S.C.A. No. 02497

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Chipman and Freeman, JJ.A.

BETWEEN:		
AIR CANADA		Brian W. Downie and Daniel W. Ingersoll
	Appellant	for the Appellant
- and -		
HAZEL M. BUSH		Derrick J. Kimball and H. Heidi Foshay Kimball
	Respondent	for the Respondent
		Appeal Heard: December 13, 1991
		Judgment Delivered: January 14, 1992

THE COURT: The appeal is allowed as per reasons for judgment of Chipman, J.A.; Hallett and Freeman, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the defendant from a decision of Mr. Justice Gruchy following an assessment of damages for bodily injury.

The respondent was a passenger on a flight of the appellant's airline scheduled to depart from Toronto to Halifax on March 24, 1984. While the flight was awaiting departure somebody yelled "fire", with the result that the plane was evacuated. The respondent was directed by the stewardess to an emergency exit and told to slide in a sitting position down a chute to the ground. She did so and landed abruptly on her rear end. She was immediately taken to a hospital, x-rayed, given medication and sent by limousine to her daughter's home in Toronto. She returned home to Nova Scotia the following day. The appellant admitted liability for the incident.

An originating notice was issued on the respondent's behalf in March 1985. Sporadic negotiations continued between the respondent's solicitor and claims representatives of the appellant for about three years, and in April, 1988, a defence was filed. The assessment of damages were held on March 18, 19, and 20, 1991 and Mr. Justice Gruchy filed his decision on April 19, 1991.

The appellant lives in Lockhartville, Kings County, and was 56 years of age at the time of the mishap and 63 years old at the time of trial. She lived with her husband until his death in 1989 and had brought up six children. Her husband worked in Halifax and she worked in domestic service, principally at one

household for a number of years and, in the years immediately preceding her accident, at two or three others.

As a result of the accident, the respondent suffered a bruised tailbone. Despite the fact that x-ray studies were negative, she continued to suffer great pain and she was unable to return to the strenuous physical work in which she had previously been employed. Medical evidence called on her behalf at the trial was to the effect that she had been disabled as a result of the accident from doing more than light housework in her own home.

The trial judge, after seeing and hearing the respondent testify and considering the medical evidence, found that she was suffering from myofascial pain syndrome and coccydynia resulting from a bruised tailbone sustained in the accident. As a result, she was totally disabled from returning to her former work or any other employment for which she was or might reasonably have been qualified. Although she had degenerative changes in her spine with some indication of arthritis, such conditions did not contribute to her disability. She sustained a whiplash injury in a car accident in 1988. Her doctor said that the effects of this were distinct from the injuries sustained in the subject accident. No finding was made as to what effect this accident in 1988 would have had on her ability to work had she not already been disabled since 1984.

After reviewing the evidence and the exhibits, Mr. Justice Gruchy awarded damages as follows:

Non-Pecuniary Damages	$20,000.00
Pecuniary Damages:	
(a) wage loss to date of trial	$63,306.00
(b) future wage loss	$ 9,375.00
(c) chiropractic services	$ 1,980.00
(d) transportation costs	$ 2,750.00

Prejudgment interest was allowed at 10% on the non-pecuniary damages, but only from March 24, 1987 because there had been inordinate delay in bringing the matter to trial. The wage loss to the date of trial was arrived at by taking an estimated annual income of $6,250.00 from March 24, 1984 to the valuation date at average annual chartered bank 90 day deposit rates. This was derived from a table to which counsel had agreed, a copy of which was made available to this court. No interest was allowed on the other items.

The appellant challenges the award of damages on grounds which may be summarized as follows:

1) The estimate of lost earnings was excessive.

2) The award of prejudgment interest on the non-pecuniary damages was erroneous.

LOST EARNINGS:

The appellant made a number of submissions in support of its argument that the pecuniary damage award was excessive and I will deal with each in turn.

Estimate of Yearly Income:

The appellant argues that the finding by the trial judge that the respondent's income was effectively $125.00 per

week or $6,250.00 per year was not supported by the evidence. It is said that in arriving at this finding, the trial judge made a palpable and overriding error.

Prior to the accident in 1984, the respondent was employed in four households doing various tasks such as cleaning, cooking and baby-sitting The principal employer was Royce Fuller. The respondent had worked for Mr. and Mrs. Fuller for some 17 or 18 years. The respondent said that when she first started, the work was full time but in later years as the family grew older she was only wanted part time to do the cooking. She did not remember how many years she had worked full time, but she estimated that most of the years working there were full time, Monday to Friday each week and all day. She did not remember what her pay was. She said that she also bought a lot of fruits and vegetables from them as they had a farm, but that Mrs. Fuller was generous in giving her clothes for the children and other household items. She thinks that when Mrs. Fuller retired from teaching school, the work shifted over to part time since Mrs. Fuller was able to do her own work at home. When she switched to part time work, it was twice a week in the afternoons. She said the pay was the same as it had been when she was working full time.

