NOVA SCOTIA COURT OF APPEAL
Citation: ***Sharpe v. Abbott***, 2007 NSCA 6

Date: 20070118
Docket: CA 263736
Registry: Halifax

Between:

Thomas W. Abbott and Patrick W. Abbott

Appellants

v.

Tammy Murina Sharpe

Respondent

Revised judgment: The text of the original judgment has been corrected according to the erratum dated April 4, 2007.

Judge(s): Cromwell, Saunders & Oland, JJ.A.

Appeal Heard: October 11, 2006, in Halifax, Nova Scotia

Held: Appeal allowed in part, as per reasons for judgment of Saunders, J.A.; Cromwell & Oland, JJ.A. concurring

Counsel: Jean McKenna, for the Appellants
Derrick Kimball & Nash Brogan, for the Respondent

INDEX

Paragraph

Introduction **1**

Background **4**

Positions of the parties **24**

Preliminary matters **27**

Issues **28**

1. Did the trial judge err in the exercise of his discretion when deciding certain procedural and evidentiary matters such that the appellants were denied a fair trial?

2. Did the jury err by arriving at a perverse and wholly erroneous estimate of the respondents' damages?

3. Did the trial judge err in his award of costs?

Issue 1

Inflammatory comments by counsel **33**

Failure to disclose **40**

Discovery evidence **51**

Mention of "insurance" **56**

Going beyond the written report **65**

Importance of employment history **73**

Adjournment **74**

Failure to explain defence theory **75**

Importance of vocational alternatives **77**

Actuarial evidence **78**

Conclusion **83**

Remaining issues **89**

Jury’s questions and answers **90**

Issue 2

Causation **92**

Damages **107**

Non-pecuniary **109**

Standard of review **109**

Setting “limits” **113**

Whether the “cap” applies **117**

A functional approach **118**

What facts are to be considered **126**

The test **132**

Whether to mention a “range” in this case **152**

Past loss of income **154**

Diminished future earning capacity **156**

Cost of future care **160**

Loss of valuable services **161**

Issue 3

Costs **162**

Conclusion **166**

Reasons for judgment:

[1] A minor motor vehicle accident eight years ago led to an eleven day civil jury trial and an award of damages for injuries and losses totalling $750,000.00. The appellants say the award is perverse and ask that the matter be remitted to the trial judge for a complete reassessment of damages. The appellants also argue that the trial judge erred in law and in the exercise of his discretion in certain procedural matters, the cumulative effect of which they say likely led the jury to carry out a wholly erroneous assessment of the value of the respondent's claim. Alternatively the appellants seek a new trial or ask that this court substantially reduce the jury award.

[2] The respondent says that while the accident itself may have been relatively insignificant, the impact of her injuries was catastrophic, such that she faces a lifetime of pain and discomfort, on account of which she has become permanently disabled and left virtually unemployable. She says that none of the jury damage awards should be disturbed.

[3] For the reasons that follow I would allow the appeal in part and reduce the award for non-pecuniary damages, and costs. The record is complete and enables us to conduct that assessment. This is not a case where I would order a new trial, or remit the matter to the trial judge for reassessment. In all other respects the jury's decision should stand.

Background

[4] I will start by giving a brief introduction to the facts of the case. Necessary detail will be added later when I address the particular issues requiring our consideration.

[5] The mishap occurred on October 10, 1998. The respondent, Tammy Sharpe, was twenty-two. She was a front seat passenger in a vehicle that was stopped in a line of traffic and rear-ended by a van behind it. There was very slight damage to the bumper of the car in which Ms. Sharpe was seated. The van was not damaged at all.

[6] Within hours of the accident Ms. Sharpe visited the emergency department of her local hospital, complaining of discomfort on the left side of her neck which radiated into her left shoulder and upper arm. X-rays were normal. She was given a soft collar and prescribed muscle relaxants.

[7] Five days later she consulted Dr. Spencer her family physician for a bladder infection and also reported tenderness in her neck and shoulder following the motor vehicle accident. Her doctor referred her for physiotherapy.

[8] Ms. Sharpe underwent a total of 29 physiotherapy treatments concluding on March 3, 1999. At no time was there any mention of leg or hip pain.

[9] She continued to see her family doctor every few weeks from January through May, 1999. During those months she also visited a chiropractor who reported that as of her last treatment on May 19, 1999 ". . . she felt over 90% better and only experienced some occasional stiffness/tightness."

[10] The first reference in the medial records to any complaint about pain in her right hip followed Ms. Sharpe's attendance at Dr. Spencer's office on June 17, 1999, some eight months after the accident. The pain was not described as radiating down the leg or up into her back. Dr. Spencer diagnosed the hip pain as bursitis.

[11] In August 1999 she was seen by an orthopaedic surgeon, Dr. Brien, who also felt that she had right-sided trochanteric bursitis. She received an injection which brought significant relief for several months.

[12] In December 1999 she complained that the pain was radiating down the lateral aspect of her leg, to below the knee. A CT scan was ordered. In February 2000, Dr. Brien reported to Doctor Spencer that the CT scan showed very "non-specific findings" and that he really had nothing to offer the patient except suggesting a possible return to her chiropractor.

[13] A month later Dr. Spencer referred her to Dr. Pollett, an anesthetist and pain specialist. Dr. Pollett diagnosed the problem as chronic regional pain syndrome, also known as reflex sympathetic dystrophy. A technical definition of the syndrome is not apparent from a review of the medical evidence presented at trial. Medical texts and research studies indicate that the profession's understanding of

the syndrome, both in terms of clinical assessment and treatment, continues to evolve. See for example _New Treatments for Reflex Sympathetic Dystrophy_, R. J. Schwartzman, New England Journal of Medicine, Volume 343:654-656, August 31, 2000, Number 9. Many specialties in medicine are engaged in its study including anesthesiology, neurology, rheumatology, orthopaedics and rehabilitation. Dr. Pollett described it as a condition likely due to a malfunction of the sympathetic nerve system, brought on by two factors, one external such as trauma suffered by the patient, and the other intrinsic in that only a small portion of the population will develop the condition from the same injury. Dr. Pollett said his patients described their symptoms as a "very, very intense burning pain" that was "persistent 24/7."

[14] The respondent was referred by her solicitors to Dr. Watt, a physiatrist, for a medical/legal opinion. He saw her on September 26, 2000. She told Dr. Watt that she no longer had any pain or numbness in her neck, shoulders or arms, but that she was not able to walk because she was in so much pain, and that she could only sit for 15 minutes without taking a break.

[15] The respondent was examined at the request of the appellants' solicitors by Dr. Reginald Yabsley, an orthopaedic surgeon. He too considered that Ms. Sharpe had bursitis (as had Drs. Spencer and Brien in their initial diagnoses). Dr. Yabsley described such a condition as occurring and re-occurring, said it was very common, and that he would see as many as four patients a week with the complaint. He said it was "not probable" that the respondent's hip pain was related to the motor vehicle accident.

[16] For his part, Dr. Pollett agreed that the causal connection between the motor vehicle accident and the hip/leg pain was "an unusual presentation." He acknowledged his uncertainty in arriving at such a diagnosis, but said it was hard to think of any other explanation.

[17] Ms. Sharpe was unemployed and living at home at the time of this mishap. She graduated from Grade XII in 1994 with a 72% average. She then took a business technology course at the University College of Cape Breton. She did not complete the program. In June 1995 she took a job at a convenience store in Glace Bay where she continued working until December 1995. Her income tax return for that year reports total earnings of $4,038.00.

[18] In 1996 she collected unemployment insurance benefits of $3,590.00 and earned income of $1,500.00 from some other source.

[19] Ms. Sharpe attended the "National School of Learning" in 1996-97 where she obtained a "Security Specialist" certificate. In May 1997 she applied to the Atlantic Police Academy, Holland College, Prince Edward Island. Due to an apparent administrative glitch she was unable to successfully complete certain preliminary steps in the testing process.

[20] Ms. Sharpe did not go back, or make any effort to re-take the test at any time in the 16 month interval between the initial testing period and the motor vehicle accident.

[21] She briefly obtained employment at Zellers. Her 1997 income tax return showed earnings of $3,965.00.

[22] As mentioned, the accident took place on October 10, 1998. Shortly thereafter Ms. Sharpe was hired at Wal-Mart. She worked through November and December as a switchboard operator, 6-8 hours/day, 4 days/week. She was laid off at the end of the year due to a shortage of work. She applied for social assistance benefits which supplemented her income until February 1999 when she began to collect EI benefits.

