Date: 20010404
Docket: CA 165587

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Morriscey v. Zwicker,* 2001 NSCA 56]

Bateman, Saunders and Oland, JJ.A.

BETWEEN:

CHRISTINA MORRISCEY

Appellant

- and -

GARY RONALD ZWICKER

Respondent

REASONS FOR JUDGMENT

Counsel:	Glenn E. Jones for the appellant Ian C. Pickard and Patricia Mitchell for the respondent
Appeal Heard:	February 13, 2001
Judgment Delivered:	April 4, 2001
Revised Decision:	The text of the original judgement has been corrected incorporating the text of the erratum (released April 4, 2001).
THE COURT:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Bateman and Oland, JJ.A. concurring by separate reasons.

Saunders, J.A.:

[1] The appellant, Christina Morriscey, was injured in a motor vehicle accident on February 27, 1995. Her car was struck by the defendant's automobile when he crossed the centre line and caused the collision. The respondent admitted liability but challenged the appellant's various claims for damages. Trial by jury was chosen by the appellant. The case was heard by Supreme Court Justice John M. Davison, sitting with a jury, June 26-30 and July 4-7 and 10, 2000.

[2] After concluding its deliberations, the jury came to a unanimous decision as follows:

> Question 1: Did the negligence of the defendant in the motor vehicle accident which occurred on February 27, 1995 cause or contribute to injuries to the plaintiff? **Yes**
>
> Question 2: If the answer to Question 1 is yes, at what amount do you assess the total damages to the plaintiff in the following categories:
>
> (1) General damages for pain, injuries, suffering, loss of enjoyment of life, past and future **$25,000**
>
> (2) Financial loss
>
> A) past loss of income from February 27, 1995 until today, if any **$34,000**
>
> B) future loss of income, if any; **NIL**
>
> C) cost of future care, if any **$3,600**

[3] Ms. Morriscey appeals, alleging several errors during the conduct of the trial. Essentially, her complaints may be narrowed to an allegation that the jury's award of compensation was not nearly enough and therefore "perverse" and that Justice Davison erred in the directions he imparted when charging the jury.

Alleged Errors by the Jury

[4] I prefer to deal first with the appellant's complaint concerning the quantum of her damage award. After thoroughly considering the record, I am satisfied that there is no merit to the various allegations claiming error by the jury in their calculation of damages.

[5] The jury is the sole finder of fact. Justice Davison's charge is replete with continual reminders to these jurors of their responsibility. When addressing the matter of damages, Davison, J. again reminded the jury of their role with regard to the facts and the evidence. He was careful to explain the relevant principles of law necessary for the jury to properly assess damages, including the applicable standard of proof, and that the appellant carried the burden of proving her case on a balance of probabilities.

[6] The trial judge also instructed the jury on the principles of weighing the written and oral evidence of witnesses, assessing credibility, the difference between direct and circumstantial evidence and the doctrines of causation, mitigation and remoteness.

[7] Nothing in the record suggests any error on the part of Justice Davison in properly charging this jury on all legal principles relevant to a proper consideration of Ms. Morriscey's various and substantial claims.

[8] After considering and weighing all of the evidence of the appellant, including her credibility, together with the evidence of many lay and expert witnesses, the jury awarded the appellant $25,000 as general damages. In order to vary or set aside damages awarded by a properly instructed jury, the appellant must satisfy us that the award was wholly out of all proportion to that which ought to have been given as compensation for her injuries and damages. In **Nance v. B.C. Electric Railway**, [1951] 3 D.L.R. 705 (P.C.) at pp. 713-14, Lord Simon stated:

> Whether the assessment of damages be by a judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case in the first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the Appellate Court can properly intervene, it must be satisfied that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or by leaving out of account some relevant one); or, short of this that the amount awarded is either inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage . . . 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 just sitting alone. The figure must be wholly 'out of proportion'. (underlining mine)

[9] In **Piercey v. Board of Education, Lunenburg County District** (1998), 167 N.S.R. (2nd) 68, Justice Pugsley, writing for this court, discussed the standard of review to be applied to a jury verdict:

> The burden on the Appellant to set aside the verdict of the jury is to convince us that it was:
>
> > ...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 . . .