Mr. Fuller testified that his wife retired around 1982 or 1983 and that the respondent then went to part time work "half days or something like that for awhile but then it petered out". Fuller's testimony was that the respondent was paid $30.00 a week and given transportation to and from the Fuller home and he

thought they paid her the same when she worked part time as they had always done. He expressed the view that she was worth more than $30.00 a week and said that he and Mrs. Fuller provided fringe benefits such as vegetables and apples and used household items. He had sold the respondent and her husband a car for $350.00 and then ended up giving it to her. At times when there were changes in his family he gave away furniture to friends and "a considerable amount" to the respondent. He said they were never concerned about how much they gave her because they could not put a price on the value of the respondent to his family. He felt the respondent had made a major contribution to the upbringing of his own children. He stated that while he paid the respondent $30.00 a week in cash, he and his wife had difficulty in concluding the value of what she got in money and money's worth because there were "so many fringe benefits". Questioned by respondent's counsel, he said:

> "Q. Do you recall indicating to me that you probably paid her about $125.00 a week in money and money's worth?
>
> A. Yes. Um-hm.
>
> Q. Do you recall indicating of that $125.00 a week that you probably paid her about $80.00 a week in cash?
>
> A. Well, I've forgotten about it.
>
> Q. Okay. So you don't recall that conversation?
>
> A. No I don't.
>
> Q. But your evidence today is that it was $30.00 a week that you paid her.
>
> A. Um-hm.

> Q. Do you recall Mr. Fuller how much you would have paid Mrs. Bush in the last year that she worked for you for 1984?
>
> A. (No audible reply.)
>
> Q. If you had to put a figure on it, in one year . . .
>
> A. I don't know. I don't know."

In reviewing the evidence, Mr. Justice Gruchy referred to the testimony of other persons for whom the respondent worked part time in the years immediately prior to 1984 and who paid her approximately $800.00, $500.00 and $1,000.00 a year respectively. This was in addition to what she earned from the Fullers. The respondent's own evidence indicates however that she ceased working for the lady who paid her $500.00 a year sometime before the accident. The dollar amount paid by the Fullers on the basis of a 52 week year equalled $1,560.00. At the beginning of his testimony Fuller, when asked whether she worked all year round answered, "except in the summer and then occasionally she worked then too".

Mr. Justice Gruchy, in making his finding as to the wage loss said:

> "In actual cash Mrs. Bush was earning $3,860.00 per year but I am convinced that I must consider additional income to compensate for the loss of benefits Mrs. Bush was deriving from her employment by Mr. & Mrs. Fuller. Mr. Fuller said, and I accept, that an appropriate rate would have been $125.00 per week. The evidence indicated that Mrs. Bush worked for Mr. and Mrs. Fuller about seven hours per day or 35 hours per week. At $125.00 per week that would have amounted to $3.57 per hour. Considering that Mrs. Nichols was paying her $7.00 per hour and Mrs. Clarke paid her $20.00 per day, the figure of $125.00 is reasonable. I also note

> that as a matter of law, minimum wages in Nova Scotia in the same period rose from $3.75 to $4.50 per hour. The minimum wage legislation does not apply to persons employed as domestic, but that rate has a persuasive effect in these considerations.
>
> I therefore accept that Mrs. Bush's income at the time of her disabling accident was effectively $125.00 per week or $6,250.00 per week since March 24, 1984. Alternatively, I find that such rate was that which Mrs. Bush should have earned during the period in question had she not been injured."

With deference, the evidence does not support the finding that Mrs. Bush's income was effectively $6,250.00 per year. The cash income was probably less than $3,860.00. As pointed out, one employer who had paid her at the rate of $500.00 per year was not hiring her prior to the accident. The work for the Fullers was not over 12 full months of the year, but it is very difficult from the evidence to determine just how much it was. The burden of proving these items rested with the respondent. The trial judge has, in my opinion, misinterpreted the evidence of Fuller which does not support the conclusion that he was paying her anything like $125.00 per week in money or money's worth. The evidence with respect to the so-called fringe benefits being various items given to the respondent from time to time by the Fullers is again very difficult to assess. Mr. Fuller was not able to put a value on these items when asked and it is certainly no less difficult for this court to attempt to do so.