[23] Ms. Sharpe took a job as a security officer at the casino in Sydney in early May 1999. There she earned $9,217.00 for the balance of that year. In 2000 she worked at the casino as a "casual" and reported earnings of $11,431.00. Her job at the casino lasted until November, 2000. Employment records contain less than favourable performance reviews. Ms. Sharpe was obliged to report for disciplinary interviews, the last of which occurred on November 25, 2000. She has not had any employment in the 6 years since. Ms. Sharpe lives with her parents and her two year old little boy.

Positions of the parties

[24] Causation, sufficiency of proof, and credibility were three principal issues at trial.

[25] The appellants challenged Ms. Sharpe's veracity and work ethic. They argued that she had failed to prove the existence of a medical condition for which she now claims total disability. They say she failed to establish any causal link between that medical condition and the motor vehicle accident. They say her spotty and low paying employment history, and relatively minor physical limitations could not possibly support the level of damages she claimed in compensation. The appellants say the evidence before the jury did not justify what is an excessive award for damages totalling $750,000.00, and that this court must intervene.

[26] For her part, Ms. Sharpe says that it was entirely for the jury to assess her credibility, and decide whether she had proven her cause of action and her entitlement to damages. On this record, in the face of conflicting medical evidence, the jury's duty was to decide whether Ms. Sharpe's claim had been established on a standard of probability. She pointed to the medical evidence of her various treating physicians as establishing the disabling nature of her condition, and the necessary causal connection between its onset and the motor vehicle accident. The evidence fully supports each of the jury's awards under the various heads of damage. There is no merit to any of the appellants' arguments that the trial judge erred in his management of the case, or instructions to the jury, or that the jury's assessment of the respondent's compensation is perverse.

Preliminary Matters

[27] Before addressing the issues that arise in this appeal two points require mention. First, counsel for the appellants chose not to argue 6 of the 19 grounds listed in their notice of appeal, conceding that no objection was taken to these points at trial and that certain matters were touched upon in other submissions. Second, appellants' counsel acknowledged at the hearing that they were <u>not</u> challenging any part of the trial judge's charge to the jury as reflecting reversible error. Rather, they preferred to say that a "constellation" of procedural mis-steps or discretionary decisions made by the judge during the trial led the jury astray and probably accounts for their wholly erroneous award of damages. I will deal with that particular submission in a moment, but first wish to list and characterize the matters that require our consideration.

Issues

[28] The myriad of grounds, complaints and submissions put forward by the appellants may be distilled as three principal inquiries, each of which invites its own standard of review. For convenience, I have framed the relevant issues as follows:

1. did the trial judge err in the exercise of his discretion when deciding certain procedural and evidentiary matters such that the appellants were denied a fair trial?

2. did the jury err by arriving at a perverse and wholly erroneous estimate of the respondents' damages?

3. did the trial judge err in his award of costs?

[29] Each of these inquiries will necessitate a more detailed discussion of the appellants' present complaints and how those matters were addressed by the judge during the course of this eleven day trial.

1. Did the trial judge err in the exercise of his discretion when deciding certain procedural and evidentiary matters such that the appellants were denied a fair trial?

[30] As I have observed, appellants' counsel confirmed at the hearing before us that she was not alleging any reversible error in the trial judge's charge to the jury. This was a wise concession. In my respectful opinion, Justice Edwards gave very thorough, timely and helpful directions to the jury both in his final charge, and at various points throughout the trial, where cautionary advice or meaningful instruction was required.

[31] However, counsel for the appellants seemed to take the position that a "constellation" of procedural mis-steps or discretionary rulings by the trial judge somehow led the jury astray and "explains" their perverse damage award.

[32] While not argued explicitly, the many specific examples raised by the appellants are grouped in such a way as to suggest that the appellants were denied a fair trial. With respect, for the reasons that follow, I disagree.

Inflammatory comments by counsel

[33] The appellants' first complaint is expressed this way:

> ***The verdict of the jury as a whole was based on inflammatory remarks or mis-statement of the evidence by Respondent's counsel during the course of his final submissions to the jury.***

[34] Specifically, the complaint attacks these remarks by the respondent's lawyer in the course of his final argument:

> Now the defence doesn't give credit to her very much. They don't think Tammy had a future. She wasn't going to be a police officer, she wasn't going to be a security officer, she wasn't going to amount to much at all. Why? Because she had some social assistance and EI in the past? Well, if that's the hallmark of failure at life, we had better tell our children to give up. Because many of them do depend on these sources of income in getting established. And even as we go on, many of us depend on these supports in difficult times. And is there something wrong with that? We have Employment Insurance. You pay into it. You are entitled to those benefits if you need it. Look at her situation. She is in agreement to repaying the taxpayers of this province the social assistance that she has received if she comes into money. One thing she is not is she is not a freeloader.

[35] This, in the appellants' submission, was an unfair mis-characterization of their position at trial where they argued that the respondent would never become a police officer as she would be unable to meet the screening requirements, but that no such restriction would hamper her finding a job in the retail security sector. The appellants urged that Ms. Sharpe's problems at the casino may have stemmed from inexperience or immaturity. As expressed in their factum:

> Most of these jurors are from industrial Cape Breton, where there a high level of unemployment, and as a result, a high degree of reliance on EI and Social Assistance. These jurors would be very sensitive to any suggestion that Appellant counsel, (from Halifax, as Mr. Kimball was quick to point out in his opening), might consider an individual to be a freeloader.

[36] In my view there is no merit to this submission.

[37] The comments made by the respondent's lawyer in summation, and which are now attacked by the appellants, were not the subject of <u>any</u> comment by counsel or the trial judge, either during or after the summation. A failure to object, while not determinative, is certainly a feature we may take into account. See, for example, **Eng v. Medjuck** (1999), 180 N.S.R. (2d) 276 at ¶ 38; **Rogers v. Young** (2000), 185 N.S.R. (2d) 197 at ¶ 16; **Morriscey v. Zwicker** (2001), 192 N.S.R. (2d) 268 at ¶ 40; **Campbell v. Jones** (2002) 209 N.S.R. (2d) 81 at ¶ 324 ff.; **Jessome (Guardian ad litem of) v. Walsh** (2003), 213 N.S.R. (2d) 251 at ¶ 8; and **Noiles v. Chase**, [2004] N.S.J. No. 191 at ¶ 18.

[38] In defending this case the appellants adopted a two-pronged strategy. The medical case from their standpoint centred on the evidence of Dr. Yabsley, the effect of which was that Ms. Sharpe was injured, but that her injuries were transient in nature, that she had made a complete recovery, and that whatever lingering problems she suffered had nothing to do with this accident. The second prong consisted of casino employees and other witnesses who were called to attack the credibility of the plaintiff, attempting to portray her as immature, irresponsible, perhaps a little lazy, certainly untruthful, and somebody ready to take advantage of the system. Her cross-examination focussed to a great extent on these issues with many references to her sporadic work record and reliance on social supports.

[39] Having regard to all of these circumstances, the impugned remarks when seen in context were neither unfair nor inappropriate. The cases relied upon by the appellants such as **de Araujo v. Read**, [2004] B.C.J. No. 963 (C.A.); and **Hallren v. Holden**, [1913] B.C.J. No. 41(C.A.) reflect language by counsel that was truly egregious including comments that were vitriolic, repetitive, referred to evidence never called or which would have been inadmissible, and were clearly intended to inflame the jury. In those cases the prejudice to the defendants was patent. Such did not happen here.

Failure to disclose

[40] The appellants' next complaint is expressed this way in their factum:

> ***The . . . judge erred in failing to declare a mistrial, as a result of the failure of the Plaintiff to disclose the reports of Dr.'s Beauprie, and Brownstone, and the failure of the Plaintiff to provide copies of the files of Dr.'s Spencer, Watt and Pollett, prior to trial.***

To this, the appellants raise a closely related objection that:

> ***The Learned Trial Judge erred in failing to explain to the jury the significance of the discovery evidence of the Plaintiff and Dr. Spencer and in refusing to allow a copy of the Spencer discovery evidence to be provided to the jury.***

I will deal with both of these complaints together.

[41] To understand this complaint a brief chronology is required. Dr. Spencer is Ms. Sharpe's family physician. Dr. Pollett is the pain specialist to whom Dr. Spencer referred Ms. Sharpe for assessment and treatment. Dr. Watt is a specialist in physical medicine and rehabilitation, with whom Ms. Sharpe's counsel consulted and who prepared a medical/legal report dated September 29, 2000.

