Court of Appeal File No: CA46728

COURT OF APPEAL

ON APPEAL FROM: The Order of the Honourable Madam Justice Winteringham of the Supreme Court of British Columbia and Jury, pronounced February 4, 2020

BETWEEN:

PATRICIA DAWN ELLIOTT

RESPONDENT
(PLAINTIFF)

And:

RYAN McCLIGGOT AND
SLEGG CONSTRUCTION MATERIALS LTD

APPELLANTS
(DEFENDANTS)

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CHRONOLOGY

The respondent accepts and adopts the appellants' chronology.

OPENING STATEMENT

Ms. Elliott was in a motor vehicle accident where a flat-deck lumber truck drove into her vehicle in reverse. The accident was not a high-speed collision. Her injuries were never catastrophic. Several of her injuries healed quickly and well. However, through no fault of her own, some of her injuries did not heal. They developed into chronic myofascial pain in her neck, shoulders and upper back. She also developed cervicogenic headaches. The medical evidence is unanimous.

Ms. Elliott has responded well to her setbacks. She changed careers and moved into office work. However, she sacrificed her dream of a hands-on career working with young children. She can no longer pursue a career where she can be home with and for her children, two of whom are disabled. She now lives in a constant state of discomfort, tension and low-grade headache. She takes medication every day. Sometimes her condition flares up into serious pain. When Ms. Elliott is in a significant pain flare-up, she is in no condition to work and she's of no benefit to herself or her employer. On average she misses 1 to 1.5 days per month due to flare-ups from her injuries. The expert opinion from the doctors predict that her condition is permanent. Although nobody can know how Ms. Elliott's career would have gone if not for the accident, she is now less capable overall of earning income from all types of employment. She does not have the same potential in life she did, either to earn an income or enjoy what life has to offer.

For pecuniary damages, Ms. Elliott sought approximately $100,000. The jury awarded her $106,500.

The jury assessed non-pecuniary damages at $350,000, close to the cap. The jury had no reference to the cap or judge-made awards for cases similar to Ms. Elliott’s. The jury’s award significantly exceeded what a judge would award. However, given that Ms. Elliott is left with pain that is constant and lifelong, the award is not inconsistent with contemporary mores such that it may be said to be shocking or such that no jury reviewing the evidence as a whole and acting judicially could have reached it.

PART 1 -- STATEMENT OF FACTS

1. The statement of facts produced by the appellants is largely accurate.

2. However, the respondent disagrees the judge's charge on non-pecuniary damages was very brief and lacked much of the content found in the full model CIVJI charge.

3. Appendix A to this factum reproduces the abbreviated CIVJI charge for non-pecuniary damages. Produced in Appendix A below the abbreviated charge is a tabular comparison of the full model charge in one column with corresponding extracts (as applicable) from the charge delivered to the jury in the next column. The table evidences that although the judge did not address items in precisely the same order as the CIVJI charge, nor did she always repeat them verbatim, the judge delivered to the jury substantially the full CIVJI charge on non-pecuniary damages.

4. On the whole, the appellants' statement of facts de-emphasizes the severity, chronicity and impact of the respondent's injuries from the uncontroverted accident-related injuries of myofascial pain and cervicogenic headache. Although her injuries are not catastrophic, Ms. Elliott is in constant, aching discomfort that will likely never go away. (T:75, AAB 10, 14, 32, 36). She takes medication every day to help control these symptoms, one round in the morning, another in the afternoon, and, depending on how she is feeling, sometimes a third round in the evening (T: 58, 106, AAB 9).

5. At the time of the accident, she was in the process of licensing her daycare through the Vancouver Island Health Authority (T:60). Instead of completing the licensing, she had to close her daycare and she was evicted from her home which doubled as her business premises (T:69). She was no longer able to continue in her preferred vocation and "lifetime goal" of taking care of children (T:59), and she

can no longer pursue a career where she can be home and present for her children, two of whom are disabled (T: 60, 65)

6. Ms. Elliott manages and adapts with a daily medication regime, by getting up from a seated position every half hour or so (T:69. AAB: 260), using a heating pad, sometimes at work (T:87-88) and always after work (T:125), stretching daily (T:123), and pacing and reducing household chores (T:126).

7. She has flareups about once a month when the pain will become more severe and that can last 3-4 days and require her to take a day or two off work (T:99-100). Every two to three months she will have a severe flare up and her evidence is: “If I wake up with a severe flare up, it is often in a state where I immediately feel sick to my stomach because my head is hurting too much and everything is quite tender and painful. I try and do the same thing. I try and do my stretches. I take my medication. But often it is just a no-go situation. Like, I am looking at my clothes and trying to get dressed and it's feeling – sorry (T:128) … I'm sitting there looking at my clothes and I know that as a single parent I am responsible for getting to work, taking care of my children, providing for my household, but I'm sitting there looking at my clothes and I just can't find the energy to get up and get dressed and everything just feels like that little bit hopeless. And so I'm trying to get myself going but on those days it's just – I just end up calling in…. Instead of just tension, you know, the muscles in my shoulder and in my back are actually aching and spasming and my neck, instead of just having tension, it's stiff and sore and the headache is to the point where, instead of being a minor annoyance like it is on a daily basis, it is actually, like, throbbing pain headache to the point where sometimes it feels difficult to actually remain in a standing position because my head is hurting so much” (T:130).