The alternative finding that the respondent "should have earned" $125.00 a week during the period in question stands on no firmer foundation than the finding that $125.00 was "effectively" her weekly earnings.

Loss of earnings incurred down to the date of trial are special damages which must be pleaded and proved. In some cases, this is very simple but in a case such as this, the circumstances are such that it is not so easy. In Paulse v. Neville, et al (1977), 12 Nfld. & P.E.I.R. 223 Gushue, J.A. speaking for the Newfoundland Court of Appeal said at p. 227:

> "There is not much in the way of authorities available to indicate the particularity with which special damages are to be proved, but this is understandable because it obviously will vary with different types of cases and the availability of evidence. In my view, however, a correct interpretation of the strict proof required in the assessment of special damages is that they must be proved to as great an extent, or as fully, as possible in the circumstances of a particular case."

Recognizing the difficulties facing the respondent and the obligation to be fair to both the injured party and the wrongdoer, I am satisfied that $3,500.00 is a realistic estimate of the annual earnings, including benefits, of the respondent prior to the accident. Subject to adjustment for any contingencies to be taken into account, that figure should form the basis of the calculation of pre-trial wage loss. According to the table provided by counsel the number reached for the pre-trial period, subject to any such adjustment, is $35,451.50. This table has an allowance for interest built in. Counsel not having taken any exception to the interest calculation, I apply the table without further analysis of the interest factor.

Reported and Unreported Income:

The appellant refers to evidence of the respondent's income tax returns which showed earnings for the years 1980 to 1985 as follows:

1980	$1,000.00
1981	$ 900.00
1982	$1,000.00
1982	$1,000.00
1983	0
1984	$ 200.00
1985	0

The appellant submits that as a matter of policy this court should not allow a claim for pecuniary loss based on evidence of earnings in excess of amounts declared by a plaintiff in income tax returns. We were referred to the decision of Chief Justice Glube in Pilgrim v. Corkum (unreported S.B.W. 0770) in which she said:

> "This court, no matter what the arguments put to it, will not accept information of unclaimed earnings in looking at the loss of income. The court cannot condone nor will it arrive at a loss of income based on such evidence. I do not believe that the plaintiff earned $20,000.00 or $15,000.00 in the two years, as stated before his accident and if he did, that is his problem but I cannot accept these as figures on which I should base loss of income. He possibly earned something more than what is showing on his income tax returns but aside from refusing to base it on income undeclared for tax purposes, the court is not in a position to play a guessing game as to what income a person could, should or did earn."

We were also referred to Audet v. Frenette (1988), 89 N.B.R. (2d) 306, a decision of the New Brunswick Court of Appeal. In that case, the respondent had sustained injuries in an automobile accident and claimed for loss of earnings in various businesses. The trial judge's award for loss of earnings from

one of the businesses was based on income which the respondent testified had not been reported on his tax return. Ayles, J.A., speaking for the New Brunswick Court of Appeal, held that no award on the basis of this undisclosed income should be made. He referred to Major v. Canadian Pacific Railway Company (1922), 64 S.C.R. 367 and Napier v. National Business Agency Ltd. (1951), 2 All. E.R. 264 at 266, in the first of which cases it was noted that no court would lend its aid to one who founds a cause of action upon an illegal or immoral act, and in the second that people who insert fictitious figures in their income tax returns are governed by this principle. Ayles, J.A. concluded at p. 312:

> "It would go against the public policy to allow the respondent to use the courts to recover income lost as a result of an accident but which was never formally acknowledged and reported in his tax return."

In Lewis v. Williams (1990), 111 N.B.R. (2d) at 284 Landry, J. of the New Brunswick Court of Queen's Bench in assessing damages observed that the plaintiff had only declared a portion of her earnings on her income tax return. Following Audet v. Frenette, he awarded damages based only on the reported income.

In Hachey v. Dakin, et al (1983), 57 N.S.R. (2d) 441 Burchell, J. of the Trial Division of this court in assessing damages noted that the plaintiff had kept no records and filed no income tax returns. He said at p. 443:

> "While I agree with the general proposition that the court should not condone fraudulent breaches of the provisions of the Income Tax Act, I think the question of whether there was or was not a loss of income is one of fact to be determined upon a consideration of

> the evidence as a whole. It is my opinion, in other words, that a failure to file income tax returns should not be treated as an absolute bar against a claim for loss of income..."