[42] In response to these particular grounds of appeal respondent's counsel submit that during the course of this litigation they disclosed relevant material in accordance with our Rules and complied with all requests or undertakings given at discovery. Such compliance they say is stipulated in a confirmatory memorandum prepared by the date assignment judge.

[43] I will first dispense with the complaint concerning the alleged failure to produce Dr. Watt's file. In my opinion, with respect to Dr. Watt, there was no obligation upon the respondent to provide any other information. This physician was not being called by the respondent as a witness. Indeed, the appellants advised prior to and repeatedly during the trial that they (the defence) expected to be calling Dr. Watt and that his file would be available at that time.

[44] I will turn now to a consideration of production as it relates to the other physicians. It is clear that because Dr. Spencer and Dr. Pollett were Ms. Sharpe's treating physicians, their files were ongoing. Those files were produced at trial and counsel had access to the contents when the doctors appeared to testify.

[45] As to the reports of Drs. Beauprie and Brownstone, these reports were contained in the files of the referring doctor, Dr. Pollett as well as the family doctor, Dr. Spencer. In his factum Mr. Kimball, counsel for Ms. Sharpe states:

> The Respondent was unaware of the existence of these reports and received knowledge of the reports at the same time as the Appellant when the up to date files were made available at Trial when the doctors attended to testify.

[46] Faced with this discovery, Ms. McKenna, on behalf of the appellants, proposed two options for the trial judge's consideration. First, permit the plaintiff to finish her case and then adjourn until after the Christmas break to allow the Abbotts to present the defence case at which time the appellants <u>might</u> (and this was not stated explicitly so I must infer) arrange to interview Dr. Beauprie, or discover him, or have him attend at trial as a defence witness. The other option was to ask for a mistrial.

[47] Edwards, J. refused to declare a mistrial. I have no reason to question the wisdom of that decision. An examination of the transcript and running commentary among counsel and the judge on this controversy indicates that the appellants never formally sought an adjournment. Nor is there any indication that contact was made or attempted, with either of these physicians during the Christmas break when there was certainly time to do so. If there had been any real prejudice to the appellants' position, it was never articulated.

[48] More importantly, any disadvantage to the appellants could easily have been addressed during the Christmas break by arranging for Drs. Brownstone or Beauprie to be examined at discovery, or subpoenaed with their files to attend at trial. If such reasonable efforts proved unsuccessful, then a legitimate case might have been made for an adjournment to accommodate the doctors' schedules, provided the trial judge thought it necessary in order to compensate for any <u>real</u> prejudice suffered by the appellants.

[49] Based on this record I am not prepared to say that the trial judge erred in his handling of the situation. The trial process is by its very nature, highly dynamic. Questions of evidentiary admissibility or exclusion as well as other procedural or logistical matters arise frequently and are typically dealt with on the spot, as matters arise.

[50] Before concluding my consideration of this particular complaint, I do wish to express my concern that counsel for Ms. Sharpe did not become aware of the existence of reports from Drs. Beauprie and Brownstone until they - like appellants' own counsel - first opened and reviewed Dr. Pollett's file during the course of his testimony. One would expect that timely pre-trial preparation would have revealed any other treating physicians' involvement and more particularly the existence of their actual written reports, long before this "discovery" in the heat of trial. The "eleventh hour" revelation of such important information, naturally leading to the controversy I have described, is disquieting.

Discovery evidence

[51] The next, and somewhat similar complaint relates to the discovery evidence given by both the respondent, and her family physician Dr. Spencer. This ground of appeal states:

> ***The Learned Trial Judge erred in failing to explain to the jury the significance of the discovery evidence of the Plaintiff and Dr. Spencer and in refusing to allow a copy of the Spencer discovery evidence to be provided to the jury.***

[52] Notwithstanding Ms. McKenna's concession that nothing in Justice Edwards' charge constituted reversible error, it would appear that with this particular complaint, as well as that set out at ¶ 78, *infra*, the appellants do allege legal error in the manner in which the trial judge instructed the jury, or the evidence he allowed them to consider. Accordingly, I will consider the appellants' complaints as though error in law were being asserted. This ground, as framed, raises two separate allegations. The first alleges error on the part of the trial judge in charging the jury, the second concerns an alleged "refusal" to accede to the appellants' request to have the entire transcript of Dr. Spencer's discovery examination introduced into evidence.

[53] I will deal with the second point first. Appellants' counsel has now confirmed in writing following this hearing that no such request is reflected in the record. Accordingly there was no "failure" on the part of the trial judge meriting our review.

[54] As to the complaint that the judge neglected to explain to the jury the significance of Ms. Sharpe's and Dr. Spencer's discovery evidence, this too is without merit. Counsel for the appellants used Dr. Spencer's discovery evidence in the course of her cross-examination, and this evidence was referred to both in the course of her summation to the jury, and in Justice Edwards' charge. Dr. Spencer confirmed his discovery testimony in his evidence at trial, and in his charge the trial judge said he did not think there was any contradiction. It is apparent that Justice Edwards did not attach the same significance to this evidence, as did counsel for the appellants. Further, in her closing address to the jury, appellants' counsel referred to the relevant portions of the discovery transcript and invited the jury to agree with her that Dr. Spencer had changed his mind because he had adopted someone else's opinion. This view was squarely and persuasively put to the jury by appellants' counsel. It was open to them to accept this argument, or reject it. There is no indication the jury did not fully appreciate the significance of the discovery evidence.

[55] Finally, appellants' counsel did not object to the trial judge's charge. For all of these reasons I would dismiss this ground of appeal.

Mention of "insurance"

[56] The appellants' next complaint is that the judge erred in his handling of the revelation during trial that "an insurance company" was behind the defence of the law suit. The issue is framed by the appellants in their factum in this way:

> ***The Learned Trial Judge erred in failing to withdraw the case from the jury, upon discovery of comments by Dr. H. Pollett as to the existence of an insurance company, and the strategy attributed to the insurance company.***

[57] The reference by Dr. Pollett to the "insurance company" occurred not in his testimony but in a chart note made a few days before the trial began. Neither party noticed that entry when Dr. Pollett's updated file was introduced into evidence. Ms. Sharpe's lawyers did not become aware of the entry until appellants' counsel first raised the issue. The relevant portion of the chart note stated:

> Evidently, the insurance company is trying to make out that it is from walking on concrete floors but she has been walking on concrete floors long before the accident and never had any problems.

[58] Justice Edwards was satisfied that it was highly unlikely the jury had seen the reference. There was no evidence that they had. Even if members of the jury had read the notation, the trial judge determined that it was not especially prejudicial and could be appropriately dealt with by him in specific directions to the jury. That was a perfectly sensible approach.

[59] I do not accept the appellants' characterization that the reference in Dr. Pollett's chart note was set out "in very negative terms." It seems to me the language used is a clear, concise and accurate expression of the essence of the defence theory in the case.

[60] It should be noted that in raising the matter, appellants' counsel sought to have the jury discharged as a "preference," but acknowledged that there were other options. Counsel stated:

> One option is to remove page 24 before the jury gets back at their books . . .

[61] In resolving the matter, the judge ruled that the offending page should be removed from the exhibit books, and this was done. He further determined that it might be appropriate to charge the jury on the question of "insurance" if counsel preferred that this be done. In addition, he invited appellants' counsel to offer further suggestions on the wording of his instructions in this respect. Although counsel for Ms. Sharpe felt it unnecessary, counsel for the appellants asked that the jury be charged on this issue. She approved the wording used, as this extract from the record reveals:

> THE COURT: Okay. Just one point I wanted to check, pursuant to our discussion yesterday. Ms. McKenna, do you still want me to raise the insurance issue with the jury? In case you did I was just - I just drafted the following:
>
>> You may be wondering whether there is an insurance company involved in this case. If so, I must caution you to disregard any such notion. Whether or not there is an insurance company involved is simply not relevant. You must answer the questions put

> to you strictly on the basis of the evidence you have heard in this court.

If you want me to read that to them I will.

MS. MCKENNA: That would be my preference.

[62] It should also be noted that earlier in the trial, appellants' counsel had herself raised the issue of insurance when cross-examining Dr. Morgan. Although the word "insurance" was not used, counsel repeatedly referred to "coverage" in relation to payment for chiropractor treatments.

