVJI 14.01 (Summary of Submissions of Counsel).

**31. Again, as I understand it, counsel for** [THE DEFENDANT] **alleges** [E.G.]**:**

**(1) the force of the collision between the motor vehicles was so insignificant that it could not have caused the injuries claimed by** [THE PLAINTIFF]**.**

**(2) Some of the expert reports are not reliable because they rely on facts not proven.**

**(3)** [ETC.]**.**

### CONFLICTING POSITIONS [§3.01.27]

User Note: See CIVJI 14.01 (Summary of Submissions of Counsel), §14.01.3.

**32. These positions are my interpretation of counsel's arguments. If they differ in any way from what counsel said, you must accept their statements in preference to mine.**

**33. Where there is a conflict in the positions, do not weigh one against the other when reaching a decision. Keep in mind, the burden of proof is on** [THE PLAINTIFF] **to prove** [THE DEFENDANT'S] **negligence caused (his/her) injuries and (he/she) suffered damages as a result.**

**DUTY TO DELIBERATE** [§3.01.28]

User Note: See CIVJI 14.03 (Duty to Deliberate Together).

**34. It is your duty to consult with one another and to reach a just verdict according to the evidence and the law. Listen attentively to your fellow jurors. Put forward your own points of view in a calm and reasonable manner. Be prepared to change your mind if you are convinced you are wrong. Each of you must make your own decision as to whether** [THE DEFENDANT] **caused** [THE PLAINTIFF'S] **injuries and, if so, what amount** [THE PLAINTIFF] **should receive in the way of reasonable compensation.**

**DISCUSSING THE EVIDENCE AND THE LAW** [§3.01.29]

**35. There is no fixed routine you must follow in arriving at your verdict. Here are some suggestions. First, review the evidence. List the particular pieces of evidence next to the applicable element or ingredient of the claim or the defence. Second, determine the facts you find from that evidence. List those facts. Third, apply the law that I gave you to those facts and decide whether the plaintiff or the defendant should succeed in whole or in part.**

**VOTING** [§3.01.30]

**36. You may take a vote at any time. However, if you spend a reasonable amount of time considering the evidence and the law and listening to each other's opinions, you will**

**probably feel more confident and satisfied with your eventual verdict than if you rush things. You may vote by raising your hand, by a written ballot or by a voice ballot. If you cannot reach a verdict after trying many times to do so, ask me for advice on how to proceed.**

**UNANIMITY** [§3.01.31]

User Note: See CIVJI 14.04 (Unanimity).

**37. The law requires you to be unanimous in any verdict you see fit to return.**

**FURTHER INSTRUCTIONS ON THE LAW** [§3.01.32]

User Note: See CIVJI 14.06 (Further Instructions on the Law).

**38. If you have any difficulty with the law, just pass a note to the sheriff setting out the question you want answered. We will then reassemble the court for the purpose of answering your inquiry.**

**FURTHER INSTRUCTIONS ON THE EVIDENCE** [§3.01.33]

User Note: See CIVJI 14.07 (Further Instructions on the Evidence).

**39. If you have any problems remembering the evidence, you may also pass a note to the sheriff setting out what evidence you would like played back. We will then reassemble the court for the purpose of playing back the evidence.**

**40. Usually, we cannot just play back a particular phrase or sentence. The whole of the evidence of a particular witness must be played back, including the examination-in-chief and the cross-examination. In saying this I do not want to discourage you from asking that evidence be played back. You have every right to hear the evidence again. However, in most cases, and this seems to be one of them, your verdict will**

**more likely be founded on the whole of the evidence rather than on one particular piece of evidence.**

**COMMENTS BY COUNSEL ON THE EVIDENCE** [§3.01.34]

User Note: See CIVJI 14.05 (Comments by Counsel on the Evidence).