As a matter of policy, I think it is going too far to say that an injured plaintiff should be absolutely bound by the numbers in his or her income tax return when asking a court to make a finding as to income for the purposes of a damage assessment. While I condemn the practice of intentionally filing a misleading income tax return, I would note that persons who do so are subject to punishment under the provisions of the Income Tax Act. Such unlawful conduct which may embarrass a plaintiff in convincing the court of the true level of his or her income cannot be said to be the founding of a cause of action upon an immoral or illegal act. The cause of action which includes the claim for damages is not founded upon the income tax fraud. It is founded inter alia upon the true income which was lost during the time the injured plaintiff was unable to work. The unlawful conduct relates to the plaintiff's dealings with the taxing authorities respecting income prior to the time the cause of action arose.

I am, however, of the opinion that evidence of earnings as disclosed in a tax return is very strong prima facie evidence against any claimant who would contend that the income was in fact higher. The strength of the inference to be drawn against a plaintiff in such a case will depend always on the circumstances of the particular case. That is what I believe Chief Justice Glube had in mind in Pilgrim, supra. It is clear from reading

her decision as a whole that she simply did not believe that the plaintiff earned significantly more than what he declared in his return and she was therefore not in a position to help him on the basis of a guessing game. I prefer the approach taken by Burchell, J. in Hachey, supra, to that taken in the New Brunswick authorities.

With that in mind I turn to the evidence relating to the respondent's income tax returns. She testified that her husband made up the tax returns on her behalf at the same time as he made up his own. She had no knowledge of what was in them and her husband did all of the family banking. She did not check the tax returns prepared by her husband but simply signed them because he asked her to. She had no knowledge of her obligation to declare income and knew nothing about income tax.

The returns for every year indicated that the respondent was not taxable on the amounts declared. Her exemptions and credits were such that even at the figure I have estimated to be her income, she would not have been taxable in any year with the possible exception of 1980. Mr. Justice Gruchy made the following finding.

> "But in Mrs. Bush's case, I am convinced that, (a) in all likelihood in the years when she did not file returns she was not taxable; (b) if she was required to file at all (and I rather think she was not), then such requirement was not more than a technical requirement; and (c) she completely left such matters to her husband."

I am satisfied that there was no dishonesty involved. In the exceptional circumstances here, Mrs. Bush is not estopped by her income tax returns from establishing a level of earnings in excess of those therein set out.

Contingencies:

The appellant contends that there should have been a reduction from the award for contingencies such as uncertainty whether the Fullers would continue to require her services either at the same level or at all. To that I say that the evidence was that the respondent was shown to be a conscientious and capable employee. Mr. Fuller indicated that he valued her services and gave no indication that he proposed to discontinue them or reduce her pay had she continued working after 1984. Moreover, there was no suggestion that a person of Mrs. Bush's qualifications could not secure similar, perhaps more remunerative employment, with somebody else. Mr. Fuller testified that she was worth more than he was paying her. If anything, a positive contingency might be considered to allow for the fact that the respondent might have found better employment or persuaded the Fullers to increase her salary. It is proper to consider inflation as a positive contingency. The figure selected for the salary calculation was that which represented her earnings in 1984. In all probability, these persons who were hiring her would, in response to inflationary pressures, have increased her pay.

The appellant then refers to the fact that the respondent had degenerative changes in her spine with some indication of arthritis. Reference was also made to the 1988 accident in which the respondent suffered a whiplash which required her to wear a soft collar and the fact that her neck is continuing to cause pain. It is said that such health conditions and possible intervening events such as the 1988 accident should have been taken into account as negative contingencies.

The trial judge made an explicit finding that the degenerative changes in the spine with indication of arthritis have not contributed to the respondent's disability. The disability he has found results solely from the 1984 accident and there is no evidence which would warrant a finding that but for that accident she would be unable to work even if these conditions would have slowed her down. The 1988 accident has resulted in discomfort but it has not been established - and in this respect the burden is upon the appellant - that that accident so injured the respondent that she would not still be able to do her work had she not been totally disabled in 1984. Again, it is possible that it would have interfered with her work, and such an accident and other intercurrent illness are negative contingencies to be considered in dealing with a period of seven years, particularly with someone of the respondent's age.

In Lewis v. Todd and McClure (1980), 2 S.C.R. 694, Dickson, J. (as he then was) speaking for the Supreme Court of Canada said at p. 714 with respect to contingencies:

> "In principle, there is no reason why a court should not recognize and give effect to, those contingencies, good or bad, which may reasonably be foreseen. This is not to say that the courts are justified in imposing an automatic contingency deduction. Not all contingencies are adverse. The court must attempt to evaluate the probability of the occurrence of the stated contingency."

In my opinion, the negative contingencies such as possible loss of work with the Fullers, the 1988 accident and the degenerative changes and arthritis are offset by the positive

contingencies of inflation and/or the opportunity to secure other employment at a higher rate. I would not disturb the trial judge's decision in this respect and would make no deduction for contingencies from the base figure.