PART 2 – ISSUES ON APPEAL

8. The principal issues on this appeal are:

    a. What is the applicable test for this Court to interfere with a jury's award of non-pecuniary damages and how should it be applied to the facts of this case?

    b. Was the trial judge's charge to the jury on non-pecuniary damages inadequate and, if so, did it rise to the level of causing the trial to be unfair such that a new assessment of damages by the trial court is plainly required in the interests of justice?

PART 3 – ARGUMENT

9. The jury awarded Ms. Elliott non pecuniary damages in a much higher amount than a judge sitting alone could have, or should have, in similar circumstances. As usual on such an appeal, the parties will each suggest in their respective factums judge-alone decisions they say are reasonable comparators for Ms. Elliott's injuries. The expectation is that this Court will then select one or more appropriate comparators and use that as a foundation from which to depart to some degree, moving in the direction of the jury's award to recognize the jury's evident view of the case.

10. It is trite that this Court will not interfere with a judge's award of non-pecuniary damages merely if the judge awarded something different than the Court of Appeal would have awarded on the facts of the case. And although greater deference still is owed to the award of a jury, it is admitted that that mere principle is not enough to save this jury's award to Ms. Elliott from some interference by this Court. But that is the starting point.

11. With respect to the greater deference owed to a jury's award, in *Moskaleva v. Laurie,* 2009 BCCA 260 ("*Moskaleva*")—which it is to be noted postdates the case of *Stapley v. Hejslet* 2006 BCCA 34 ("*Stapley*") relied on by the appellant—this Court notes "…the test applied on appellate review of a jury award in a personal injury case in this Province cannot be regarded as well settled": para 96.

12. The test became more settled with *Moskaleva.* This Court clarified there are two different standards: one for judge awards and one for jury awards. A judge's award may be upset because the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage": *Moskaleva* at para 127 citing *Nance v. British Columbia Electric Railway*, 1951 CanLII 374 (UK JCPC), [1951] 3 DLR 705 at 731-714. However, for a jury's award to justify correction by the court of appeal, the disparity must be wider.

13. The court explained the test to interfere with a jury's award in *Moskaleva* at para 127:

> 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).

14. In short, a jury's award may be inordinately low or inordinately high and thus a wholly erroneous estimate of the damage, but it will still stand unless, in addition to that, it is "wholly disproportionate or shockingly unreasonable"

15. Considering those principles, Ms. Elliott's case appears to be on all fours with *Little v. Schlyecher,* 2020 BCCA 381 ("*Little*"). The headnote of that case reads as follows:

> 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.

16. Ms. Little's injuries were described by Fenlon, J.A. at para 7 as consisting of:

> 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.

17. Ms. Little acknowledged that the award for non-pecuniary damages had to be reduced somewhat and she suggested a reduction to an award of $250,000 was appropriate, which the court ordered.

18. Fenlon, J.A. agreed that an award at the upper limit was “wholly disproportionate” (para 15).

19. It is natural enough to ask why Ms. Elliott’s award should be treated any differently, and indeed, at first glance, it should not be.

20. The answer lies in a combination of the test used by the Supreme Court of Canada in *Young v. Bella,* 2006 SCC 3 at para 66 (accepted by this Court) to interfere with a jury’s award of damages, (“wholly disproportionate **or** shockingly unreasonable) and the common but criticized practice of comparing non pecuniary damages awards of juries to those of judges. It is submitted that the latter rests on shaky and logically unsound foundation, duly criticized by several judges of this Court over many years, and it is a practice that should now be, if not discarded, at least deemphasized in favor of a test that focuses more on the second element of the test in *Young*.

21. It is submitted that, on a correct reading of the authorities, for an appellate court to properly interfere with a jury’s award of *nonpecuniary* damages, it is not sufficient that the jury’s award lacks proportion in whole to a judge’s award. Rather, the correct and appropriate test to interfere with a jury’s award of non-pecuniary damages is on the second disjunctive element of the test articulated in *Young*, namely that the award is “shockingly unreasonable”.

22. This formulation is more fully annunciated by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) at para 159 and repeated in *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para 108 as meaning:

> so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice

23. In fact, in *Whiten* at para 108, the Supreme Court of Canada says the test for interference with general damages is "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'"

24. Considered literally, shock, as an emotional response, is an unsatisfactory basis upon which to ground a legal test. However, the answer to this concern is that "to shock the court's conscience" is really an analogue for another longstanding test used to define the threshold at which the appellate court may properly interfere with a jury's verdict: that is the test as expressed in *McCannell v. McLean*, 1937 CanLII 1 (SCC), [1937] S.C.R. 341, at 343:

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

25. This formulation, though old, is still good. It has been adopted by this Court recently and several times in the past. in *Thomas v. Foskett*, 2020 BCCA 322 ("*Thomas*") Madam Justice DeWitt-Van Oosten, writing for the Court says at para 47[1]:

> [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.