**41. I will now ask counsel if they have any comments on the evidence, as opposed to the law, that I may have inadvertently misstated, or any significant evidence that I may have omitted to mention. I do this for the purpose of correcting any minor errors and not to invite reargument.**

**(Mr./Ms.)** [COUNSEL FOR THE PLAINTIFF], **do you have any comment?**

**(Mr./Ms.)** [COUNSEL FOR THE DEFENDANT], **do you have any comment?**

**Members of the jury, as I told you earlier, it is your memory and opinion of the evidence that counts, not the memory or opinion of counsel or me.**

**QUESTIONS—VERDICT** [§3.01.35]

User Note: See CIVJI 14.02 (Answering Questions).

**42. Here is the list of questions you will be required to answer. I will go through them with you.**

User Note: Review questions.

**43. When you complete the questions and your foreperson signs the Question sheet, just inform the sheriff that you have a verdict. He or she will pass that information on to me. We will then reassemble the court for the purpose of receiving your verdict.**

**44. When you come back into the courtroom, your foreperson (Mr./Ms.)** [NAME] **will be asked to stand and deliver the verdict. (He/She) will be asked, for example: what is your answer to Question #1?; what is your answer to Question #2?; etc.**

**45. After answering the questions, you will all be asked to stand and confirm the verdict.**

**RETIREMENT** [§3.01.36]

**46. You may now retire.**

NOTES

(1) *Knauf v. Chao*, 2009 BCCA 605 involved a three-day motor vehicle accident trial in which the judge used the abbreviated instructions, including the instructions for loss of future earning capacity. The plaintiff's injuries prevented her from performing a second job she had held at the time of the accident, but there was a question as to how much longer the plaintiff would have worked at the second job and whether she was precluded from engaging in other occupations. The court said at para. 33:

> [J]udges 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.

(2) *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3:

> 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.

(3) In British Columbia, s. 95 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (and its equivalent provision, s. 52 of the *Insurance (Motor Vehicle) Act*—the name of the statute before its amendment on June 1, 2007) provides that the loss must be calculated on the plaintiff's net loss after deductions for taxes and employment insurance premiums. Claims arising out of accidents that occurred before June 1, 2007 continue to be dealt with by the *Insurance (Motor Vehicle) Act* and Revised Regulation (1984) under the Insurance (Motor Vehicle) Act. For claims arising out of accidents that occurred on or after June 1, 2007, it is necessary to identify the particular certificate or policy against which or under which the claim arises. The current *Insurance (Vehicle) Act* and Insurance (Vehicle) Regulation apply if the certificate or policy took effect on or after June 1, 2007.

# CIVJI 12.03

# NON-PECUNIARY DAMAGES —INTRODUCTION



## PURPOSE OF AWARD FOR NON-PECUNIARY LOSS [§12.03.1]

**1. I now turn to what are called damages for non-pecuniary loss. Non-pecuniary losses are personal injury losses that have not required an actual outlay of money. The purpose of such an award is to provide solace to** [THE PLAINTIFF] **for such things as pain, suffering, disability, inconvenience, disfigurement, loss of enjoyment of life, and loss of expectation of life.[1] One purpose of an award of damages for non-pecuniary loss is to substitute other amenities for those that the plaintiff has lost—not to compensate the plaintiff for the loss of something with a money value.[2] I will discuss the various elements of this award in order to help you decide what sum, if any, you will award** [THE PLAINTIFF] **for these things.[3] Your award should address such losses suffered up to the date of trial and also those (he/she) will suffer in the future.[4]**

**DUTY TO AWARD SUM THAT IS FAIR AND REASONABLE** [§12.03.2]

**2. Damages for these losses have a different purpose than other damages. There is no market in health and happiness, and non-pecuniary losses have no objective, ascertainable value. It is generally not possible to put a plaintiff back in the position (he/she) would have been in had the (injury/loss) not occurred, and this is especially true of non-pecuniary loss. You must fix a sum that is tailored to** [THE PLAINTIFF]**, one that is moderate but fair and reasonable to both parties, keeping in mind that you will be fully compensating** [THE PLAINTIFF] **for (his/her) future care needs and other pecuniary losses. It would be a mistake to try to assess for** [THE PLAINTIFF] **a sum for which (he/she) would have voluntarily chosen to suffer such pain, disability, inconvenience, disfigurement, loss of enjoyment of life, and loss of expectation of life. Although I will discuss these factors separately, you should make one assessment for non-pecuniary loss that takes all of these factors into account.**[5]