Future Income:

The appellant also attacks the award of future lost earnings, not only on the ground that the income figure was incorrect but that no deduction for contingencies was made. The time span selected by the trial judge as the anticipated working life expectancy of the appellant following the trial was only one and one-half years. If anything, this was an assumption favourable to the appellant because there is no real reason to suppose that had the respondent not been disabled, she would necessarily have fully stopped working at the age of 65. I think this, coupled with the possibility of further inflation, is sufficient to outweigh any unfavourable contingencies and I would, as did the trial judge, multiply the base figure by one and one-half without making any discount. This is a fair estimate. As the trial judge said, it is at best just that. I would, therefore, for the award of $9,375.00 substitute a figure of $5,250.00, as a result of the lower estimate that I have made of the respondent's earning power.

THE AWARD OF PREJUDGMENT INTEREST:

The appellant submits that the trial judge by his award of prejudgment interest on non-pecuniary damages from March 21, 1987 failed to give proper weight to the respondent's delay in prosecuting the action and failed to give sufficient weight to

the extent to which inflation was reflected in the award of non-pecuniary damages and its effect on the selection of an appropriate interest rate.

Sections 41(i) and (k) of the Judicature Act, R.S.N.S. 1989, c. 40 provide:

> "41(i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> . . .
>
> (k) the Court in its discretion may decline to award interest under clause (i) hereof or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation."

It is to be observed that the trial judge is given a broad discretion in fixing the interest rate. Unlike the Legislation in some other provinces, no guidelines are given to the court for dealing with specific situations such as the treatment of pecuniary as opposed to non-pecuniary damages, or special damages as opposed to general damages. The Legislation does invite the court in exercising its discretion to consider generally the time period during which the plaintiff has been

deprived of the use of the money. Undue delay in prosecuting the litigation is another factor which the trial judge may, in the exercise of the discretion, take into account in reducing the interest.

There was indeed a very long delay in bringing this case to trial. In penalizing the respondent by allowing interest from March 24, 1987 only, Mr. Justice Gruchy has exercised the discretion given to him by the statute. After reviewing the record and hearing argument of counsel, I am unable to say he erred in such exercise, and I would not disturb the time period over which prejudgment interest is to be paid.

The appellant points out that the non-pecuniary damages were assessed a long time after the accident. It is an award made in current 1991 dollars. It is presumably, by reason of inflation, greater in dollar amount than the respondent would have recovered in 1984. It is contended that as the damage award reflects inflation, the respondent was awarded a larger figure than would have been the case had the trial been held immediately following the loss or even at some reasonable time, say within two or three years, of it. It is probable that a court in 1991 would award greater non-pecuniary damages for a given injury than it would for the same injury in earlier years. It is generally accepted that judges are sensitive to that fact that inflation is a reality and that older awards are of limited value in making a damage award because inflation has made the dollar worth less.

The appellant submits that commercial rates of interest such as the rate selected by Mr. Justice Gruchy contain a large

component related to inflation. Investors demand a rate of interest which will keep up with inflation and yield a real return in addition. This was recognized by this court when Civil Procedure Rule 31.10(2) was enacted:

> "31.10(2) The rate of interest to be used in determining the capitalized value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is two and one-half (2½) per centum per annum."

The purpose of prejudgment interest is to attempt to place the plaintiff in the same position he or she would have been in had the award been paid on the day the cause of action arose. Damages for tort are assessed as of the trial date. If the award is updated for inflation occurring to the trial date, the plaintiff, it is said, gets a double recovery for inflation if as well an interest rate allowing for inflation is applied to that award. Accordingly, it is submitted by the appellant that a more appropriate rate would be such as provided in Rule 31.10 which attempts to reflect a real rate of return, inflation already having been accounted for in the updated award.

The appellant refers to decisions of the Manitoba Court of Appeal in Melnychuk v. Moore and Associated Beer Distributors Ltd. (1989), 6 W.W.R. 367, the British Columbia Court of Appeal in Graham v. Grant (as yet unreported 1990 B.C.J. No. 1269) and an earlier decision of that court in Leischner v. West Kootenay Power & Light Company (1986), 24 D.L.R. (4th) 641. In Melnychuk, supra, Twaddle, J.A. said at p. 379:

> "What we are concerned with in this case is an award of general damages for pain and

> suffering and loss of amenities. These non-pecuniary damages are assessed with reference to the value of money at the date of trial. There is thus included in the amount awarded to the plaintiff a factor for monetary inflation between the date of the accident and the date the judgment is delivered. The plaintiff is still entitled to a profit on the money she would have received at an earlier date, but the allowance for interest at the full rate would duplicate the inflation factor already included in the judgment."