[63] A jury will not automatically be discharged if it is disclosed that a defendant is covered by insurance. The decision whether to discharge the jury is a matter within the trial judge's discretion. In exercising that discretion the trial judge must weigh all of the circumstances and decide whether the reference to insurance has caused real prejudice to the defendant, in the sense that a substantial wrong or miscarriage of justice has occurred, thus making it appear that it would be unfair to continue with the present jury. **Hamstra (Guardian ad litem of) v. British Columbia Rugby Union**, [1997] 1 S.C.R. 1092. Finally, I would also observe that automobile insurance is mandatory in Nova Scotia. I expect such a notorious fact is well within the common knowledge of persons chosen for jury duty. This would seem to me to be a relevant consideration for any trial judge to take into account.

[64] It is clear to me that Justice Edwards exercised his discretion judicially. There is no basis for questioning his ruling.

Going beyond the written report

[65] The next in what I have termed a miscellany of complaints concerns Edwards, J.'s ruling with respect to the scope of Dr. Pollett's testimony. Appellants' counsel expresses it this way in her factum:

> ***The Learned trial judge erred in allowing the expert witness Dr. Harry Pollett to testify as to matters not addressed in his written opinion.***

[66] This complaint arose during Dr. Pollett's direct examination when he was asked by Ms. Sharpe's counsel certain questions concerning the source of Ms. Sharpe's pain. Dr. Pollett started to speak of studies involving victims of whiplash type injuries and the varying recovery time for certain segments of those study groups. Appellants' counsel objected, complaining that Dr. Pollett was "going well past the four corners of his opinion." The objection was made and the trial judge dealt with it in the presence of the jury. This is what he said:

> **THE COURT:** Well it seems to me that Dr. Pollett, in giving opinion evidence on pain management, that necessarily incidental to giving such opinion, he must have some understanding of the mechanism of pain and what causes the various conditions and I really don't see how he could give expert opinion evidence in the designated field unless he at least incidentally touched on, in this case, the so-called whiplash. I understand there's quite a bit of controversy about whether that's an appropriate term and . . .
>
> **DR. POLLETT:** And I don't particularly like the term either but it's considered more of a legal than a medical term.
>
> **THE COURT:** Even in the legal field, however, there is a condition that I suppose laypeople understand as such. So I'm not going to permit the objection and at this point I just want to do a little follow-up explanation to what I gave you before, members of the jury - to what I gave you before Dr. Pollett took the stand. You will recall that when I asked Mr. Kimball in what fields he was going to qualify him and Ms. McKenna stood up and said she had no trouble with his qualifications and she was familiar with them so at that point, indicated she was not - implicitly she was indicating to me that she was not opposing the doctor being permitted to give expert opinion evidence in the field of anesthesiology (sic) and pain management. So I would have been content to so qualify him at that point. Then Mr. Kimball proceeded to elicit the doctor's qualifications despite the fact that they had been acknowledged by opposing counsel. That's - I shouldn't say par for the course but that's frequently done because, as I indicated to you, it's for you to weigh and assess any opinion evidence given by Dr. Pollett and decide what, if any, weight you're going to place upon it when you're making your decision in this case. And so counsel, like Mr. Kimball did, with that in mind, will usually elicit from the doctor his qualifications through his *curriculum vitae* so you will know what training and experience he's had which enable him to give the opinion which he's proffering to the court. So that's the reason that type of examination took place. Now you heard Ms. McKenna object on the point about the explanation of the whiplash injury as being outside the permitted parameters, if I can put it that way, of the expert opinion evidence and you heard my ruling that I thought on the contrary, I thought it was necessarily incidental to his being able to

> give an opinion in that field. So I overruled the objection and I'm going to permit Dr. Pollett to continue with his explanation that he was starting to do before the objection arose. Mr. Kimball?
>
> **MR. KIMBALL:** Thank you, My Lord.

[67] Now the appellants complain that Justice Edwards erred in failing to restrict Dr. Pollett to what he said in his written opinion.

[68] I respectfully disagree. The only report provided by Dr. Pollett prior to this trial was dated June 11, 2001. His subsequent treatment of Ms. Sharpe was ongoing. He diagnosed her as suffering from reflex sympathetic dystrophy in the right leg. The appellants say that Dr. Pollett had not diagnosed the respondent with chronic pain in his June 2001 report, and that he only began to go into detailed evidence regarding chronic pain during his testimony.

[69] Almost four and one-half years had elapsed between the time of Dr. Pollett's report and his appearance at trial. Without in any way ignoring plaintiff counsel's obligation to file an updated medical report in cases where the physician's opinion is no longer complete (**CPR** 20.08 and 31.09), one might reasonably expect that in a case like this defence counsel will also take steps to update their understanding of any key physician's ongoing treatment and evaluation of the claimant, through customary pretrial procedures such as renewed discovery, use of interrogatories, etc.

[70] The record shows that Dr. Pollett's report was in the hands of the appellants for some considerable time prior to trial. The appellants now say Dr. Pollett had not diagnosed a chronic pain condition, yet it is clear to me that the conditions diagnosed in his report were all conditions associated with chronic pain. On the issue of causation, the inference is also obvious from reading Dr. Pollett's report that he drew a causal link between his diagnosis and the injuries Ms. Sharpe sustained in the motor vehicle accident. It would be difficult to read Dr. Pollett's report in any other way.

[71] In the result there is no merit to the submission that the trial judge erred in permitting Dr. Pollett to testify as he did. I would dismiss this ground of appeal, and for the same reasons reject the collateral argument advanced before us at the hearing that the judge erred in failing to restrict Ms. Sharpe's chiropractor, Dr. Kyle

Morgan from going beyond his written reports, or expertise, or failing to give the jury a limiting instruction with respect to those experts.

[72] I will now address the remaining “miscellaneous” grounds advanced by the appellants. These allege errors on the part of both the jury and the trial judge.

Importance of employment history

[73] The appellants complain that:

> ***The jury failed to consider the instruction of the Learned Trial Judge as to the weight to be given as to the employment history of the Plaintiff.***

There is no merit to this submission. This is really a complaint to do with the jury’s assessment of the evidence and their award of damages which the appellants describe as “perverse.” I prefer to address that point when I address the specific damage awards, commencing at ¶ 107, infra.

Adjournment

[74] The appellants complain that:

> ***The Learned Trial Judge erred in allowing the trial to proceed when it was apparent that it could not be completed without a lengthy break.***

This was clearly a matter within the trial judge’s discretion. I reject the submission that Justice Edwards treated the parties unfairly in his exercise of that discretion. A trial judge’s right to supervise and control the trial process includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable deference on appeal unless it can be shown that the judge erred in principle, or that the judge did not exercise his or her discretion judicially. **Webber v. Canada Permanent Trust Company v. Long** (1976), 18 N.S.R. (2d) 631 (A.D.), and **Moore v. Economical Mutual Insurance Co.**, [1999] N.S.J. No. 250.

Failure to explain defence theory

[75] The appellants complain that:

> ***The Learned Trial Judge erred in failing to remind the jury that all of the expert evidence was that the Plaintiff's alleged leg and hip pain was unrelated to any previous back pain, and in implying to the jury that back pain occurring prior to the hip pain, had significance.***

There is no merit to this complaint alleging error in the trial judge's charge to the jury. No objection was raised by counsel at the time. While not determinative, a failure to raise objections at trial militates against appellate interference with a jury's decision. See the cases referred to at ¶ 37, supra.

[76] It should also be noted that when Justice Edwards asked counsel for submissions following his charge, counsel for the appellants did not object, but rather stated:

> The only other comment that I would have is, you did mention that I argued that the back pain was a red herring. And I think it's important to note that all of the physicians that testified, whoever they testified for, or on behalf of, all said and all concurred on one thing, in that the pain in that leg is originating in the hip and is not related in any way to back pain, and that's why we (sic) says it's a red herring. But that's one point they all concurred on. Now, that was in my - <u>when you referred to my position, that was in my position. So that probably satisfies that concern</u>. (Underlining mine)

Importance of vocational alternatives

[77] The appellants next complain that:

> ***The Learned Trial Judge erred in failing to instruct the jury to consider the vocational alternatives available to the Plaintiff.***

There is no merit to this complaint. The appellants never objected to this "error" in the charge. Neither is it canvassed in the appellants' submissions. No evidence was called or presented at trial pertaining to any particular vocational alternatives available to Ms. Sharpe. This was raised by the appellants in cross-examination of the respondent, who maintained that she was unable to work. In any event, I am satisfied that in his charge the judge specifically noted appellants' counsel's

suggestion that the respondent might pursue other options. In this and other respects the judge's reference to the evidence in his charge was balanced and fair.