[10] Justice Pugsley went on to discuss the concept of a jury's verdict being perverse. At p. 75 Justice Pugsley quoted from Justice de Grandpré in **Olmstead v. Vancouver-Fraser Park District** , [1975] 2 S.C.R. 831:

> First, a word about the suggestion that a verdict should be 'perverse' before it is set aside. To my mind, this word implies a moral turpitude which, in the present instance, has not been proven to exist. On this point I would rather accept the statement of Lord Fitzgerald in *Metropolitan Railway Co. v. Wright,* [1886] 11 Ap. Cas. 152:
>
> > The judgment of the noble and learned Earl who presided in the Court of Appeal imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of 'perversity' and have substituted for it the verdict should not be disturbed unless [it] appeared to be not only unsatisfactory, but unreasonable and unjust. . .

[11] Most recently, we considered this same question in **Rogers v. Young,** [2000] N.S.J. No. 179(C.A.), at §18. There the appellant was awarded $5,000 in general damages and $7,500 for loss of income as a result of injuries, including a broken back, suffered in a motor vehicle accident. The appellant took the position that the jury's assessment of damages was so inordinately low that no jury reviewing the evidence as a whole and acting judicially could have reached such a conclusion. Freeman, J.A. concluded from his review of the evidence that:

> ...it was neither unreasonable nor perverse for the jury to have concluded that the Appellant failed to discharge his burden of proving entitlement to higher awards

> for general damages or lost income, or for damages for loss of services or earning capacity. It is not for this court to reweigh the evidence or substitute its findings of fact for those of the jury. (underlining mine)

[12] Having considered all of the evidence presented during the course of this lengthy trial, I am completely satisfied that it was neither unreasonable nor perverse for the jury to have concluded that Ms. Morriscey was not entitled to greater general damages. Simply to illustrate, there was abundant evidence that the injuries suffered by Ms. Morriscey did not significantly limit her lifestyle or enjoyment of vigorous outdoor activities. As well, witnesses demonstrated that several factors could have triggered or aggravated the appellant's physical and psychological problems after this 1995 motor vehicle mishap and which were completely unrelated to it. Further, the respondent presented video surveillance evidence of the appellant which may well have affected the jury's assessment of her evidence.

[13] Given the medical evidence called by the respondent and developed during cross-examination of the appellant's own experts, there was a basis upon which the jury could find that Ms. Morriscey's post-traumatic stress disorder did not substantially interfere with her day-to-day living. Over all, there was ample evidence to support the conclusion that the effects of the mishap upon the appellant were mild and that any on-going problems were complicated by intervening accidents and stress entirely unrelated to the respondent's fault. I agree with the respondent's submission on appeal that the expert evidence called on behalf of the appellant appears to have been severely compromised by Ms. Morriscey's own failure to provide her doctors with critical information.

[14] The appellant was working as an insurance agent for Mutual of Omaha at the time of the accident. Her income was based on commissions and bonuses. She complains that the award of $34,000 for past loss of wages was far too low to provide adequate compensation for income lost between February, 1995 and trial. She argues that her past wage loss should be calculated at a salary of $50,000 per year, minus income earned since the mishap. At trial the respondent presented strong evidence impugning the assumptions upon which the appellant's claim was based. For example, Ms. Morriscey had never earned an annual salary of $50,000. Her hoped for promotion to District Manager was far from a sure bet. A senior manager with her company admitted there was a very high attrition rate among insurance agents in general and that only 15% of all those who start in the industry are

still employed as insurance agents five years later. There was also substantial evidence called to show that Ms. Morriscey's employment opportunities were unchanged from her pre-accident state. For example, Dr. Krane testified that there were no physical or psychological impairments which would lessen the appellant's prospects for finding similar employment. In terms of her activities of daily living, including social functioning, Dr. Krane said the appellant showed very few limitations. Similarly, Dr. Rosenberg expressed the opinion that the appellant had a high global functioning assessment and that she could undertake any employment she wanted.