[1] It is submitted that reference to the jury acting "judicially" must mean in a careful and serious manner, rather than as would a trained judge.

26. To understand why it is the second part of the formulation expressed in *Young* that governs a jury's ward of non-pecuniary damages (shocking the court's conscience) and not the first part (wholly disproportionate), we must note that general damages, while they can be disproportionate to what a judge would award in a like case, can never be disproportionate to the actual loss suffered by the plaintiff.

27. Non-pecuniary damages can never be disproportionate to the loss because the loss is non-monetary. It is **non-**pecuniary. Damages for a loss of earning capacity or a breach of contract can be disproportionate to an actual loss, wholly or partially. But by contrast, general damages can only be disproportionate to what a judge would award in a like case.

28. Any notion of proportionality is meaningless without some mathematical relationship between two quantities. We understand intuitively we can compare directly losses in dollars from a breached contract, or losses in dollars from the inability to perform labour, to losses in dollars that a judge or jury may award. But how do we compare aches, pains, suffering, and human misery to dollars? The answer is we cannot. Non pecuniary awards are, as Finch, C.J.B.C. said, writing for this Court in *Dilello v. Montgomery*, 2005 BCCA 56 "inherently arbitrary" (para 49).

29. A jury's verdict on non-pecuniary damages can be plainly unjust or it can be such that no jury acting judicially could have arrived at it, but strictly speaking it cannot be disproportional to anything but judge-made awards.

30. This brings us to the current comparative approach, which has already been the subject of some judicial criticism, to be discussed. It is the respondent's contention that the time has arrived to depart from the comparative approach, which considers whether juries' awards of nonpecuniary damages are "wholly disproportionate" to those of judges, and instead apply a test that asks whether

the jury's award shocks the court's conscience in the sense that no jury reviewing the evidence as a whole and acting judicially could have reached the verdict it did.

31. For judges as triers of fact, the law developed a sensible system whereby like injuries are (more or less) compared to one another with the intention that similar cases should yield similar awards in dollars. Such damages are awarded along a scale, with nominal amounts given for the least serious injuries all the way up to a cap of 100,000 1978-inflation-adjusted dollars for the most serious injuries.

32. It is a curious but evidently important feature of the jury system that jurors are not told this or given information about various categories of injury and ranges that judges award. Instead, this is purposefully concealed from them. What they are told instead is what this jury here was told in the charge:

> 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 provide you with copies of other trial judgments relating to similar kinds of cases; or to tell you about awards in other cases
>
> 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 opinion. In that event, the educational value of your independent judgment would be lost to the law.

33. The jury is empaneled and individuals are taken from their jobs and families to perform an important public service and civic duty. They are required to engage in a task that is inherently arbitrary, using only their gut, intuition, and common sense as legally untrained members of the community, with no notion of scale or proportion conferred on them for damages for pain and suffering.

34. These individuals, we might assume, debate, even agonize over the correct amount to agree on, in the fulfilment of their duty.[2] And after they give their verdict

[2] In this case the jury deliberated over 7 and a half hours, until just after 7 PM. It is noteworthy that if after 3 hours a jury does not reach a unanimous verdict, then s.22 of

they are discharged and read the following standard passage as, again, this jury was:

> And so, members of the jury, I know that you've had a long afternoon and evening, thank you very much. I -- Madam Foreperson and members of the jury, while carrying out your obligations as jurors over these past seven days you have represented the people of British Columbia in a most important civic duty. On their behalf I would like to thank you for the care and attention you gave to this case.
>
> Sitting as a juror is a serious responsibility. You are not trained to do it, but nonetheless you accepted the assignment as conscientious citizens. The law and the courts in this province do not belong to the government, the judges, or counsel, they belong to the public. Your service in this trial as members of the public helps to prove that fact. It also educates those of us who are not jurors by keeping us in touch with the attitudes and beliefs of the community that you represent.(T:345-346; CIVJI §101.1 - §101.2)

35. Meanwhile, there is a scale, one that is hidden from the jury. It is, as any such scale must be, arbitrary. But it is the judges' scale. And if the jury, without knowledge of this scale, departs from this judges' scale "wholly", the Court of Appeal will find the jury has *erred factually* in its assessment of the general, non-monetary damages and revise the award.

36. Jurors are conscripted to perform a public service. They are told, correctly, that money can never truly compensate a person for pain and suffering. They are told that while a judge sitting alone without a jury is required to consider similar awards of other judges to maintain consistency, they will not be told of similar awards, and that this is so the educational value of their independent judgment will not be lost to the law. They are tasked with engaging in an assessment to the best of their ability but which is at its core inherently arbitrary. Finally, having done so, often after weeks of trial and many hours of deliberation, they are thanked and told that their service as jurors proves that the law of the province belongs not to counsel,

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the *Jury Act* R.S.B.C. 1996, c. 242 provides that the judge of the court may receive the verdict of 75% of the jurors. In this case, the jury's verdict was unanimous.

judges or to the government but to the public.