The Legislation in Manitoba providing for prejudgment interest and compensation for loss of immediate receipt of the award differs from s. 41(i) and (k) of the Judicature Act, supra. Care must be taken in assessing statements by courts dealing with different statutory provisions. However, to the extent that the above quoted statement emphasizes that a plaintiff ought not to be compensated twice for inflation, it has considerable appeal in formulating an approach to the exercise of the broad discretion given under the Judicature Act, supra.

In Leischner, supra, the court said at p. 674:

> "...The purpose of prejudgment interest is to place the plaintiff in the position he would have been in had the award been paid on the day his cause of action arose. If the award is updated for inflation occurring between then and the trial date, he is placed substantially in that position, except for what money he would have earned in that period over and above inflation. To put it another way, a large component of commercial interest rates is inflation - investors demand a return which will keep up with inflation and yield something in addition. To award the plaintiff damages reflecting inflation to the date of trial as well as interest at commercial rates from the date the cause of action arose, may result in duplication and over-compensation." (emphasis added)

Thus, the Court of Appeal affirmed the trial judge's decision to award a lower rate of interest because inflation was built into the award, saying that it was open to the judge to do this.

In Graham v. Grant the point assumed greater significance. The Trial Court in 1988 awarded non-pecuniary damages of $150,000.00 for negligence occurring in 1974 and 1978, apportioning $25,000.00 of the award to the wrong committed on the earlier date and $125,000.00 to that committed on the later date. Interest at 10% per annum was ordered on $25,000.00 from September, 1974 and on $125,000.00 from December, 1978. The result was that prejudgment interest amounted to more than the sum awarded for the non-pecuniary loss. MacFarlane, J.A. speaking for the court said at p. 7 of the report:

> "The effect of inflation, both on the award and the interest rate, does not appear to have been given much weight in arriving at a 10% interest rate. Two factors were stressed. The first is the length of time from the date of the first act of negligence (14 years). The second factor was that there were several acts of negligence. Indeed that involved a problem in identifying the date the cause of action arose. But once 1974 and 1978 were specified as the dates upon which the cause of action arose, an interest rate could be applied without difficulty. I do not understand how that problem could justify the fixing of a higher rate than that which is required to put the plaintiff in the same financial position in 1988 as she would have been in had she had the money in 1974 and 1978, given the fact that the value of her purchasing power had been preserved by adjusting the award for inflation, and by applying the interest rate to that larger amount."

In providing that the interest to be paid shall be "at a rate the court considers appropriate", the British Columbia Legislation is, in this context, substantially the same as s. 41(i) and (k) of the Judicature Act, supra. The Court of Appeal concluded that the trial judge erred in the exercise of his discretion in fixing the interest rate because he had already taken inflation into account in fixing the award. To then select a commercial rate of interest would compensate the plaintiff twice and result in an injustice. The Court of Appeal reduced the rate of interest to 5% percent being the minimum allowable under the Legislation.

In Gaudet v. Doucet (1991), 101 N.S.R. (2d) 309 Davison, J. in the Trial Division of this court dealt with this issue. After referring to the approach taken in cases such as Melynchuck, Leischner, and Graham, supra, he said at p. 326 that he was unable to agree with it. He referred at p. 327 to the following passage from the judgment of Lord Wilberforce in Pickett v. British Rail and Engineering Ltd. (1980), A.C. 136 at 151:

> "As to interest on damages, I would restore the decision of the judge. This was varied by the Court of Appeal on the theory that as damages are now normally subject to increase to take account of inflation there is no occasion to award interest as well. I find this argument with respect, fallacious. Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that real 'value'. The one has no relation to the other. If the damages claimed remained, nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same. Apart the inflation

> argument no reason was suggested for interfering with the exercise of the judge's discretion."

In Pickett, the issue was not whether interest should be reduced because of the effect of inflation on the award, but whether it should be awarded at all. The House of Lords did not address the reality that commercial interest rates do contain an inflation component. It did so subsequently in Wright v. British Railways Board (1983), 2 A.C. 773. See Leischner, supra, p. 672-673.