[15] Naturally, it is difficult to say on what basis the jury made its past loss income award. Nevertheless, given the record, the money awarded under this head of damage was neither perverse nor unreasonable.

[16] The appellant submits that by denying her any money at all for future loss of income, the jury's decision can only be described as perverse. I disagree. For reasons that I will explore more fully later in this decision, I am satisfied that Justice Davison clearly charged the jury on the options open to them with regard to future loss of earnings. There were four experts who testified specifically on the issue of Ms. Morriscey's future employability. Dr. Howes and Dr. Doane were called by the appellant. They testified that based upon her psychological injuries, Ms. Morriscey could have future problems with employment. Their testimony was likely undermined by the appellant's failure to provide her doctors with all relevant information, including an accurate description of her current working abilities at the time they prepared their reports. Doctors Rosenberg and Krane were called by the respondent. They each expressed the opinion that the plaintiff was not impaired from pursuing any employment she wished.

[17] These jurors, chosen by the parties, were free to accept all, part or none of any witness's testimony or reports. Given the evidence, it was entirely open for the jury to conclude that Ms. Morriscey was not entitled to any award for future loss of income.

[18] The sum of $3,600 awarded for her cost of future care was not challenged by the appellant.

Alleged Errors by the Trial Judge

[19] Let me turn now to errors said to have been made by Justice Davison, either in his treatment of certain evidence or in his directions to this jury.

[20] I say at the outset that there is no merit whatsoever to the appellant's submissions that Justice Davison erred in law by misdirecting the jury

concerning the medical evidence called by Ms. Morriscey's counsel, or relating to the appellant's credibility, or concerning the doctrines of causation, or thin and crumbling skulls.

[21] There was no error on the part of Davison, J. in his treatment of Dr. Howes' evidence . The appellant alleges that by directing the jury to ignore certain portions of Dr. Howes' reports and by pointing out that she was neither a medical doctor nor a neurologist, the judge left the impression with the jury that her evidence was not (or less) credible. Further, the appellant argues that by failing to summarize Dr. Howes' evidence, the trial judge left the jury with the impression that her evidence should be ignored.

[22] With respect - and despite Mr. Jones' able arguments on behalf of the appellant - I disagree. The statement that Dr. Howes is not a medical doctor is accurate. She is a psychologist. The inference that neurologists are specialists within the medical profession who have particular expertise in diagnosing brain injury, is accurate. Dr. Howes stated as much during her *voir dire* and there was nothing wrong in Justice Davison mentioning it as a simple observation on his part, in his directions to the jury.

[23] The appellant alleges that failure to summarize Dr. Howes' evidence was prejudicial to her case. It is both unnecessary and unreasonable for a trial judge to summarize the evidence of every witness. While it is true that Davison, J. did not summarize the details of Dr. Howes' reports or her oral evidence, neither did he summarize the evidence of the respondent's psychologist, Dr. Krane.

[24] It must also be remembered that Justice Davison "skipped" a full day between the lawyers' final arguments and charging the jury. He did that in order to give the jury an entire day by themselves in their jury room to carefully study the expert reports and other exhibits in whatever manner they chose. I commend this approach as being eminently sensible in a case such as this where jurors are faced with conflicting opinions and reports from experts in complex matters. It is often difficult enough for trained judges to grasp the importance of complex and sometimes diametrically opposed experts' opinions, even when they have the "luxury" of poring over such reports late at night or on weekends during a lengthy trial. How then can we expect untrained jurors from all walks of life who leave the court room at 4:30 p.m., prohibited from taking anything away with them to review, to study, understand and discuss among themselves whatever documents or exhibits might be especially difficult?