37. In the context of these representations, to have an appellate court then interfere with the verdict only because it bears disproportion in whole to what a judge would have arbitrarily awarded on the "judges' scale" that is concealed from the jurors, is, it is submitted, problematic.

38. In the context of the civil jury system as it presently operates, there is a very real distinction between general damages that are wholly disproportionate to what a judge would award, and those that are so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. The two cannot be considered interchangeable or synonymous.

39. In part of the trilogy of cases in which a cap was set down on non-pecuniary damages, Dickson, J in *Andrews v. Grand & Toy Alberta Ltd*., 2 SCR 229, 1978 CanLII 1 observes at 261," There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one."

40. The reasons for the cap are made clear at 261:

> In particular, this [non pecuniary damages] is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

41. Since then, this Court has said repeatedly that non-pecuniary damage awards for non-catastrophic injuries do not "scale" to the cap. As this Court set out in *Moskaleva:*

> [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.

42. In the context of jury awards, the containment of the social burden of non-pecuniary awards is satisfied by two mechanisms. The first is the cap on non-pecuniary damages, which operates as a rule of law. The second is the power of an appellate court to intervene below the cap if awards are "wholly disproportionate or shockingly unreasonable".

43. However, this latter mechanism is raised before and used by this Court so infrequently that any effect it may have on the public or ratepayers is imagined more than real. A search of decisions published by this Court over the past 10 years (2011-2020 inclusive) shows a total of five instances when this Court intervened in respect of a jury's award of non-pecuniary damages at or under the cap, on the grounds it was too high or low. This is an average of once every two years:

    a. in *Little* damages of $375,000 were reduced to $250,000;

    b. in *Thomas* non-pecuniary damages of $15,000 were increased to $60,000;

c. in *Evans v. Metcalfe*, 2011 BCCA 507 a new trial was ordered after the jury awarded damages of $1,000 (past loss of earnings and special damages were assessed at $10,300 and $6,000 respectively)

d. in *Taraviras v. Lovig,* 2011 BCCA 200 damages of $300,000 were reduced to $200,000.

e. in *Ciolli v. Galley*, 2011 BCCA 106 the jury awarded damages well in excess of the cap, which were reduced by the trial judge to the cap. The appeal was allowed and a new trial ordered due to problems with the judge's charge related to causation, contingencies and discount rates. The court also noted the non-pecuniary damages even at the cap were wholly disproportionate.

44. The jury's leeway should be broadened so that it will have the scope to make awards that may be disproportionate in whole on the judicial comparison approach but which are not shockingly unreasonable and which the jury may still properly reach by reviewing the evidence as a whole and acting judicially. Permitting this will have virtually no policy impact.

45. Conferring such leeway on the jury would be consistent with the principle laid down by the Supreme Court of Canada in *Dube v. Labar*, [1986] 1 SCR 649 at para 17 that there is a "duty residing in the court to sustain, so long as it be reasonable to do so, the jury's disposition of the issues without judicial intervention. The court is concerned, of course, at all times, with providing ultimate justice consistent with the principles of the law."

46. In *Moskaleva*, Rowles J.A. summarizes at para. 128 the origins of the judicial comparison approach for jury awards of non-pecuniary damages and those cases that have called it into question:

> [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.

47. In *Cory v. Marsh* 1993 CanLII 1150 (BC CA) Gibbs, JA says in dissent at para 52:

> …imposing trial judge awards as an appropriate measure of reasonableness negates the very purpose of a jury, to bring into the courtroom the standards and the common sense of the community.
>
> 53 I am not persuaded that the jury in this case did otherwise than conscientiously assess non-pecuniary damages impartially, as directed by the trial judge, and by the application of the standards and common sense of the community.

48. Gibbs, JA also notes in his dissent in *Cory* at para 32 how jurors, as witnesses to a live trial, are simply better placed to weigh and consider the evidence:

> We address the non-pecuniary issue therefore having before us the same record as was before the jury, although our record is in the form of the inanimate, coldly impersonal, printed page whereas the jury had under scrutiny an animated, nine day, passing parade of real, live people.