Actuarial evidence

[78] The appellants complain that the trial judge:

> ***. . . erred in allowing the report and evidence of actuary Paul Conrad to go to the jury, when the prejudicial effect outweighed the probative value in the circumstances.***

I would dismiss this ground of appeal. The cases relied upon by the appellants such as **Morriscey v. Zwicker**, [2001] N.S.J. No. 126 (C.A.) and **Hillier v. Mann** (2001), 199 N.S.R. (2d) 238 (S.C.) were raised at trial when objection was first taken to the introduction of Mr. Paul Conrad's actuarial report. Evidently the appellants' concern was that the jury would be "inflamed" by the actuary's calculations, and led astray in their consideration of the evidence. The only basis for exclusion advanced when making the objection was that leave to introduce such reports had occasionally been refused by some judges in other cases.

[79] The trial judge - properly in my view - did not accept the argument that simply because the actuarial report referenced substantial figures, it was prejudicial or inflammatory. Edwards, J. took great pains both at the time the actuarial report was first introduced, and during his charge, to caution the jury on the use of the report and Mr. Conrad's testimony. Edwards, J. prefaced his remarks with the following:

> Before I say anything about the actuarial report. I give you overriding caution that you must be very careful in the use to which you put this report, because, as Mr. Conrad acknowledged on the witness stand, it is based on assumptions. And so its only utility is if the assumption on which it is based are borne out in the evidence.

And in his charge, the judge stated:

> . . . there is good reason for doubting the utility of the actuarial report. So you have to be cautious when you use it.

[80] Further, the trial judge noted that the report did not take into account certain negative contingencies and accordingly gave these directions in his charge to the jury:

> . . . there are problems with Mr. Conrad's table on page 4 which severely compromise its utility to you.
>
> . . .
>
> So it is extremely problematic to apply the tables given to you by Mr. Conrad in this case, I suggest. But I admitted the actuarial tables and you have that option. But I just want to point out the pitfalls and underline the fact that you have to be very cautious using them.
>
> . . .

[81] Further, in answering the question with respect to Ms. Sharpe's claim for future loss of income, the judge explained to the jury that one alternative would be to consider a loss of diminished future earning capacity. He pointed out that such an award would not involve a mathematical calculation and he charged the jury:

> You may feel that there are so many possibilities and uncertainties that the actuarial projections are not helpful to you. In that case you will disregard Mr. Conrad's report altogether and put your own figure on the lost or diminishment of future income capacity.

[82] Given these clear and pointed instructions, there is no merit to the complaint that the judge erred in permitting the actuary to introduce his report and testify with respect to it. Evidently the appellants' counsel was satisfied with the judge's handling of the subject in view of what she said at the time:

> The future loss question, I thought your instructions on the whole actuarial report was very fair. I don't think they would be left with the impression that just because she was a young person they couldn't have used the chart. She is not comparable to a very young person who is in grade 6 or whatever. She does have some track record. You referred to that track record and that's what creates the difficulties. And with respect to this fourth issue on that, this final issue, the actuarial report, was it made plain that they can go on and answer question (a) with or without the actuarial report. And my understanding - and I took detailed notes of what you said on that. And it's pretty clear to me that you said, "Here is how you can answer 4(a). You can do it with the actuarial report, you can use your own figures, you can

> do whatever." And I think it was abundantly clear to them that they could do whatever in that regard. (Underlining mine)

Conclusion

[83] In conclusion, I have dismissed each of the grounds alleging error on the part of Justice Edwards in the way in which he handled evidentiary and procedural occurrences. These were largely matters of discretion. I see no evidence that he failed to exercise his discretion judicially, or that any of his rulings resulted in an obvious injustice.

[84] It seems to me that there is a danger in accepting an invitation to treat a series of "adverse" rulings as leading to a "constellation" of errors said to have created "an atmosphere" where jurors were directly or incrementally led astray, thus resulting in a wholly erroneous assessment of damages. There is a short answer to rejecting such an invitation. Rulings on matters of law are either right or wrong. They are gauged on a standard of correctness. Rulings that engage the exercise of a judge's discretion must reflect that the discretion was exercised judicially and did not lead to a manifest injustice. Short of that, it is not our business to interfere. One does not "add up" the number of adverse rulings as a substitute for the requisite analysis, on a proper standard of review, that I have just described.

[85] Finally, most of the appellants' complaints involve the *management* of this case by Justice Edwards. Trial judges should not be timid or restrained in their efforts to effectively manage lawyers, parties, witnesses, and time. Judges should demand and enforce civility, decorum, punctuality, and effective use of resources in their courtrooms. In fulfilling their responsibilities trial judges must strive to be impartial, clear, firm and fair. When engaged in appellate review, our deference to discretionary decisions should reflect our understanding of the accommodation that ought to be extended to trial judges whose duty it is to manage the efficiency of proceedings, in a way that respects the interests of the parties, and preserves the integrity and fairness of the proceedings.

[86] While expressed in a criminal case, the observations of Ritchie, J., speaking for the majority in **Emkeit v. The Queen,** [1974] S.C.R. 133 is as apposite in civil matters, whether the judge is sitting alone or presiding with a jury:

> In my opinion the administration of justice in our Courts would be gravely hampered if it were not recognized that a trial Judge has a wide discretion as to the manner in which a trial is to be conducted . . .

[87] It is hardly unique to find, as in this case, different medical theories advanced by the parties, coupled with an attack on the veracity and reliability of the claimant's evidence. The position taken by the appellants in this case was to present expert medical evidence which minimized the extent of the respondent's injuries and complaints and challenged any causal link between the motor vehicle accident and those ongoing complaints of which she claims to suffer, thus preventing her from any gainful employment. As well, the appellants mounted a vigorous challenge to the quantification of the respondent's claim, especially in light of her previous training, work ethic and employment history. The jury was presented with two very different positions, each throughly and ably presented by experienced counsel. In the end it must be assumed that the jury preferred the position advanced by the respondent, yet perhaps not without the careful degree of skepticism urged by counsel for the appellants. The result in this case is not to say that those defending such claims are left to the arbitrary whims of jurors unrestrained by legal precedent. Every case will be fought and defended upon the evidence that arises in that particular proceeding, with strategies that are deemed appropriate in the circumstances. Whether the tactics include the efforts employed in this case, or justify in different circumstances such other techniques as covert video surveillance to expose bogus claims, the fact remains that in resisting a lawsuit, a defendant will always have the right to attack the plaintiff's credibility, subject only to the rules of evidence and the bounds of proper advocacy. One of the trial judge's responsibilities in managing the proceedings is to effectively deal with administrative matters and carefully supervise the presentation and admissibility of evidence. Once the judge has fulfilled these important functions as manager and gatekeeper, it will then be a matter for the jury to decide whether causation and entitlement have been established to the requisite degree of proof.

[88] It is with time honoured procedures and safe-guards such as these that trumped-up or exaggerated claims are discovered, and legitimate claims properly compensated.

Remaining issues

[89] There remain two other issues: the first challenges the jury's verdict on the basis of both causation and quantum of damage; the second attacks the trial judge's assessment of costs. I will now turn to a consideration of these issues.

Jury's questions and answers

[90] To give them proper context, I will reproduce the questions asked and answers given by the jury:

> Q.1(a) Did the motor vehicle accident of October 10, 1998 cause Tammy Sharpe to suffer injury or injuries?
>
> A.1(a) Yes
>
> Q.1(b) If the answer to 1(a) is yes, what was the injury or injuries caused by the motor vehicle accident of October 10, 1998?
>
> A.1(b) Neck, shoulder, mid back, lower back, legs and hips
>
> Q.2 To what amount, if any, is the plaintiff entitled for general damages, that is, for pain, suffering, and loss of amenities?
>
> A.2 $225,000.00
>
> Q.3 To what amount, if any, is the plaintiff entitled for past loss of income, (ie. between the date of the accident and the date of trial, December 12, 2005)?
>
> A.3 $70,000.00
>
> Q.4(a) To what amount, if any, is the plaintiff entitled for future loss of income, (ie. from today forward)?
>
> OR
>
> Q.4(b) To what amount, if any, is the plaintiff entitled for lost or diminished future earning <u>capacity</u>?
>
> A.4(b) $400,000.00
>
> Q.5 To what amount, if any, is the plaintiff entitled for cost of future care?

A.5 $50,000.00

Q.6 To what amount, if any, is the plaintiff entitled for loss of valuable services?