[25] All trials are important. They must not be rushed. One must not allow the careful, logical and sometimes awkward and painstaking search for truth to be sacrificed on the altar of speed and efficiency. If trial judges are to continually remind juries that their critical work is an essential characteristic of democratic freedom, they should mean it. Jurors must be given the time and facilities to deliberate in comfort and at a reasonable pace, thereby completing their duties in compliance with the oath they all swore to uphold. Justice Davison concisely and fairly reviewed the evidence as he thought appropriate to assist the jury in addressing the issues placed before them:

> I am going to review the evidence, but I have to be a little brief due to the volume of evidence which you've got before you, and you did take notes and you have medical reports, extensive medical reports, and you did take a day to study your notes. (underlining mine)

[26] On appeal Ms. Morriscey also challenged the trial judge's handling of Dr. Howes' written assessments and reports. In effect, the appellant says this resulted in the jury making an improper and inadequate assessment of damages. At trial the respondent objected to references made by Dr. Howes in her reports that concentration problems experienced by Ms. Morriscey could possibly be linked to "organic changes" in the brain. Justice Davison reviewed the medical reports and decided to conduct a *voir dire* to first consider himself the evidence that would be given by Dr. Howes. On the basis of that *voir dire* and the wording of her reports, Justice Davison strictly admonished Dr. Howes not to make any reference to organic changes or brain injury in her testimony before the jury.

[27] In doing so, Davison, J. properly exercised his discretion.

[28] In **R. v. Mohan** (1994), 114 D.L.R. (4th) 419 (S.C.C.), Sopinka, J. stated at pp. 427-428:

> Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is over borne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its affect on the trier of fact, particularly a jury, is out of proportion to its reliability. (underlining mine)

[29] Ultimately, it is for the trial judge to decide what evidence is presented to the jury. The test for proffering opinion evidence, like all other types of evidence, is never based upon the wishes or needs of counsel. The judge stands as the gatekeeper to determine all issues of admissibility. Nowhere is that more important - or difficult - than when considering the evidence of

experts. Such moments during trial will test all the patience, vigilance, experience and skill of any judge. This is especially so when the personal timetables, anxiety, comfort and competence of jurors are added to the mental check lists and other responsibilities we impose upon trial judges in jury trials to ensure a fair trial. Justice Davison's actions in this respect preserved fairness between the parties and are unassailable.

[30] Incidental to this ground of appeal lies the appellant's submission that Davison, J. erred by refusing to recharge the jury in relation to a matter raised during Dr. Rosenberg's cross-examination and, further, that the trial judge's statement to the jury characterizing the opinions of Dr. Rosenberg as being "entirely different" from those of Dr. Doane, was misleading. I disagree.

[31] The appellant did not raise this issue with the trial judge as being a mistake in his charge. Rather, in bringing this matter to the attention of Justice Davison, appellant's counsel stated that the judge's charge had not been in error.

> During - and it was just, it wasn't at all an error, My Lord, in any way.

[32] The appellant now urges that Davison, J. erred in characterizing the views of Drs. Rosenberg and Doane as being "entirely different". However, a thorough review of the transcript, the evidence of the two psychiatrists, and Justice Davison's reference to their testimony in his charge makes it clear that he was speaking specifically with regard to future loss of income. The trial judge accurately reminded the jury that there was a difference of opinion between the two psychiatrists on this crucial point. The fact that Dr. Rosenberg agreed that post traumatic stress disorder may be relaxing and remitting in Ms. Morriscey's case did not alter his opinion on employment. In fact, this was not raised in cross-examination by the appellant's counsel.

[33] The jury had the chance to hear both psychiatrists and study, at their leisure, the doctors' reports. It would be impossible for any trial judge to recount every bit of evidence. Any appellant is well advised to remember the over arching principle that a jury charge is not to be parsed, word for word, looking for error as if under a microscope. The entire charge must always be read and considered as a whole.