49. In *Ferguson v. Lush*, 2003 BCCA 579, Mr. Justice Thackray, writing for the Court, accepted that this Court has adopted the procedure of comparing jury awards to judge-made awards for non-pecuniary damages (para 52) and called the majority’s decision in *Cory* the “lynchpin” of that approach (para 41). However, he expressed clear reservations about this approach (paras 33-43) and made reference to his concurring opinion in *Laycock v. Longo*, 2002 BCCA 186 where he said:

> [22] There is a lack of logic in citing what are suggested to be comparable cases of judge-made awards with the award under review. A jury is generally not supplied with guidelines as to a range of damages. The jury

> in the case at bar did not have before it the allegedly comparable cases cited to us by counsel for the appellant. Yet this Court is asked to find that the jury made an award "outside of the range." That is to say, the Court is asked to find that the jury was in error. This is illogical, unfair to the jury and unfair to the civil jury system.
>
> [emphasis added]

50. In *Stapley*, Chief Justice Finch, in dissent, articulates several concerns about, and criticisms of, the judicial-comparison approach. He suggests that consciously or not, judges have in mind the upper limit when assessing damages. The cap, he notes, has not been adjusted over the decades to reflect evolving community values.[3] The purpose of a jury is to reflect contemporary community standards. Second, he suggests that tailoring jury awards to match those of judges has it backwards, and "if jury awards were given their corrective function, the process would be for judges to adjust their awards so that they would approximate what a jury might give in a similar case" (para 120).

51. He also notes on the judicial comparison approach, selection by defendants of a jury trial leads to "a kind of 'win win' equation for the defence, and has the appearance of unfairness." This is because the court will typically defer to low awards, assuming, correctly, the jury must not have believed the plaintiff, while interfering with high awards if they are disproportionate.

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[3] As an example of how community standards around fairness evolve over time, and sometimes rather quickly, one might consider the minimum wage. The minimum wage is a legislated, lower-end 'cap' on compensation for an hour of an individual's labour. Just ten years ago in this province it was at $8.75 per hour ($10.27 in current dollars). Today it is $14.60 an hour. This is an increase in real terms of 42 percent. By the time this appeal is scheduled to be heard in June, 2021, the minimum wage will be $15.20 per hour.

See: B.C. Reg. 67/2011 s.1 and B.C. Reg. 12/2018 s.1

See also: Statistics Canada, *Consumer Price Indexes for Canada,* Bank of Canada Inflation Calculator

52. This is precisely the win-win situation the appellants here seek to avail themselves of. Although it is true that both parties filed jury notices some 18 months before the trial, Ms. Elliott did so *pro forma* to preserve her election (RAB 2-3). When Ms. Elliott filed her trial brief about three months before the trial, she indicated the trial should be by judge-alone (RAB 7) It was ultimately the appellants who paid the jury fees and selected to proceed by jury. Indeed, doing so should have been most propitious for the appellants, given that they placed on their amended list of documents under Part 4 a certificate of conviction and transcript of proceedings, regarding criminal charges in 2010 wherein Ms. Elliott pled guilty to forgery and fraud (RAB 15). These were matters that ultimately had to be placed before the jury and which must have weighed in their deliberations.[4]

53. The nature of Ms. Elliott's injuries are such that her credibility was paramount at the trial. The defendants selected a jury trial knowing that and with the intention of raising before the jury Ms. Elliott's past criminal and discreditable conduct. It was a prudent gamble to take. But it was one that ultimately did not succeed. Now, having lost, the appellants seek to have this Court undo the bad hand they were dealt. That is precisely the type of defendant-skewed 'win-win' situation referred to by Finch, CJBC in his dissent in *Stapley*, and one which should be avoided so as not to create a perception of imbalance.

54. In sum, it is submitted that eliminating the comparative element from the test for interference with a jury's award of non-pecuniary damages, or at least de-emphasizing it, and focusing instead on whether the jury's award shocks the court's conscience (in the sense that no jury reviewing the evidence as a whole

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[4] Ms. Elliott's relationship ended 6 weeks after her the birth of her youngest child, Anastasia, in October, 2006. She didn't have a job to go back to because her workplace shut down. Her daughter had been undergoing trips to BC Children's Hospital in Vancouver. When Ms. Elliot was in danger of being evicted, she took travel receipts and changed the date on them and re-submitted them to Income Assistance for reimbursement (T:68-69)

and acting judicially could have reached the verdict it did) will be salutary and:

a. Make the test match that set out in *Whiten v. Pilot* for interference with a jury's award of non-pecuniary damages,

b. Be consistent with the test set out in *Young v. Bella*,

c. Be fairer to the civil jury system on the whole, and to the role of jurors who are tasked with assessing general damages without reference to judge-made awards,

d. Eliminate the appearance of a double standard or "win-win" for defendants, and

e. Have no adverse policy or systemic effects.

Applying the Proposed Test

55. Ms. Elliott's injuries are not catastrophic. But they are chronic, persistent and likely lifelong. Diagnoses like "cervicogenic headache" and "chronic myofascial pain" (AAB p. 14, ln 410) while applicable, are also cold and clinical.[5] What it means is that Ms. Elliott will have constant low-grade headache, as well as neck and back pain, which she has had continuously since the accident in 2012, and it will likely never go away (AAB p. 10, ln 230-245; p.14, ln 20) So, she can expect to be in pain the rest of her life and to continue use of painkillers on a daily basis (AAB p. ln 200). She will continue to suffer flare ups where pain becomes worse, and significant to the point it interferes with her ability to work. (T:126-130). Her sleep will remain interrupted (T:110). She will never be physically capable to go back to

[5] Dr. Basri, the appellant's expert also adds a diagnosis of "very mild post traumatic neurogenic thoracic outlet syndrome" (AAB p.36 para 1)

her chosen and preferred career of being with children in a daycare.