**GUIDELINES IN ASSESSING DAMAGES** [§12.03.3]

**3. In assessing damages, you may consider what use the plaintiff can make of the money you may choose to give (him/her). One purpose of making an award under this heading is to substitute other amenities for those the plaintiff has lost. It is meant to provide better physical arrangements beyond those directly arising from the injury (some "extras") to make the plaintiff's life more bearable.**[6]

**4. In determining the appropriate award, you may also consider the following common factors:**

- **(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 and mental abilities;**
- **(i) loss of lifestyle; and**
- **(j) the plaintiff's stoicism (as a factor that should not, generally, penalize the plaintiff).**[7, 8]

User Note: Loss of capacity for housekeeping may be compensated as a non-pecuniary loss or, where there is evidence of either the plaintiff's need to pay for housekeeping services or that services are routinely performed for them gratuitously by family members or friends, as a pecuniary award. See §12.09.11.

NOTES

(1) In *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 476–477 (S.C.C.), the court set out a "functional" approach to assessment of non-pecuniary loss in an attempt to provide a rational basis for awards that by nature are difficult to quantify in monetary terms.

This approach was endorsed in *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609 at 639–640 (S.C.C.).

The "functional" approach is further explained in *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636–639. See also B.M. McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1981), 59 Can. Bar Rev. 1, in particular at 11–12. And see *Black v. Lemon* (1983), 48 B.C.L.R. 145 (C.A.); and *Bracchi v. Horsland* (1983), 147 D.L.R. (3d) 182 (B.C.C.A.).

(2) *Lindal v. Lindal*, *supra*, note (1) at 639.

(3) The evolution of these subheads of damage (pain, suffering, loss of enjoyment of life (or amenities), and loss of expectation of life) has been gradual and may not have ended: see K. Cooper-Stephenson and E. Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed. (Thomson Reuters, 2018) at 685. Although the Supreme Court of Canada has endorsed a functional approach in which a single award is made for all subheads of non-pecuniary damage, Dickson J. in *Andrews*, *supra*, note (1) at 476, refers to the subheads:

> ... non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life.

Although the plaintiff's age and life expectancy may be considered in arriving at an award for damages, there is no requirement that an award be calculated as though for a younger person and then discounted to take into account the plaintiff's age: *Ha v. Mayar*, 1999 BCCA 667.

(4) While it is possible to keep the various categories of non-pecuniary loss logically distinct, there is necessarily some overlap among them. It is better, therefore, that a single award be made for all types of non-pecuniary loss: *Andrews*, *supra*, note (1) at 478.

(5) The second paragraph in this Instruction is modelled on a passage from the judgment of Dickson J. in *Andrews*, *supra*, note (1) at 475–476:

> 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 ... . No money can provide true restitution.

(6) This Instruction reflects the "functional loss" approach directed by the Supreme Court of Canada in *Andrews*, *supra*, note (1); *Thornton v. Prince George School District No. 57 Board of School Trustees* (1978), 83 D.L.R. (3d) 480; and *Arnold v. Teno, supra,* note (1). For a discussion of some of the outstanding questions about using the "functional loss" approach to jury trials, see CIVJI 12.7 (Upper Limit of an Award Where Injuries Catastrophic/Devastating), note (1a).

(7) See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal refused [2006] S.C.C.A. No. 100 (QL).

(8) In *Kim v. Lin*, 2018 BCCA 77 at para. 33, the appellate court noted the trial court has some discretion in assessing these claims as part of the non-pecuniary or pecuniary loss:

> Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work—i.e., where the plaintiff has suffered a true loss of capacity—that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

The court affirmed this flexibility in *Riley v. Ritsco*, 2018 BCCA 366 at para. 101:

> It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is

> appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.