[34] I turn now to what impressed me as the most serious allegation of error on the part of Justice Davison. The appellant complains that the trial judge erred in law by misdirecting the jury concerning the use to be made of the actuarial evidence. In his factum, counsel for the appellant writes:

> With the greatest of respect to His Lordship, the intensely critical view taken in the jury charge toward the actuarial approach sabotaged the position of the Appellant, seriously prejudicing her claim. (underlining mine)

This is strong language and would never be used idly by counsel. A preliminary review of the judge's charge as it related to the evidence of the actuary, Brian Burnell, left me troubled. I will reproduce it here in its entirety:

> Mr. Burnell's evidence deals with both past and future loss of income. As a Judge, and as other Judges do, I have great difficulty with the use of actuary evidence in some circumstances. Actuaries are persons skilled in mathematical calculations. On occasion, they are of assistance to Judges who have situations like a person completely disabled by an accident, unable to work, and the Judge or jury need to know the lump sum he would have earned over his life span.
>
> But an actuary's evidence is only a guide. That's all it is intended to be. And as Mr. Burnell said on the stand, he can't fix or determine the wage loss. That wasn't his role, and he didn't even hear the evidence. The factor figure given by Mr. Burnell is before you, if you wish to use it, but I say, and it's my view, that there are problems with the use of that figure. For example, Mr. Burnell didn't use any circumstances involving contingencies to deduct from the figure, except the mortality rate. There are contingencies involved in life, and one only has to consider Stacy's evidence about attrition in the insurance agency of 85%. You have to consider the hazards of a vocation of the plaintiff, of business depressions, dismissals, technological developments, and other changes, which would decrease or increase the capacity to earn in the future.
>
> I am not in any way suggesting that there is not a loss of earnings in the future. I am not in any way suggesting there is or there is not. But I am suggesting that with both past wages and future wages, and you can ignore my suggestion, that you realize you cannot assess those losses with absolute certainty in mathematical precision.
>
> If you're dealing with a future loss, who is to say that the plaintiff will continue at a salary of $17,000? She may be making more, she may be making less. The past or the future loss is not easy. You have to predict, to some extent, the future and you're required to do that based on the evidence you've heard.
>
> . . .

> There are a number of contingencies and uncertain factors you might have to consider in determining the prospects and the potential of the plaintiff to earn in the future if the accident had not happened, and I submit they make it impossible to calculate precisely the future loss of earnings, and arrive at a lump sum which will fairly and reasonably compensate the plaintiff for any loss of future earning capacity, based on the evidence.
>
> It is my recommendation to you, which you do not have to accept, that this common-sense method is preferable to the use of the evidence from Mr. Burnell.
> . . .
>
> Now, if you can calculate these figures and arrive at a reasonable and fair annual estimate of the plaintiff's loss, and you can consider a fair retirement age and multiply by the figures given by Burnell. But I suggest that there are two other avenues open to you. I'm not suggesting, for the moment, that you should not find loss of earnings, if that's what the evidence says to you. But I'm suggesting that they should be calculated in a manner different than what is being urged upon you with respect to the Burnell figure.

[35] After repeated and detailed consideration of the charge in its entirety, as well as the dialogue between counsel and the court on this issue as described in the record, I am now satisfied that the judge's remarks did not distract the jury from their sworn duty to decide this case fairly, impartially and objectively based upon their own assessment of the evidence, as exclusive judges of the facts.

[36] Justice Davison's misgivings about the proper use to be made of actuarial evidence in cases like this one are well known. He has expressed them frequently in oft-cited cases, for example: **Poirier v. Dyer** (1989), 9 N.S.R. (2d) 119 (S.C.T.D.); **Dillon v. Kelly** (1996), 150 N.S.R. (2d) 102; and his comments in **Gaudet (Guardian of) v. Doucet** (1991), 101 N.S.R. 309 (S.C.T.D.), quoted with approval by Chipman, J.A. in **Newman (Guardian ad litem of) v. LaMarche** (1994), 134 N.S.R. (2d) 127 (N.S.C.A.).