56. It is submitted that it cannot be said that the jury's award of non-pecuniary damages are such that no jury reviewing the evidence as a whole and acting judicially could have reached it.

In the alternative: Applying the Comparative Test

57. Ms. Elliott's injuries are comparable with those of the plaintiff in *Little*, though Ms. Elliott is without a mood disorder and she did not claim distinct psychological injury from the accident.

58. Here the appellants contend that in similar cases judges awarded between $90,000 and $130,000.[6] That is probably accurate.

59. In *Little* the appellants suggested that similar judge-made awards for Ms. Little's injuries were $115,000. The respondent in *Little* suggested a reduction to $250,000 would be appropriate and the court acceded to that.

60. It is submitted that if this Court rejects the argument against the comparative approach and applies the comparative approach, a reduction to $250,000 is similarly appropriate.

Did the judge err in her charge on non-pecuniary damages?

61. The appellants contend the judge erred by charging the jury on nonpecuniary damages "in an abbreviated fashion with limited modification". The respondent disputes this characterization of the charge. She submits it is more accurate to state the judge delivered the full charge with limited modification.

[6] In *Daleh v Schroeder*, 2019 BCSC 1179, non-pecuniary damages were reduced by 10 percent, to $117,000, for failure to mitigate.

62. Appendix A to this factum reproduces the abbreviated CIVJI charge for non-pecuniary damages. Produced in Appendix A below the abbreviated charge is a tabular comparison of the full model charge in one column with corresponding extracts (as applicable) from the charge delivered to the jury in the next column. The table evidences that although the judge did not address items in precisely the same order as the CIVJI charge, nor did she always repeat them verbatim, the judge delivered to the jury substantially the full CIVJI charge on non-pecuniary damages.

63. In considering the implications of this, it should be remembered that the *Civil Jury Instructions* publication is a tool not a bible. In *Earnshaw v. Despins*, 45 BCLR (2d) 380, 1990 CanLII 596 (BC CA) at 11 of 39 (cited to CanLII) the Court found there is no duty in law on a trial judge to give an instruction in the terms set out in CIVJI. Rather, what matter is whether the instruction given concerning the point in issue are "sufficient".

64. Similarly, In *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para 74, Mr. Justice Hinkson stated the *Civil Jury Instructions* are "only a guide and the choice of whether to adopt any portion of the manual or not is for the trial judge to determine in each case."

65. While Ms. Elliott disputes there was anything wrong with the charge, even if the charge were less than perfect, or not ideal, that would not be grounds to justify appellate interference. The Honourable Chief Justice Finch observes in *Tsoukas v. Segura,* 2001 BCCA 664 at para 76:

> In the criminal context, it is said that an appellant is entitled to an adequately instructed jury, not a perfectly instructed jury: *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314 per Lamer C.J. In the civil context, I would say that both parties are entitled to a trial that is fair, not one that is free from all imperfections.

66. The charge to the jury was a collaborative process between counsel and the trial judge. A pre-charge conference was held on January 29, 2020 wherein numerous matters pertaining to the charge were discussed (T:175-184). The judge provided a written draft charge to counsel on the morning of January 31, 2020 (T:210), several days before the jury was charged. The matter was stood down for counsel to review the draft charge. Further discussion about the charge ensued (T:233-246).

67. No objections to the charge were taken at any point. Failure to object to the charge is "a powerful circumstance militating against appellate interference with the ensuing verdict." See: *Laidlaw v. Couturier*, 2010 BCCA 59 at 69; *Basra v. Gill* (1995), 1994 CanLII 1435 (BC CA), 99 B.C.L.R. (2d) 9 (C.A.) at para. 15, and *Rendall v. Ewert*, 1989 CanLII 232 (BC CA) at 11.

68. Furthermore, in discussing whether it is appropriate to order a new trial, this Court, summarizing longstanding principles, recently said this in *Findlay v. George*, 2021 BCCA 12

> [92] Because of the inherent hardship associated with a new trial, the resultant uncertainty, delay and added costs, an appellant who seeks a retrial in a civil case is required to put a "strong case" forward: de *Araujo v. Read,* 2004 BCCA 267 at paras. 50–52. Generally, a new trial will not be ordered unless it is plainly required in the interests of justice: *Mazur v. Luc*as, 2010 BCCA 473 at paras. 45–46; *Tsoukas* at paras. 71–75.

Cost of Future Care and Past Loss of Earning Capacity

69. Ms. Elliott gave submissions to the jury on assessment of damages for cost of future care, past loss of earning capacity, and future loss of earning capacity. On cost of future care and past loss of earning capacity, the jury awarded more than suggested. On future loss of earning capacity, the jury awarded less than suggested. This alone is unremarkable. The jury determines the appropriate

award on the evidence, not the parties. The charge (AAB: 155) specifically directs the jurors at para 80:

> …Because the assessment of damages is a question for you to decide, you are not bound by counsel's suggestions. As I have indicated, the arguments of counsel are not evidence from which you can find facts.