Mr. Justice Davison also referred to the decision of the Ontario Court of Appeal in Borland v. Muttersbach (1985), 23 D.L.R. (4th) 664. That court affirmed the decision of the trial judge who said (15 D.L.R. (4th) at 508):

> "Defence counsel urges that there should be no more than a nominal award of interest on non-pecuniary damages. He pointed out that Shelley Borland had been awarded 'the rough upper limit' of $170,000 which reflects a growth due to inflation of $70,000 over six years since the 'Trilogy' decisions: **Andrews et al. v. Grand & Toy Alberta Ltd. et al.**, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; **Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al.**, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; **Arnold et al. v. Teno et al.**, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609. He alleges that the growth in awards in recent years have outstripped the rate of inflation and that the court must recognize that non-pecuniary damages are in respect of future, as well as past, loss - particularly so in the case of Shelley Borland. He submits that the rate of interest should be reduced to reflect the policy of the section that interest not be paid on future pecuniary loss. He referred to the case of **Graham et al. v. Persyko**, unreported, R. E. Holland J., released July 30, 1984 [since reported 30 C.C.L.T. 85], where the court reduced the rate of interest on non-pecuniary damages. The

reasons are very brief on this point. They are as follows [p.103]:

> It is clear, however, that my assessment carries an element of inflation with it. It is above the old upper limit. In these circumstances the award of $125,000 will bear interest at only two and one-half per cent from February 23, 1981 to the date of judgment.

> I have difficulty with this. $170,000 is agreed to be the amount in 1984 dollars which is the equivalent to $100,000 in 1978 when the Trilogy was decided. The award of $170,000 will purchase no more goods and services than $100,000 in 1978. The plaintiff receiving $170,000 in 1984 is receiving the same compensation as the plaintiff receiving $100,000 in 1978 although expressed in different dollars. Whatever the award, the statute gives the plaintiff the **prima facie** right to receive prejudgment interest on it at the prime rate prevailing in the month before it was issued. A defendant who is prepared to forgo investment income may reduce or extinguish the plaintiff's claim for prejudgment interest by making an advance payment or payments. An insurer who wishes to invest the money at current high rates should not profit by having the benefit of such rates while being required only to pay a nominal rate of interest to the plaintiff. In my view, this would discourage advance payments, thereby adding to the distress of the victims and would be contrary to the policy reflected by s. 36."

The Ontario Legislation respecting prejudgment interest in force at that time was reviewed by the trial judge at p. 506, 15 D.L.R. (4th). It differed in some respects from s. 41(i) and (k) of the Judicature Act, supra. Among other things it fixed a prejudgment rate but it was nevertheless similar in that it gave the judge an overriding discretion to set whatever rate appeared just.

Mr. Justice Davison then referred in Gaudet to s. 41(1) of the Judicature Act, supra, and concluded that it imposed an imperative duty on the court to award interest. He said at p. 327:

> "In the case at bar, there was a loss at the time the cause of action arose. The court is required to award interest. By considering inflation in my award, I have done no more than award a sum equivalent in 'real' terms to the amount that would have been awarded if the award was made on April 25, 1986. The plaintiff is still entitled to interest at the agreed rate because he has been deprived of the amount to which he was entitled for almost five years."

There are thus two lines of authority dealing with this issue. I have given them thought and have concluded that the approach taken by the British Columbia Court of Appeal in Leischner, supra, and Graham, supra, is to be preferred, subject to its proper application in each case.

At the outset, I express my disapproval of testing the justice of the issue by inquiring as to what the defendant or its insurer might be able to make by investing "the money" during the time between the accrual of the cause of action and the judgment. The purpose of prejudgment interest is to compensate the plaintiff for being without the money represented by the award of damages. It is not designed to penalize the defendant or to deprive the defendant of an undue windfall in being able to enjoy the money during the intervening period. Should the defendant or its insurers be able to demonstrate that a loss occurred on its investments during the period, would interest be withheld or reduced? That would appear to be the corollary of such

reasoning. Plaintiffs should, I think, be appalled that such a consideration would be entertained. To state the proposition demonstrates its lack of merit.

It is important to analyze the two functions carried out by the trial judge: first, the award of the non-pecuniary damages and second, the fixing of the appropriate interest rate.

In taking the first step, the trial judge awards non-pecuniary damages at the time of the trial. If inflation has been taken into account, a figure is reached which is greater than that figure having the same purchasing power at the time the cause of action arose. This is as it should be. The rule that the loss is to be valued as of the date of trial is designed to preserve the real value of money; to preserve the purchasing power of the plaintiff. In Graham v. Grant, supra, p. 4 MacFarlane, J.A. said:

> "In approving a 5 per cent interest in Leischner this Court recognized:
>
> 1. Non-pecuniary loss must be valued as at the date of trial if the plaintiff is to be placed substantially in the position she would have been in had the award been made on the date the cause of action arose. The rule is designed to preserve the real value of money; to preserve the purchasing power of the plaintiff.
>
> 2. While the inflation factor in the award is directed towards preserving the real value of money, interest is to compensate one for being kept out of the money: Wright v. British Railways Board, [1983] 2 All E.R. 698.
>
> 3. In fixing an appropriate rate of interest to compensate a plaintiff for what she would have earned from the date of the cause of action to the date of trial it ought to be kept in mind that a large component of

> commercial interest rates is inflation. It must also be recognized that investors demand a return which will keep up with inflation and yield something in addition."