A.6 $5,000.00

[91] As noted previously, the appellants have challenged the jury's decision both with respect to their finding that a causal link existed between the respondent's complaints and the subject motor vehicle accident, and their assessment of damages. For convenience, I will deal with both of these assertions, beginning with the challenge concerning causation.

2. Did the jury err by arriving at a perverse and wholly erroneous estimate of the respondents' damages?

Causation

[92] This particular ground of appeal is described:

> ***The verdict of the jury as to the causal link between the Plaintiff's pain and the motor vehicle accident was a finding that could not be made upon consideration of the evidence adduced at trial.***

With respect, I see no merit to the this ground of appeal. There was ample evidence before the jury which would permit its members to reasonably conclude that Ms. Sharpe's injuries and ongoing condition were real, and disabling, and causally linked to the appellants' negligence, thus entitling her to compensation for her loss.

[93] It should be noted at the outset that the jury's answers were both responsive and consistent. I think it instructive to list what the jury must have determined in order to answer the questions as they did. They must have been satisfied:

(1) that the Appellant was completely responsible for the accident;

(2) that the accident caused injuries to the Respondent;

(3) that the injuries sustained by the Respondent as a result of the accident included the injuries noted almost immediately to the neck, shoulder and back as well as the injuries that did not become apparent until months later, the lower back, leg and hip;

(4) that as a result of the accident injuries the Respondent has endured and will continue to endure significant pain and suffering;

(5) that because of the accident injuries she has been unable to be gainfully employed in the past, present and future;

(6) that she requires further treatment for these injuries; and

(7) that she has or will suffer a loss by way of valuable services.

[94] Without yet commenting upon the *quantum* of the awards under the several heads of damages, I am satisfied there was ample evidence available to the jury to reasonably sustain each of these seven critical conclusions. The appellants admitted responsibility for the accident, and conceded that Ms. Sharpe sustained certain injuries as a result of the accident. As counsel acknowledged, and as emphasized by the trial judge, the real question for the jury was whether the respondent had proven that her right hip and leg pain were caused by the accident. This was a critically important determination, since it was the hip and leg pain that constituted the respondent's most disabling and painful condition.

[95] The weight of the medical evidence supported the respondent's contention that her disabling condition was caused by the accident. This was the effect of the medical testimony called by the respondent through the reports and testimony of Drs. Pollett, Spencer and Morgan. Ultimately the only contrary evidence was the opinion of Dr. Yabsley, who was called by the appellants and who had never examined the respondent.

[96] In Dr. Yabsley's opinion, Ms. Sharpe had suffered only a minor sprain, leading to pain in the neck, shoulders and upper back, but without any significant low back problems. Months later she developed a symptomatic right trochanteric bursitis of her hip. Dr. Yabsley failed to see any causal connection between that onset and this accident. He was critical of the usefulness of the photonic treatments undertaken by Dr. Pollett. In Dr. Yabsley's view, Ms. Sharpe's complaints were largely resolved. He said that her condition develops "spontaneously" and that "it's

very rare for it to develop following an injury." He described it as a "very common" ailment brought on by inflammation. The treatment he recommends for patients was to "leave it alone and do nothing." The "best treatment" was to occasionally inject the site with cortisone. Dr. Yabsley said that most people get it, and that it eventually heals.

[97] Evidently the jurors were not persuaded by Dr. Yabsley's evidence. Once they determined that the disabling condition (leg and hip pain) was caused by the motor vehicle accident, the other conclusions and awards could be reasonably expected to flow from that finding, including past loss of income, diminished future earning capacity, cost of future care, and loss of valuable services.

[98] Based on the jurors' answers they must have accepted the medical evidence presented by the respondent, and to the extent it differed from the medical evidence called by the appellants must have rejected that position.

[99] There was ample and uncontradicted evidence that Ms. Sharpe was in good physical condition at the time of the accident. She had taken the necessary physical to participate in the police officers' assessment test. She was an active young woman who enjoyed the outdoors and who played baseball, arm wrestled, practised ju jitsu, walked and swam. Ms. Sharpe was happy and energetic. She mowed the lawn and shovelled snow at her parents' residence. She helped with domestic duties around the house.

[100] After the accident Ms. Sharpe required extensive and ongoing treatment for her injuries. She was prescribed very serious medications including the narcotic Oxycontin. She undertook a lengthy regimen of physio therapy and chiropractic treatments. She consulted with a number of specialists. Despite these interventions her overall condition did not improve. Her situation deteriorated.

[101] Dr. Spencer testified that he made the causal connection between the motor vehicle mishap and Ms. Sharpe's continuing pain after reviewing Dr. Watts' letter and reviewing his notes. He acknowledged that psycho-social factors including emotional stress, work environment and financial circumstances can aggravate or affect the rate of recovery.

[102] Ms. Sharpe attended the pain clinic and remains a patient of Dr. Pollett at the present time. Dr. Pollett testified that the respondent suffers from "reflex sympathetic dystrophy in the right leg, accompanied by some myofacia pain in the lower back and in the neck and shoulders and some tension headaches." Dr. Pollett said his diagnosis was consistent with the history of a motor vehicle accident and could not think of any other explanation although he agreed Ms. Sharpe's case was an unusual presentation.

[103] All of the evidence confirmed that she now lives in a state of serious chronic pain. Even Dr. Yabsley acknowledged that Ms. Sharpe lived in pain.

[104] The evidence also established that her pain had been disabling. No one said Ms. Sharpe was unable to work, forever. On the other hand, no one testified that she ought to be able to return to employment tomorrow. The weight of the evidence offered by Ms. Sharpe's physicians and her other health care professionals was that her pain was severe, and chronic, and that on account of it she would be unable to undertake any meaningful employment, indefinitely.

[105] I am satisfied that the jury did not err in finding and accepting that a sufficient causal link between the respondent's motor vehicle accident and the disabling nature of her resulting injuries had been proven on a balance of probabilities.

[106] I will now turn to a consideration of the appellants' vigorous attack on the *quantum* of damages awarded by the jury.

Damages

[107] This ground of appeal reads:

> ***The verdict of the jury on all heads of damages was unreasonable, perverse, exorbitant, and not in keeping with the jurisprudence, and not a finding that could be made upon consideration of the evidence adduced at trial.***

[108] The nature of this ground of appeal requires an analysis of the jury's awards under each of the various heads of damage. For convenience, I will restate those specific awards.

Non-pecuniary damages for pain suffering and loss of amenities:	$225,000.
Past loss of income:	70,000.
Diminished Future Earning Capacity 400,000.	
Cost of future care	50,000.
Loss of valuable services	5,000.
TOTAL:	**$750,000.**

Non-Pecuniary Damages for Pain and Suffering and Loss of Amenities: $225,000.00

Standard of Review

[109] In any appellate review of a jury's award of civil damages, one starts from the fundamental principle that a jury's verdict will not be disturbed unless it is so plainly unreasonable and unjust as to satisfy us that no jury reviewing the evidence as a whole and acting judicially could have reached it. Where damages at trial are determined by a judge sitting alone, then unless it is evident that in assessing damages the judge applied a wrong principle of law (as for example taking into account some irrelevant feature, or omitting a relevant one), or where the damages awarded are so inordinately low or so inordinately high as to constitute a wholly erroneous assessment, an appellate court will refuse to intervene. These simple statements of the law have been applied throughout Canada for at least a century. See, for example, **McCannell v. McLean**, [1937] S.C.R. 341; and **Nance v. British Columbia Electric Railway Company Limited**, [1951] (AC) 601.

[110] While great deference must be afforded the jury on both findings of fact and the assessment of damages, appellate courts will intercede when satisfied that the

jury's award is one that "shocks the conscience" of the court, and reflects "palpable and overriding" error as being out of all proportion to proper compensation for such injuries and loss. **Young v. Bella**, [2006] 1 S.C.R. 108; **Morriscey v. Zwicker** (2001), 192 N.S.R. (2d) 268 (C.A.); and **Jessen v. CHC Helicopters International Inc.** (2006), 245 N.S.R. (2d) 316 (C.A.).

[111] Appellate courts "have a responsibility to moderate clearly erroneous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly situated Plaintiffs" . . . (faulty) ". . . awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and as a consequence undermining a public confidence in the courts." **Boyd v. Harris** (2004), 237 D.L.R. (4th) 193 (B.C.C.A.) at ¶ 11.

[112] In my respectful view this is a case where we must intervene. An award to Ms. Sharpe of $225,000. for non-pecuniary damages is out of all proportion to awards for similar injuries in Canada. For reasons I will now develop I would reduce that award to $100,000.00.