In *Riley*, it was not appropriate to make a separate pecuniary award because there was no evidence of any incapacity on the part of the plaintiff that would result in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for.

# CIVJI 12.04

# PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE



## REGARDING THIS INSTRUCTION [§12.04.A]

User Note: This Instruction is designed for use as an explanation to the jury of the basis of the pain and suffering component of the award for non-pecuniary loss. It should be read after CIVJI 12.03 (Non-pecuniary Damages—Introduction).

## EXPLANATION OF PAIN AND SUFFERING [§12.04.1]

**1. Your assessment should take into account the pain and suffering, if any, that** [THE PLAINTIFF] **has experienced from the date of the injury to the present, as well as for the pain and suffering you conclude (he/she) is likely to experience in the future. In making your assessment, you should consider all distress or discomfort caused or contributed to by the event of** [DATE] **that has been felt by** [THE PLAINTIFF] **in the past and is likely to be felt by (him/her) in the future.**[1]

**EXPLANATION OF LOSS OF ENJOYMENT OF LIFE** [§12.04.2]

**2. If you find that** [THE PLAINTIFF] **suffered injuries and that** [THE DEFENDANT] **is liable for** [THE PLAINTIFF'S] **injuries,** [THE PLAINTIFF] **is entitled to damages for the negative effect of those injuries on (his/her) enjoyment of life. Thus, if you conclude that because of the event of** [DATE], **(he/she) has been unable to enjoy, in the way that (he/she) formerly could, whatever life should offer, your award should reflect that loss.**[2]

**DISTRESS MUST BE GENUINELY FELT** [§12.04.3]

**3. The law does not provide for recovery of damages for distress where none is felt, as, for example, where the accident victim is unconscious. However, if you are satisfied that** [THE PLAINTIFF] **has sustained injuries that have given (him/her) distress or discomfort, even if you consider that most people would not have felt it, or would not have felt it so severely in the circumstances, you must award damages for that pain and suffering.**[3]

**EVIDENCE OF PAIN AND SUFFERING** [§12.04.4]

**4. With respect to** [THE PLAINTIFF'S] **complaints relating to pain, injury, and suffering from the date of the event until the date of the trial, you (heard/read) the evidence of Dr.** [NAME] **(and/or** [THE PLAINTIFF, OR HIS OR HER FAMILY MEMBERS OR FRIENDS]**) explaining the injuries** [THE PLAINTIFF] **suffered.**[3a] **You also heard** [THE PLAINTIFF OR HIS OR HER FAMILY MEMBERS OR FRIENDS] **tell you the extent of the pain and discomfort (he/she) experienced because of these injuries.**

**CORROBORATIVE EVIDENCE OF PAIN AND SUFFERING** [§12.04.5]

**5. Other evidence from** [THE WITNESS] **was placed before you to support in some degree the evidence of** [THE PLAINTIFF] **concerning (his/her) pain and suffering.**

**PLAINTIFF'S PRE-ACCIDENT ACTIVITIES** [§12.04.6]

**6.** [THE PLAINTIFF] **testified that before the accident (he/she) enjoyed the following activities and was able to do the following unpaid work in the home:**[4]

**(1)** [SPECIFY]

**(2)** [SPECIFY]

**(3)** [SPECIFY]

**(4)** [ETC.].

**BASIS OF AWARD FOR LOSS OF ENJOYMENT OF LIFE** [§12.04.7]

**7.** [THE PLAINTIFF] **says (he/she) has not been able to do these things to the same extent (or at all) because of the accident.** [THE PLAINTIFF] **also says (he/she) is unable to enjoy (his/her) work as well since the (injury/accident). These are matters affecting** [THE PLAINTIFF'S] **enjoyment of life. If you accept (his/her) evidence, (he/she) is entitled to be compensated for this loss of enjoyment of life as part of an award for non-pecuniary loss.**