When the second step of making the interest calculation is taken, one goes back to the time the cause of action arose or such other date chosen pursuant to s. 41(k) of the Judicature Act. The rate selected applies from that time. If it is a rate with an inflationary component, the result is that in theory at least, the plaintiff is compensated twice for inflation. Davison, J. said at p. 326 in Gaudet that an increase between 1986 and 1990 from $110,000.00 to $135,000.00 is only to reflect and protect the "real" value of money. Commercial interest rates applied from the time the cause of action arose are designed to do the same thing, and if they are applied to an award already inflation adjusted, such protection is given twice.

Turning to the example referred to by the trial judge in Borland, supra, if the plaintiff receives $170,000.00 in 1984 for an injury sustained in 1978 which would in that year have attracted an award of $100,000.00, a premium for inflation of $70,000.00 has been added. To then add interest at a commercial rate hands out an additional premium for inflation. Fairness would either dictate an award of $100,000.00 with interest at the full commercial rate or $170,000.00 with interest at the real rate of return.

A double recovery should be avoided in the exercise of a trial judge's discretion under s. 41(i) and (k) of the Judicature Act, supra. The conclusion must be that to the extent that inflation was taken into account for the period between the

accrual of the cause of action and the trial, the judge should then adjust the interest rate so that it is not taken into account for a second time. This exercise should be carried out in fixing the rate and requires an examination of the award to determine whether inflation from the date the cause of action arose has been taken into account. Judges should take particular care in cases where a long period of time has elapsed between the time the cause of action arose and the assessment of damages. It is in these cases where one can more often say with confidence that the award has grown by inflation from what it would have been at the time from which interest starts to run. In many cases, a judge may not be able to say with any degree of certainty that an inflation factor has been built into the award. In these cases when the second step is taken, a commercial rate of interest would generally be appropriate. Where, however, a judge is satisfied that inflation has been built in, a rate such as the discount rate of 2½% per annum is appropriate. If the trial judge does not do this, a double recovery results to the plaintiff. An injustice is therefore done which requires interference by an appeal court with such an exercise of discretion.

I must therefore consider whether inflation was sufficiently built into this award to justify interfering with the interest rate selected by Mr. Justice Gruchy in exercising his discretion. This point was not specifically drawn to Mr. Justice Gruchy's attention and he therefore did not have the opportunity to focus upon it. In this case, interest was ordered

to run from March 24, 1987 and not from the accrual of the cause of action. It is only necessary therefore to consider whether inflation was taken into account for the period March, 1987 to the date of a trial. I have reviewed the authorities which Mr. Justice Gruchy considered in arriving at an award of non-pecuniary damages of $20,000.00. These were seven cases decided by this court between 1982 and 1989. The case on which Mr. Justice Gruchy appears to have relied most was the decision of this division of the court in Gallant v. Oickle (1984), 63 N.S.R. (2d) 91. Only three of the cases were decided after 1987 and in all of them references were made by the court to a number of pre-1987 cases and very few decided thereafter. Having regard to the dates of the comparable awards and the circumstances of those cases as they compare to the present, I am unable to say that Mr. Justice Gruchy has awarded anything more because of inflation by reason of the fact that this award was made in 1991 rather than 1987. Briefly put, it does not look unlike a 1987 or earlier award.

It follows therefore that I am unable to say with any confidence that the respondent was adequately compensated for inflation in the fixing of the award with respect to the period over which interest runs, and I would leave undisturbed the interest rate of 10% in this case.

CONCLUSION:

I would allow the appeal by reducing the award for past and future wage losses from $63,306.00 to $35,451.00 and from $9,375.00 to $5,250.00 respectively. This would reduce the total

award to $64,681.50 after taking into account a credit of $750.00 agreed to by the parties. The respondent would recover in addition to the trial costs interest on $20,000.00 from March 24, 1987 at the rate of 10% per annum to the date of payment, and interest at the same rate on $44,681.50 from May 22, 1991, the date of Mr. Justice Gruchy's order to the date of payment. See Rule 62.10(4). I would allow the appellant 50% of its costs of this appeal to be taxed, in view of the fact that success on the issues was divided.

David R. Cayton

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.