[37] The issue regarding actuarial evidence and whether it was properly admissible in this case was clearly identified and debated by the parties *before* trial. For example, Justice Goodfellow of the Supreme Court wrote to counsel by letter dated May 31, 2000, setting out several points that concerned him after reviewing the file in preparation for trial. In particular, he asked for counsel's response on the admission of expert reports without the necessity of calling their authors in proof. His enquiry prompted a reply from Mr. Pickard, counsel for the respondent, who in his letter to Goodfellow, J. dated June 1, 2000, wrote:

> ...We have advised Plaintiff's counsel that we object to the admission of the Plaintiff's actuarial report ...
>
> The Defendant requests a pre-trial conference to discuss the jury questions, actuarial evidence and the additional medical reports.

[38] Davison, J. held a pre-trial conference with counsel on June 8. He confirmed that discussion by memo in writing in which he stated *inter alia*:

> Counsel for the plaintiff advise me that the heads of damage being sought by the plaintiff are as follows:
>
> 1. Loss of Earnings to date;
>
> 2. Loss of Future Earnings or Diminution of Earning Capacity;
>
> . . .
>
> A discussion took place as to whether loss of earning capacity should be a part of general damages or should come under a separate head, and this matter has to be considered.
>
> . . .
>
> There was discussion with respect to the evidence of the actuary, Mr. Brian Burnell. I indicated that I have concern about the report going to the jury in the interest of fairness to the defendant. The jury must be aware that the evidence of the actuary is only relevant if the fax (sic) on which he bases his opinion has been proved. (underlining mine)

[39] The jury questions to which I referred earlier in this decision were prepared by counsel and approved by the trial judge. It is notable that questions relating to the appellant's financial loss, in particular past loss of income, future loss of income, and costs of future care, ended with the words "if any". Thus, it was obviously in the minds of counsel that it was always open to the jury to decide to award nothing to Ms. Morriscey for such claims. In light of these circumstances, and the other exchanges between counsel and the judge in the transcript, I find it difficult to understand how counsel for the appellant could have been "surprised" by Justice Davison's charge, as suggested to us in argument during the appeal.

[40] I am also entitled to take into account the fact that counsel for the appellant failed to raise the issue with the judge following the charge or in any way urge that the alleged "error" be corrected. After he completed his charge, Davison, J. provided counsel with the opportunity to address him and express any concerns they had. Other matters were raised by the appellant, but not this one. In **Rogers, supra**, the appellant raised an issue on appeal that was not raised at trial. Freeman, J.A. stated at §16-17:

> The Appellant alleges errors in the jury charge relating to Dr. Loane's evidence, instructions as to past loss of income, the claim for lost wages and earning capacity, and the distinction between earning capacity and loss of future income.
>
> At the conclusion of Justice Davison's charge to the jury, after the jury had retired, he asked counsel for their remarks. Counsel for the appellant replied that she had none, indicating the jury charge had met with her satisfaction.
>
> In *Royal Bank of Canada v. Wilton et al* (1995), 123 D.L.R. (4th) 266 at page 275, the Alberta Court of Appeal held:
>
> > In a civil jury trial, lack of objection with respect to the jury charge and the questions put the jury are a strong factor against a finding of the jury charge as faulty and that a new trial should be ordered.

[41] It is to be remembered that Davison, J. held a *voir dire* to determine whether Brian Burnell's actuarial report should go to the jury for its consideration. After hearing the evidence on the *voir dire* and submissions from counsel, Justice Davison refused to allow the jury to see Mr. Burnell's report and he limited the scope of Mr. Burnell's evidence to simply presenting multipliers by which the jury might then calculate past and future loss of income. On the record before us, I cannot say that Davison, J. erred in the exercise of his discretion.