**DUTY TO AWARD FAIR AND REASONABLE SUM [§12.04.8]**

**8. When fixing a sum for damages with respect to pain, injury, and suffering, you know that damages can never be adequate in the sense that a person would undergo this pain and suffering in exchange for money. Although you cannot truly compensate for pain and suffering, you must try to**

**assess an amount for** [THE PLAINTIFF] **that is moderate but is fair and reasonable and bears some reasonable relation to the loss and injury claimed, as shown in the evidence. This amount forms part of your award of damages for non-pecuniary loss.**

**AGGRAVATED DAMAGES** [§12.04.9]

**9. Non-pecuniary damages can be augmented by an award of "aggravated damages" in certain circumstances.**[5] **Such an award is permitted where** [THE PLAINTIFF] **has experienced injury to (his/her) feelings, dignity, pride, or self-respect, especially where the injury experienced by (him/her) was increased by the manner in which** [THE DEFENDANT] **inflicted the injury. For instance, a plaintiff may be entitled to aggravated damages if (he/she) was subjected to a sudden, unprovoked, and brutal attack, or if the injury included a loss of dignity, humiliation, or a breach of trust.**[6] **If you conclude that** [THE PLAINTIFF] **suffered** [E.G., HURT FEELINGS, INDIGNITY, HURT PRIDE, LOSS OF RESPECT]**, you may increase your award for non-pecuniary damages by increasing the non-pecuniary damages that you would otherwise award.**

NOTES

(1) For a discussion of the concept of pain and suffering, see K. Cooper-Stephenson and E. Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed. (Thomson Reuters, 2018), at 686–688.

It is appropriate to take into account that the damage did not occur all at once, but over a protracted period of time: *Gauld (Guardian ad Litem of) v. Jameson* (1994), 89 B.C.L.R. (2d) 79 (C.A.).

Even where the physical injuries have been almost completely resolved, if the plaintiff's psychological problems remain dominant and have a devastating impact on the plaintiff's health and life, this is to be taken into account in the award for pain and suffering: *F. (K.E.) v. Daoust* (1996), 29 C.C.L.T. (2d) 17 (B.C.S.C.).

(2) See Cooper-Stephenson and Adjin-Tettey, *supra*, note (1) at 688–690. The wording of this charge draws on the language in *Skelton v. Collins* (1966), 115 C.L.R. 94 at 129–130 (Aus. H.C.):

> The next matter turns upon very different considerations. It turns upon the plaintiff's being deprived of something that he could not have sold, his ability to enjoy in the way that he formerly could whatever life should offer.

Thus, where a plaintiff continues to work in pain, even though he or she may suffer no loss of earning capacity, he or she has suffered additional loss of enjoyment of life because of the discomfort experienced: *Chan v. Maguire* (1998), [1999] 2 W.W.R. 67 (Alta. C.A.).

(3) *Krahn v. Rawlings* (1977), 77 D.L.R. (3d) 542 at 544 (Ont. C.A.); *Kingscott v. Megaritis* (1972), 27 D.L.R. (3d) 310 at 316–317 (Ont. H.C.). In *Krahn v. Rawlings*, MacKinnon J.A. said:

> It is trite law that the respondent has to take this appellant as he finds her. If her personality, or psychological make-up, makes her susceptible, as a result of the accident, to what counsel called "conversion hysteria", whether it is labelled a post-traumatic neurosis or not, it is none the less a real consequence of the accident for this particular appellant.

For discussions as to whether chronic pain syndrome is compensable as a genuine disability or whether it involves a weak will or desire for sympathy on the part of the plaintiff, see *Maslen v. Rubenstein* (1994), 83 B.C.L.R. (2d) 131 (C.A.); and *Gray v. Gill* (1993), 18 C.C.L.T. (2d) 120 (B.C.S.C.).

In *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, the court stated that despite the lack of objective findings at the site of the injury to support the existence of chronic pain syndrome, "there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real".

*Skelton v. Stewart* (1994), 93 B.C.L.R. (2d) 200 at 207 (C.A.):

> At the heart of those cases is the question whether the symptoms of which a claimant complains are genuine, or whether they are motivated by a desire for financial gain. For there to be such a desire it surely must be a conscious one—one which can be controlled or overcome by the claimant.