70. Across these three heads of damages, the jury awarded only $7,389.27 more than requested in total by Ms. Elliott.

	Plaintiff's submission	Jury's award
Cost of future care	$11,045.00	$15,000.00
Past loss of earning capacity	$8,865.73	$46,500.00
Future loss of earning capacity	$79,200.00	$45,000.00
TOTAL	$99,110.73	$106,500.00

71. With respect to the jury awarding more than Ms. Elliott requested, the only head of damages with a disparity of any real moment is the past loss of earning capacity. There, Ms. Elliott submitted she should be awarded $8,865.73, and the jury awarded of $46,500.

72. Ms. Elliott's suggestion to the jury for past loss of earning capacity used a conservative analytical framework with a number of built-in assumptions. It assumed that, but for the accident, her daycare would have stayed unlicensed, it would have shut down when it had, and she then would have gone on to the precise jobs she did, when she did, and for the wages she did after the accident, only that she would not have had to take any days off due to her injuries (AAB:134). Nothing compelled the jury to accept those assumptions or proceed to assess past loss of earning capacity within this factual matrix.

73. At the time of the accident in November, 2012, Ms. Elliott was in the process of licensing her daycare (T:60). A licensed daycare allows both more children and commands a higher fee per child (T:64, 67). However, instead of potentially licensing her daycare, about a month after the accident Ms. Elliott had to shutter

her daycare and she was evicted from her dual-use home and business premises (T:69). Ms. Elliott was charged (but was then unable to pay) four months additional rent until the premises was relet (T: 70) After she shut down her daycare and was evicted, Ms. Elliott spent the next 4 months or so on social assistance until she found full-time work at Bradshaw Property that paid $13.50 per hour (T:71-72). Over the subsequent 5-year period, she steadily built up her skills and responsibilities and eventually became a bookkeeper earning $25.00 per hour.

74. The charge to the jury at paragraphs 96-97 correctly set out of the jury the law on past loss of earning capacity:

> [96] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity, that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
>
> [97] If you are satisfied on a balance of probabilities that Ms. Elliott's ability to earn income was impaired as a result of the injuries she sustained in the accident, you must go on to assess the likelihood that, had the injuries not occurred, Ms. Elliott would have earned more in income in the period between the accident and the trial than she actually earned and make an award for past loss of income using that assessment. The question of what would have happened had the accident not occurred is a hypothetical one and, 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. It is also open to you to consider Ms. Elliott's past employment history including the fact that, at the time of the accident, according to her she was operating her own business in her in-home daycare.

75. The jury's award of $46,500 for past loss of earning capacity consequently and necessarily involves a crystal-ball-gazing exercise and the consideration of hypothetical, counterfactual realities over a 7-year period. While the difference between the jury's award of past loss of earning capacity and that suggested by the plaintiff may seem significant at first blush, it works out to less than $450 a

month between the time of the accident and trial.

76. The charge to the jury is a complete answer to the defendants' complaint of the jury awarding more than the plaintiff suggested under this head.

77. The same analysis applies to cost of future care. Ms. Elliott submitted that $11,045 was an appropriate award and the jury awarded $15,000, almost $4,000 more. While we will never know precisely how the jurors got to that number, there are all kinds of reasonable ways by which they might of, on the evidence before them. Ms. Elliott asked for the cost of her medications at $30 per month until her 65th birthday. If the jury determined it were more appropriate to award medication costs until her 75th birthday, this eliminates the discrepancy almost entirely.

78. Once again, there is nothing inherently wrong with a jury assessing damages greater than those suggested by a plaintiff, particularly when the jury is instructed that they are not bound by counsel's suggestions but must make their own assessment on the evidence. The relevant question is whether the jury's amount 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.

79. This principal was recognized and applied in *M.B. v. 2014052 Ontario Ltd. (Deluxe Windows of Canada)*, 2012 ONCA 135, a sexual assault case before a jury. The case reveals that in Ontario it is the practice to both plead general damages in a specific amount and to suggest an appropriate award to the jury. The plaintiff pled $250,000 (para 74) in general damages and her counsel suggested at trial a range of $125,000 to $225,000 to the jury (para 68). The jury returned a verdict of $300,000 for general damages. In declining to interfere, and in permitting plaintiff to amend her pleadings to seek the higher amount awarded by the jury, the Court noted at para 70 that while the jury's award was generous, it was "not so plainly unreasonably and unjust as to satisfy the court that no jury reviewing the evidence as whole, and acting judicially, could have reached it".

80. It is submitted that this latter formulation is the appropriate test and it applies in this case not just to the jury's award of future care and past loss of earning capacity, but also to non-pecuniary damages.

PART 4- NATURE OF ORDER SOUGHT

82. The respondent submits the appeal should be dismissed with costs.

All of which is respectfully submitted this 10th day of March, 2021.