[42] In Canada, a trial judge is entitled to comment upon the evidence. Such commentary may even take the form of strongly-expressed views as long as the judge clearly explains to the jurors that they remain the exclusive and ultimate triers of fact. In *The Trial of an Action* (2nd ed.) (Butterworths: Toronto, 1998), Sopinka, J. at p. 164 stated:

> A trial judge has the right to comment on the evidence of witnesses, their credibility or the inferences to be drawn from the evidence. The trial judge's comments may take the form of a strong expression of his or her own views upon such matters. However, the judge must make it clear to the jury that the purpose

> in doing so is to assist the jury and not to invade their exclusive domain to decide all the issues of fact.
>
> This was originally held in the criminal case *Narkasonis v. The King* (1935), 3 D.L.R. 424 (S.C.C.), where Cannon, J., quotes with approval the following passage from the dissenting judgment of Caroll, J. at 429:
>
> > The trial judge expressed strong opinions on certain matters of fact and evidence which opinions were not favourable to the accused. A trial judge in summing up has the right so long as he makes it clear to the jury that they are the judges of the facts and are not bound to accept this view. This the Learned Trial Judge did and I do not think it can be said that, either in fact or in effect, he withdrew from the consideration of the jury anything material. (underlining mine)

While expressed in the context of a criminal trial, the principle is equally applicable to this, a civil case.

[43] With regard to Mr. Burnell's evidence, Davison, J. clearly presented the jury with three options with regard to an award for lost earnings. First, it was open to them to apply the multipliers supplied by Mr. Burnell to the appellant's own evidence; second, the jury could calculate future loss of income based on their own impartial figure using contingencies from the evidence; third, because of the uncertainties and lack of precision in such an award, the jury might deal with this aspect of the claim as constituting a loss of earning capacity, thus justifying added compensation as a general damage award. Finally, the jury was reminded that they were free to decide not to find any loss of future earnings.

[44] By my count, Davison, J. reminded the jury explicitly or implicitly at least thirteen times that they were bound to follow their own view of the evidence and not his. They were the exclusive judges of fact. Thus, while undoubtedly he

expressed his own personal views in strong language, he left all options open to the jury and made it clear that the ultimate decision was theirs to make.

[45] Had such features not been so apparent from the record in this case, then my assessment of this ground of appeal might well have been quite different. While a judge is entitled to comment upon the evidence, of an expert or any other witness, there are risks in doing so. Strong words may reflect strongly held views which - in some other case - might seem partial to one side or

another or may blur the jury's understanding of the line that separates the judge's impression of the evidence from their own. For a trial judge, the better approach may be to remain silent so as to avoid such a grave and potentially irreversible risk.

[46] For all of these reasons, the appeal is dismissed. The respondent shall have his costs; how much is not an easy matter to calculate. This is not a case where costs were awarded or achieved at trial. Following this jury's verdict, further negotiations between counsel ensued. Apparently each side had filed a formal offer to settle prior to trial, which later prompted counsel to argue between themselves who owed what to whom. The various amounts awarded by the jury to Ms. Morriscey totalled $62,600. Three weeks before the trial began, counsel for the respondent offered to settle for the sum of $150,000. For her part, the appellant filed a formal offer to accept $600,000. Ultimately, an order was taken out before Justice Davison expressing and approving the final outcome negotiated by the parties that ". . . in addition to any amounts paid to the Plaintiff prior to trial" the defendant (respondent) would pay to the plaintiff (appellant):

> ...the further sum of $50,000.00 in complete satisfaction of the award as rendered by the jury.

Obviously, that sum contemplates unspecified costs as being included in it. Thus, the conundrum. The respondent suggests to us that the "amount involved" should be $600,000, representing the last offer made prior to trial by the appellant. Applying Scale 3 yields party-and-party costs under Tariff A of **Civil Procedure Rule 63.04** of $22,375. Counsel for the respondent estimates that 75% of their total party-and-party costs for preparation and defending the case before the jury arose in the few weeks *after* Ms. Morriscey made her offer to settle and so, it is argued, the respondent "would have received" its costs of $16,781.25. Now, if the respondent were successful on appeal, he seeks 40% of those *fictional* "trial costs", in other words, $6,712.50.