See also *Dalby v. Reece* (1993), 84 B.C.L.R. (2d) 146 at 153 (S.C.):

> I accept that a person can experience pain including severe or disabling pain without displaying "objective" symptoms.

It is correct to treat a plaintiff's conscious wish to seek comfort and attention, or a conscious failure to exercise willpower to bring about a recovery, as a *novus actus interveniens*. However, if the craving for attention is unconscious, or the failure to exercise willpower is similarly unconscious and contrary to the plaintiff's apparent efforts to heal, the plaintiff should not be excluded from compensation for these psychological symptoms: *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.).

Evidence of pain and suffering is often difficult to measure, particularly in sexual assault cases where the evidence is not physical. Lack of physical evidence, however, does not mean that the pain is any less real. See *T. (J.M.) v. D. (A.F.)*, [1995] 6 W.W.R. 92 at 97 (Sask. Q.B.).

See *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 at 746 (Ont. Gen. Div.), in which a plaintiff who had been raped received an award of $175,000 in general damages to take into account the horrific

nature of the violation and the overwhelming and all-encompassing consequences of it.
See also K. Sutherland, "Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault" in *Tort Theory*, K. Cooper-Stephenson and E. Gibson (Eds.), (Captus University Publications, 1993) at 212–234.

General damages may not be awarded to an unaware plaintiff. This follows from the functional loss approach that has been adopted by Canadian courts. Thus, where the plaintiff was a severely disabled infant with only a slight possibility of reaching a level of awareness where there could be some solace for him, he was awarded $15,000 for general damages: *Knutson v. Farr* (1984), 55 B.C.L.R. 145 (C.A.).

See also *Wipfli v. Britten* (1984), 13 D.L.R. (4th) 169 (B.C.C.A.), in which a plaintiff with somewhat higher chances of experiencing improvement was awarded $75,000. Also, in *Brown (Next Friend of) v. University of Alberta Hospital*, [1997] 4 W.W.R. 645 (Alta. Q.B.), where the plaintiff was not in a persistent vegetative state, responded to some stimulation, and required medication in order to relieve pain, an award for general damages was made.

(3a) In *Saadati v. Moorhead*, 2017 SCC 28, the court clarified that proof of mental injuries is not to be treated differently than proof of physical injuries. In particular, while expert evidence may be of assistance in determining whether a plaintiff has suffered a mental injury, expert evidence of a psychiatric diagnosis is not required for a plaintiff to recover damages for mental injury.

(4) In *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 400 (Sask. C.A.) (leave to appeal refused [1991] S.C.C.A. No. 433 (QL)), the plaintiff's injuries prevented her from performing the housekeeping tasks that she ordinarily did. She claimed compensation for her lost capacity to do housekeeping. In the pre-trial period, she had hired a cleaning service only once and had struggled to do what she could despite her injuries. The court held that the trial judge had properly concluded that an award for general damages for pre-trial loss of impairment of housekeeping ability must be awarded.

For a discussion of damages for loss of homemaking capacity, see CIVJI 12.11 (Loss of Future Earning Capacity), note (13), and Cooper-Stephenson and Adjin-Tettey, *supra*, note (1) at 438-468.

(5) Aggravated general damages may be awarded in addition to punitive or exemplary damages; see *Norberg v. Wynrib*, [1992] 4 W.W.R. 577 at 602–603 (S.C.C.).

In *Norberg*, the majority (per La Forest J.) awarded $20,000 general damages and $10,000 punitive damages, taking into account the circumstances of the battery, which involved a physician taking advantage of his patient's addiction to obtain sexual contact with her, causing her humiliation and loss of dignity, and clearly violating community standards of conduct.

In *A. (T.W.N.) v. Clarke*, 2003 BCCA 670 1 at para. 102, the court stated:

> Aggravated damages are not a separate head of damages. Rather, they are an augmentation of general damages to compensate for aggravated injury: see *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) at 263 and *Y. (S.) v. C. (F.G.)* (1996), 26 B.C.L.R. (3d) 155 at [paragraph] 36 (C.A.).