Karl Hauer
counsel for the respondent Patricia Elliott.

APPENDIX A

Abbreviated CIVJI - §6.20

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.

CIVJII Part	Full CIVJI	Actual Charge
12.03	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.	[88] I will deal first with the head of damages called non-pecuniary loss. Nonpecuniary losses are personal injury losses that have not required an actual outlay of money. The purpose of such an award is to compensate Ms. Elliott for such things as pain, suffering, disability, inconvenience and loss of enjoyment of life [90] In assessing damages, you may consider what use Ms. Elliott can make of the money you may choose to give her. One purpose of making

	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. Your award should address such losses suffered up to the date of trial and also those (he/she) will suffer in the future.	an award under this heading is to substitute other amenities for those she has lost. It is meant to provide some money to make Ms. Elliott's life more bearable. [89] Your award should compensate Ms. Elliott for her pain and suffering, inconvenience and loss of enjoyment of life both up to the date of trial and in the future provided that those losses were caused by the accident.
	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	[92] 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 Ms. Elliott that is fair and reasonable and bears some reasonable relation to the loss and injury claimed, as shown in the evidence. [94]… As I have said, it is your duty to determine a sum that is fair and reasonable to both parties, based on the evidence ,you have heard [75] In respect of all types of

	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.[1]	damages, it is your duty to provide reasonable andadequate compensation in an amount that is fair to all parties, considering Ms. Elliott's loss….
	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	[90] In assessing damages, you may consider what use Ms. Elliott can make of the money you may choose to give her. One purpose of making an award under this heading is to substitute other amenities for those she has lost. It is meant to provide some money to make Ms. Elliott's life more bearable.
	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	*[this is the only portion of the full CIVJII charge that was omitted and that the appellant may reasonably argue would have been better to include]*

	(j) the plaintiff's stoicism (as a factor that should not, generally, penalize the plaintiff)	
12.04	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 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 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	(supra) [89] Your award should compensate Ms. Elliott for her pain and suffering, inconvenience and loss of enjoyment of life both up to the date of trial and in the future provided that those losses were caused by the accident. *[the appellant submits this is repetitive]*

	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.1	*[the appellant submits this is inapplicable as the appellant never lost consciousness or was in a coma]*
	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.1 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.	[91] With respect to Ms. Elliott's complaints relating to pain, injury, and suffering from the date of the accident until the date of the trial, you heard her own evidence about her lifestyle and activities before the accident and her evidence about how she has been affected by her injuries. You also heard the evidence of Nadine Dalzell and Ms. Elliott's son about their observations of the impact of the accident on Ms. Elliott. As well, you have the written reports of Dr. Waseem (and his oral testimony) and Dr. Masri setting out their medical opinions, including their assessment and prognosis
	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.	[*this was omitted at no potential prejudice to the defendants; it could only conceivably have benefited the plaintiff]*
	6.. [The plaintiff] testified that before the accident (he/she) enjoyed the following activities and was able to	[45[You heard evidence from Ms. Elliott, Nadine Dalzell (Ms. Elliott's

	do the following unpaid work in the home:1 (1) [specify] (2) [specify] (3) [specify] (4) [etc.]. 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 8. <u>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</u>	friend of 15- 16 years) and Tristan Clark, Ms. Elliott's adult son. The three described their observations of Ms. Elliott and her physical condition before the accident. Ms. Elliott and Ms. Dalzell in particular, described her as someone who was social, enjoyedsome physical activity such as golf, bowling, laser tag and gym attendance. Ms. Dalzell described Ms. Elliott as an outgoing, extroverted friend who took it on herself to organize the small group of friends and their social outings. *(supra)* [92] <u>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 Ms. Elliott that is fair and reasonable and bears some reasonable relation to the loss and</u>

	the evidence. This amount forms part of your award of damages for non-pecuniary loss. 9. Non-pecuniary damages can be augmented by an award of "aggravated damages" in certain circumstances.1 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.2 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.	injury claimed, as shown in the evidence *[there was no claim for aggravated damages and this section was correctly omitted]*
12.06	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,	*[this paragraph suggests that in assessing nonpecuniary damages jurors must in fact "pick a number", and the omission of this paragraph from the charge cannot support the appellants' contention that jurors were not given an adequate legal*

	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	*framework to approach their task in assessing non pecuniary damages]*
	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.	[93] 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 provide you with copies of other trial judgments relating to similar kinds of cases; or to tell you about awards in other cases.
	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.	*[As previously, this paragraph suggests that in assessing nonpecuniary damages jurors must use common sense to "pick a number". The omission of this paragraph from the charge cannot support the appellants' contention that jurors were not given an adequate legal adequate framework to approach their task in assessing non pecuniary damages]*
	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	[94] 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 opinion. In that event, the educational value of your independent judgment would be lost to the law. Besides, my

	lost to the law. Besides, my assessment would be based on my view of the evidence. It might be entirely different from yours.	assessment would be based on my view of the evidence. It might be entirely different from yours.

LIST OF AUTHORITIES