[47] For her part, the appellant argues that it would be much more reasonable to use $62,600 as the *amount involved*, that being the actual amount awarded by the jury. In the alternative, counsel for the appellant says that the amount involved should be no more than $260,000, that being the aggregate of the increased adjustments sought by the appellant on appeal.

[48] None of these options presents a perfect solution. Among them all I think the last best serves the interests of justice between the parties. The trial lasted ten days. The appeal was heard in a morning. A fictional calculation of party-and-party costs at trial bears no true relation to such costs on appeal. To arbitrarily apply the 40% rule to such fictional costs would, in my opinion, result in a terribly inflated cost award to the successful respondent. (See, for example, **Piercey, supra** at §68-74 C.A. (2nd)).

[49] Here, I agree with counsel for the appellant that the true measure of the respondent's risk on appeal was the relief sought by Ms. Morriscey which, if successful, would have awarded her damages totalling $260,000. Such represents an increase in her favour from what she received at trial of $197,400 which, for ease of calculation, I round up to $200,000. In my view, given the unique circumstances of this case, using the sum of $200,000 as the *amount involved* better reflects the heavy burden faced by the appellant in seeking to set aside the jury's verdict, as well as the real risk to which the respondent was exposed if he were to lose on appeal. The issues raised on appeal were seriously and vigorously contested. It was evident to me that each side saw the outcome on appeal as being difficult for counsel to predict with any degree of assurance.

[50] **Civil Procedure Rule 62.23.1(c)** stipulates that this court may make such order as to the costs of the trial or appeal "as it deems fit". Applying Scale 3 to the sum of $200,000 yields party-and-party costs of $10,375. Forty per cent of that sum is $4,150.

[51] I would award costs on this appeal to the respondent in the amount of $4,150 plus disbursements.

Saunders, J.A.

BATEMAN, J.A.: (Concurring)

[52] I am in agreement generally with the comments of my colleague and the result he has reached. I have reservations about the breadth of his remarks at paragraphs 24 and 25. Here, the judge decided to give the jury a day to review the experts' reports and exhibits before counsels' summations and the jury instruction. In the circumstances of this case, it would seem to have been reasonable. I emphasize, however, that neither counsel objected to that process and it was not the subject of appeal. Accordingly, we did not hear from counsel on the benefits or disadvantages, if any, of this approach. Counsel might argue in another context that such a practice would encourage a jury to over-emphasize written reports thus diminishing the importance of the *vive voce* testimony, in particular the cross-examination of the experts. This might be especially so where the cross-examination has substantially undermined the written report. Or counsel may be of the view that the jury break, if to be helpful, should occur before the experts testify, to ensure the jury's familiarity with the subject matter of the testimony. It is impossible to contemplate what arguments might arise. Suffice to say, there is room for disagreement on the approach.

[53] My acceptance of my colleague's view that the process was reasonable for this trial should not be interpreted as a direction that such a practice is necessary, or that a judge's failure to allow a break in the proceeding for this purpose would be reversible error. Juries do have an opportunity to review exhibits and reports during the deliberation process, after instruction by the judge. While advance familiarity with such material may in some circumstances enrich a juror's understanding of counsels' addresses and the judge's instructions, it is not a pre-requisite to a fair trial. One must also be mindful of the expense of jury trials and the disruption to the lives of the jurors. It is not in all trials that the matters are so complex as to necessitate adding to the length to the proceedings. The absence of such a break in the proceedings does not automatically lead one to conclude that the jury has been rushed or has not properly deliberated. The propriety of providing the jury with this extra time is best left to the judge in consultation with counsel.

[54] With these additional comments I agree with the decision of my colleague.

Bateman, J.A.

Concurred in:
Oland, J.A.