See also *A. (D.A.) v. B. (D.K.)* (1995), 27 C.C.L.T. (2d) 256 at 268 (Ont. Gen. Div.), where the court held on a consideration of *Norberg v. Wynrib*, *supra*, that aggravated damages are not awarded in addition to general damages but rather general damages are assessed taking into account any aggravating features of the case and to that extent increasing the amount awarded.

In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, the Supreme Court of Canada confirmed the view taken in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, that damages for mental distress in "peace of mind" contracts should be seen as an expression of the general principle of compensatory damages of *Hadley v. Baxendale* (1854), 9 Ex. 341 rather than as an exception to that principle.

The court in *Fidler* stated at para. 47 that before a court awards what have in the past been termed "aggravated damages" for breach of contract, it must be satisfied "(1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation". As

to the first of the two requirements, the court elaborated at para. 48 that it is not necessary that peace of mind be shown to be the dominant aspect or the "very essence" of the bargain. So long as the promise in relation to state of mind is a *part* of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable. The court summarized its reasoning on this issue at para. 49:

> We conclude that the "peace of mind" class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

Damages for mental suffering in cases where the defendant has breached a "peace of mind" contract are not, however, "true aggravated damages", comparable to those arising out of aggravating circumstances. True aggravated damages are not awarded under the general principle of *Hadley v. Baxendale*, but rest on a separate cause of action—usually in tort—like defamation, oppression, or fraud. The use of the term "aggravated damages" to refer to damages for mental distress arising out of the contractual breach itself, which exist independently of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation, is "unnecessary and, indeed, a source of possible confusion": *Fidler v. Sun Life Assurance Co. of Canada*, *supra*, at paras. 50 to 54.

(6) *Storrie v. Newman* (1982), 139 D.L.R. (3d) 482 at 495–496 (B.C.S.C.):

> Aggravated damages are awarded not as a pecuniary or punishment but for circumstances which have peculiarly aggravated the case.
>
> The assault here was sudden, unprovoked and particularly brutal. In addition to the pain from the injuries, this attractive young woman was left in a humiliating condition, with two black eyes and scars on her face and her clothes torn to the waist from some sort of sexual attack.

# CIVJI 12.06

# QUANTIFYING NON-PECUNIARY DAMAGES



## REGARDING THIS INSTRUCTION [§12.06.A]

User Note: This Instruction seems appropriate in British Columbia and Ontario. It is not correct for Saskatchewan as the law now stands. See the discussion in the footnotes.

## ASSESSMENT OF NON-PECUNIARY DAMAGES [§12.06.1]

**1. Damages for pain, injury, suffering, and loss of enjoyment of life are called non-pecuniary because they cannot be compared to a dollar amount as is the case in a claim for past loss of income. Therefore, as I have said, there is no formula I can give you that will guide you in fixing an appropriate sum. Each award for pain, injury, suffering, and loss of enjoyment of life is custom-made for each individual plaintiff. The law does not have a specific table illustrating how a particular injury brings a fixed and certain dollar award.**[1]

User Note: See also §12.03.3 concerning guidelines for assessing non-pecuniary damages.

**SIMILAR AWARDS** [§12.06.2]

**2. A judge sitting alone without a jury is required to consider similar awards of other judges, to maintain consistency with them. But the law does not permit me to hand you copies of other trial judgments relating to similar kinds of cases, or to tell you about awards in other cases.**

**ASSESSMENT BY JURORS** [§12.06.3]

**3. You should understand that the exercise of determining an appropriate award for non-pecuniary loss is not intellectual in the sense that it is taught as a course at law school. You can decide what is the correct figure. Your figure may differ from what I think is appropriate, but that does not necessarily mean you are wrong and I am right. You bring to the law the common sense of the community. Your decision helps the courts keep in touch with the views of the citizens, whom the law is designed to serve.**