Setting "Limits"

[113] I recognize that in this case the jury was not given any instruction with respect to a suitable dollar range for what might be considered by them to be an appropriate award of damages. In my experience juries in Nova Scotia are not given such guidance by trial judges except in the rare circumstance, if ever, where all parties agree to such an instruction. In such an event, the trial judge's charge would have to be very carefully crafted so as not to trespass on the jury's function, which as the triers of fact, is to apply their collective judgment, life experience, community values and common sense as the sole and final arbiter in deciding an appropriate damage award.

[114] The invitation to consider such instructions - while in no way mandatory - has certainly been recommended by the Supreme Court of Canada in **ter Neuzen v. Korn**, [1995] 3 S.C.R. 674, at least in cases involving catastrophic injuries. There, the plaintiff participated in an artificial insemination procedure and contracted HIV from infected semen. The trial judge did not charge the civil jury with respect to the "rough upper limit" on non-pecuniary damages mandated in the **Andrews** "trilogy."

The jury awarded $460,000. On the issue of whether the trial judge ought to have charged the jury on the upper limit, Sopinka, J., writing for a 6:1 majority said:

> [111] The second question which arises with respect to non-pecuniary damages is whether the trial judge ought to have charged the jury on the upper limit. This is a difficult question because, on the one hand, in a case in which a jury would not have awarded damages in the range of the upper limit, the jury will be unduly influenced by an instruction that refers to a higher figure. On the other hand, it seems wrong not to advise the jury in an appropriate case that as a matter of law and policy, there is a limit. The jury may struggle for nought with the assessment only to learn later that their labours were in vain. Moreover, judges are permitted, and indeed required, to give the jury guidance as to the proper conventional figure. In Crosby v. O'Reilly, [1975] 2 S.C.R. 381, Laskin C.J., for the Court, stated, at pp. 386-87:
>
>> I cannot agree with the Alberta Appellate Division that where a survival action for the benefit of a deceased's estate is tried by judge and jury the jury should be instructed as a matter of law that $10,000 is the present upper limit of an award. I do not think that damages can be so exactly defined by putting them on the basis of a legal limitation. At the same time, it is only common sense, where an appellate court is to have the final say on what is a proper conventional figure, that the jury be given careful guidance lest the result be, as here, an extravagant figure leading to successive appeals at a risk of costs that will eat up the ultimate award. Rather than fix the direction as one of law governing the upper limit of an award, the trial judge should direct the jury, in the light of the evidence respecting the deceased in all of his or her qualities, mode of life and prospects, in the light of age and physical condition, that a figure beyond a particular sum, which may be less than $10,000, may be regarded as excessive.
>
> It would be impossible for a trial judge to comply with this instruction with any degree of intellectual honesty and not mention that there is an upper limit. Indeed, the statement by Laskin C.J. clearly implies that if an upper limit had existed, the jury should be told about it.
>
> [112] Accordingly, in my view, the trial judge should instruct the jury as to an upper limit, if, after considering the submissions of counsel, he or she is of the opinion that the damages by reason of the type of injury sustained might very well be assessed in the range of or exceeding the upper limit. The instructions may include an explanation of the reason for the cap.

> [113] On the other hand, if the trial judge is of the view that the injuries involved will not likely produce an award approaching the rough upper limit, it is best that the trial judge not charge the jury on the matter. The upper limit, like any other matter of law, need not be placed before the jury where the issue does not reasonably arise on the facts of the case.

[115] Justice Sopinka's observations were delivered in the context of a "catastrophic injury" case. The "cap" for non-pecuniary damages in such circumstances was set at $100,000 by the Court in the 1978 **Andrews** trilogy. With inflation, this sum would now equal approximately $300,000 (although of course the proper adjustment of the $100,000 cap for inflation is not before us on this appeal).

[116] Recognizing that this sum is the current ceiling for non-pecuniary damages in cases where the incident produced permanent, catastrophic and totally disabling injury, how does such a benchmark apply, if at all, to "lesser" injuries?

Whether the "cap" applies

[117] The issue of the application of the "cap" to cases that fall outside the bounds of catastrophic bodily injury, has been left open by the Supreme Court of Canada. Recently the Court has stated that the "cap" on non-pecuniary damages does not apply in assessing damages for defamation, **Young v. Bella**, [2006] S.C.J. No. 2. There, one issue before the court was whether the "cap" in personal injury cases should be applied to jury awards in other circumstances. In **Young**, the jury had awarded the plaintiff $430,000.00 in non-pecuniary damages for the university's egregious treatment of the claimant while a student, which led to completely unwarranted accusations that she was a child molester. The Court unanimously upheld the jury's award, rejecting the argument that the "cap" in personal injury cases ought to be applied in cases of negligence causing economic loss. However, in discussing the application of the "cap" in bodily injury claims that are not so catastrophic, the Court reserved its judgment (at ¶ 65-66).

> The respondents have not established why the policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, should be extended to cap a jury award in a case such as the present . . . In our view, the case for imposing a cap in cases of negligence causing economic loss is not made out here.

. . .

> We leave open for consideration in another case (where the policy considerations supporting a cap are more fully developed in evidence and argument) the issue of whether and in what circumstances the cap applies to non-pecuniary damage outside the catastrophic personal injury context. While the damages are higher than we would have awarded in the circumstances, the law assigns the task of that assessment to the jury. Given our conclusion that the cap does not apply in this case, the principle enunciated in Hill that an appellate court should not interfere with a jury assessment of non-pecuniary damages unless it 'shocks the conscience of the court" precludes reduction of the award for non-pecuniary damages in this case. (Underlining mine)

Thus, the application of the "cap" to bodily injury cases where the injuries cannot be said to meet the "worst," "catastrophic" classification remains a yet to be resolved issue.

A functional approach

[118] The Supreme Court has directed that courts take a functional approach to assessing damages for non-pecuniary loss in personal injury cases.

[119] For example in **Lindal v. Lindal**, [1981] 2 S.C.R. 629 at p. 638, Dickson, J., (as he then was) elaborated upon the Court's reasons for adopting a functional approach in the "trilogy" **Arnold v. Teno**, [1978] 2 S.C.R. 287, and went on to explain that awards for non-pecuniary damages should be moderate:

> The functional approach in the assessment of damages for non-pecuniary loss was adopted by the Pearson Commission in England (*Royal Commission on Civil Liability and Compensation for Personal Injury*, (1978) Cmnd. 7054-I). The Commissioners stated that the main aim of any system for the award of pecuniary damages should be to make good the loss. Non-pecuniary damages should be awarded only when they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost (Vol. 1, paragraph 397). This led the Commissioners to recommend that a permanently unconscious plaintiff should not receive any damages for non-pecuniary loss since the money award could serve no useful purpose (paragraph 398, Vol. 1).
>
> I have already indicated that the social costs of the award cannot be controlling when assessing damages for loss of income and the cost of future care. The plaintiff must be provided with a fund of money which will provide him with adequate,

> reasonable care for the rest of his life. The social impact of the award must be considered, however, in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for damages for non-pecuniary loss is virtually limitless. This is particularly so if we adopt the functional approach and award damages according to the use which can be made of the money. There are an infinite number of uses which could be suggested in order to improve the lot of the crippled plaintiff. Moreover, it is difficult to determine the reasonableness of any of these claims. There are no accurate measures available to guide decision in this area.
>
> A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earnings would have been available for amenities. Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.
>
> A third factor is that damages for non-pecuniary loss are not really 'compensatory." The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate. (Underlining mine)

[120] It follows from this that assessing damages for non-catastrophic injuries cannot simply be a matter of comparing the seriousness of the plaintiff's injuries with those of the plaintiffs in the trilogy and scaling the award back from the maximum. As was said in **Corkum v. Sawatsky** (1993), 118 N.S.R. (2d) 137 (T.D.) at pages 154 - 5, (varied slightly on appeal, but not on this point [1993] N.S.J. No. 490) an assessment of non-pecuniary damages must take account of all of the circumstances in light of the goal of the award of providing some measure of solace for the pain, suffering and loss of enjoyment of life suffered by the plaintiff.

[121] Some scholars have suggested that awards for non-pecuniary losses, as a result of the trilogy, are or should be determined according to a "rough tariff system," in which awards are set on a proportionate basis by comparing the severity of the injury to those in the trilogy and reducing the award from the cap amount accordingly.: see, e.g. K. Cooper-Stevenson, *Personal Injury damages in Canada* (2d, 1996) at 114; S. M. Waddams, *The Law of Damages* (looseleaf edition; updated

to October 2005) at 3.610; J. Cassels, *Remedies: The Law of Damages* (2000) at 161. Some courts have at times accepted this approach: see Waddams, authorities referred to in footnote 181.