**You see, if I were to tell you the approximate range of damages I might award, and you adopted what I said, you would merely be returning a verdict based upon a judge's award. In that event, the educational value of your independent judgment would be lost to the law. Besides, my assessment would be based on my view of the evidence. It might be entirely different from yours.**

**DAMAGES A QUESTION OF FACT** [§12.06.4]

**4. Finally, under the *Negligence Act* of this province, the amount of damage or loss is a question of fact and not of law.[2] My responsibility in this trial is to guide you on the law. Your responsibility is to decide the facts. That includes the appropriate amount of damages. Your duty is to arrive at a sum that is fair and reasonable to the plaintiff and to the defendant.[3]**

NOTES

(1) As a consequence of the prohibition on instructing juries of the upper limit on pain and suffering damages in non-catastrophic injury cases, 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: *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 26 and 27, citing *Black v. Lemon* (1983), 48 B.C.L.R. 145 (C.A.), and *ter Neuzen v. Korn* (1995), 11 B.C.L.R. (3d) 201 (S.C.C.). Also of note is the Supreme Court of Canada decision in *Young v. Bella*, 2006 SCC 3, a case "outside the catastrophic personal injury context", where the court did not reduce the $430,000 non-pecuniary damages award.

(2) A finding by a jury of no non-pecuniary damages following a finding of injury is an error of law, at least in British Columbia. In *Banks v. Shrigley*, 2001 BCCA 232, *Stewart v. Shimpei* (1995), 65 B.C.A.C 113, and *Balla v. Insurance Corp. of British Columbia*, 2001 BCCA 62, the court in each case directed a new trial on this basis.

(3) See s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333, which reads, "In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact".

For this and other reasons it is improper for the trial judge to express any views as to quantum of damages: *Force v. Gibbons* (1978), 93 D.L.R. (3d) 626 at 631–632 (B.C.S.C.). See also *Gray v. Alanco Developments Ltd.* (1967), 61 D.L.R. (2d) 652 at 656 (Ont. C.A.).

However, if there is agreement between counsel and the trial judge as to the range of damages, it is permissible in Ontario for the judge to advise the jury with respect to that range: *Howes v. Crosby* (1984), 6 D.L.R. (4th) 698 at 709 (Ont. C.A.).

In Saskatchewan the law seems to be different. The point is made that, since the Supreme Court of Canada set a cap on the award of non-pecuniary damages as a matter of law in catastrophic cases, a trial judge may also instruct a jury as to an appropriate range of damages in non-catastrophic cases: *Rieger v. Burgess*, [1988] 4 W.W.R. 577 at 634–635 (Sask. C.A.); followed in *Quintal v. Datta*, [1988] 6 W.W.R. 481 at 517 (Sask. C.A.) (leave to appeal refused [1988] S.C.C.A. No. 488 (QL)). See also *Junek v. Ede*, [1991] 1 W.W.R. 60 (Sask. C.A.).

Saskatchewan has a section similar to s. 6 of the British Columbia *Negligence Act* in its *Contributory Negligence Act*, R.S.S. 1978, c. C-31, s. 4. It is unclear whether this enactment was brought to the attention of the Saskatchewan Court of Appeal in either of the above two cases. (Nor were these statutes and similar provincial enactments discussed in the trilogy of cases decided by the Supreme Court of Canada, where the court fixed a maximum amount of damages for "functional loss" as a matter of law.)

Readers are cautioned that the practice in this area is inconsistent in Canada. In British Columbia, counsel may address the jury on the dollar amounts they should award a plaintiff for every head of damages except general damages for pain, injury, suffering, and loss of enjoyment of life.

Arguably, judges should not mention the amount of damages a jury might award for any head of damages, including general damages. This is because common and statute law says that the amount of damages is a question of fact. It is a principle of jury trial instructions that judges must not tell juries what facts they should find. See CIVJI 3.01 (Abbreviated Instructions), §3.01.23, for an example of an instruction that may be given if the judge allows counsel to suggest ranges of damages.