[122] Respectfully, such an approach is not consistent with the governing authorities from the Supreme Court of Canada. Under the functional approach mandated by those authorities, the appropriateness of an award cannot be determined simply by comparing the level of disability or pain and suffering by the plaintiff with that of persons entitled to the maximum award: see, e.g. **Koukounakis v. Stainrod**, [1995] O. J. No. 1369 (C.A.) at ¶ 19. As Doherty, J.A. said in **Koukounakis** at ¶ 19:

> . . . any attempt to use the upper limit as more than a very rough guide for comparative purposes ignores the policy reasons underlying the creation of the upper limit. As Dickson, J. said for the Court in Lindal at 637,
>
> . . . the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. . . . In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case 'to meet the specific circumstances of the individual cases.' (citations omitted)

[123] In Nova Scotia the application of the "cap" as a benchmark in assessing damages for non-catastrophic injuries has long been rejected. This is consistent with the functional approach affirmed by the Court in **Lindal**, supra. For example, in **Hawley et al v. Skerry and Curry & Company**, (1983), 61 N.S.R. (2d) 195 (S.C.), Hallett, J. (as he then was) assessed the plaintiff's non-pecuniary damages at $25,000.00, after expressly rejecting the use of an upper limit as a reference point in assessing damages in "lesser" personal injury cases.

> In my opinion, the Supreme Court of Canada was not saying that in every case where a person suffers personal injuries a judge in assessing damages should apply the test that injuries such as those sustained in Andrews, Thornton and Teno cases shall be awarded a maximum of $100,000 and that all other damage awards for non-pecuniary loss shall be scaled down accordingly . . . My readings of those judgments of the Supreme Court of Canada leads me to conclude that the court was merely putting an upper limit on cases of very serious injuries and not establishing a bench mark from which all non-pecuniary damages awards are to be scaled down in accordance with how serious the damages are in relation to those sustained in the aforesaid cases.

. . .

> It is apparent to me that the upper limit of $100,000 is with respect to cases of severe personal injury and not your ordinary case of broken legs and whip-lashes, etc.

[124] The comparative approach to the assessment of non-pecuniary damages was also rejected by the British Columbia Court of Appeal in **Stapley v. Hejslet**, 2006 BCCA 34, appeal dismissed at [2006] S.C.C.A. 100. In that case Kirkpatrick, J.A. for the majority observed:

> The authorities cited . . . negate the proposition that it is proper to compare injuries of a particular plaintiff to those in the Trilogy.
>
> Thus we are left to apply the so-called "horizontal" comparative approach outlined in Boyd at para. 41:
>
>> [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted. (Underlining mine)

[125] Similar approaches have been taken in Alberta, **Pettipas v. Kingbell**, [2000] A.J. No. 165 (Q.B.); in New Brunswick, **Boucher v. Dorion**, [2000] N.B.J. No. 382; in Saskatchewan, **Adam v. Johnson Estate**, [1994] S.J. No. 384 (Q.B.); and in Manitoba, **Voulgaris v. Kereluk**, [1992] M.J. No. 269 (Q.B.).

What facts are to be considered when reviewing a jury award?

[126] In taking a functional approach to our review of the $225,000.00 awarded to Ms. Sharpe for non-pecuniary damages in this case, an especially important question arises. What factual assumptions are we to make in applying the standard of review I have just described, given that there are no detailed findings available from the jury? Are we to infer findings from the size of the award? Are we to consider the range of reasonable findings open to the jury on this record? Or are we to assume that the jury made all findings of fact reasonably available to it and capable of supporting its assessment?

[127] In **Cameron v. Excelsior Life Insurance Co.,** [1981] 1 S.C.R. 138, Laskin, J. (as he then was) stated that:

> [J]ury's findings are, however, entitled to rational appreciation and to be regarded in as favourable a light as the evidence supporting it.

[128] In reversing this court's (majority) decision and restoring the jury's verdict, the Court commended the dissenting opinion of Hart, J.A. and his detailed review of the evidence. There, Justice Hart noted that because of the "great divergence" in evidence and two possible theories for how the accident occurred, the jury could reasonably have accepted either theory. Thus, in approving Justice Hart's approach, the Supreme Court of Canada considered the range of possible findings reasonably available to the jury on the record and capable of supporting its assessment.

[129] The same approach of reviewing the evidence and attributing to the plaintiff the most favourable factual findings is seen in **Young v. Bella**, supra. In that case university officials were sued in negligence for "red-flagging" a student as a potential child abuser. The Supreme Court of Canada overturned the Newfoundland and Labrador Court of Appeal's decision, and restored the jury's award of $430,000.00 for non-pecuniary damages, together with other heads of damages totalling $839,400.00. In reviewing the evidence supportive of the jury's verdict, the Court noted the many contingencies built into the damage calculations presented to the jury, and found that:

> The jury chose to resolve those calculations in favour of the appellant. It was within their province, as triers of fact, to do so. (at ¶ 54)

[130] In its consideration of jury damage awards, we see that the Court has taken an approach which reviews the record and the contingencies presented in ultimately deciding whether the jury's findings were reasonable and such as would support its assessment of damages.

[131] This is the approach we have followed in Nova Scotia. See, for example, **Smith v. Stubbert** (1992), 117 N.S.R. (2d) 118 (C.A.), and **Jessen v. CHC Helicopters International Inc.**, 2006 NSCA 81. Other provinces take a similar tact. See, for example, in British Columbia, **Boyd v. Harris**, 2004 BCCA 146; **White v. Gait**, 2004 BCCA 517; and **Giang v. Clayton**, 2005 BCCA 54; in Alberta,

Gagnon v. Frey, 2005 ABCA 106; and in Ontario, **Padfield v. Martin** (2003), 64 O.R. (3d) 577 (C.A.).

The test

[132] Accordingly, I would hold that the proper approach when assessing and analysing facts said to support a jury's award is to ask whether in fixing damages, the findings that must have led the jury to such a conclusion are reasonable, and are open to it, based on the evidence. Whenever such findings are reasonable, and available to the jury on the record, we must then ask whether the jury's findings are capable of supporting its assessment of damages, having regard to the contingencies that arise in the circumstances of that particular case.

[133] That, however, is not the final step in the analysis. There remains the task of deciding whether the size of the award is the product of palpable and overriding error of fact, which must be judged by comparing the amount of the award to decisions of this court (or other appellate courts) that involved appeals from damage awards at trial. We must decide whether those cases suggest a range of acceptable awards. We must then ask whether this award falls within that range, and if not, is it so far outside the range that it must be varied. I will say more about that at ¶ 146, ff. *infra*.

[134] In awarding the sum of $225,000.00 to Ms. Sharpe for non-pecuniary damages, the jury obviously considered her to have suffered serious and indefinite injuries which have had a significant impact on her enjoyment of life. I am satisfied that those findings were reasonable and available to the jury on this record. It was certainly open to the jury to reject the contradictory evidence offered by the appellants, and award damages to Ms. Sharpe based on reasonable findings most favourable to her.

[135] For example, her family physician, Dr. Spencer, testified that she continued to suffer severe chronic pain, that she was not ready to resume her normal employment, that while she could probably handle most of her domestic and household duties it would only be with difficulty, and that her social and recreational life would be markedly impaired.

[136] Her chiropractor, Dr. Morgan, testified that as Ms. Sharpe still suffered restriction, and pain, and lack of mobility six years after the car accident. It was unlikely that the respondent's injuries would ever be fully resolved, or that she would ever be totally pain-free. He recommended that she continue a maintenance program of chiropractic treatments to bring her some relief and improved mobility, and to allow her to function in her activities of daily living with less difficulty and discomfort. He said Ms. Sharpe should have weekly chiropractic treatments or at the very least a couple of treatments per month. Dr. Morgan said such treatments were not covered under MSI. Unless insurance provided coverage, the patient would have to pay the cost directly: $45.00 for an initial visit and $30.00 for every subsequent visit. When asked whether the respondent would ever be free of pain, given her ongoing complaints six years post accident, Dr. Morgan replied:

> Well at this stage where it's been now almost again six to seven years since the accident, in my opinion I don't know if she will ever be pain-free.

[137] An equally guarded prognosis was given by Dr. Pollett. We see this exchange on direct examination:

> Q. How long, in your opinion, will she have this condition?
>
> A. One thing I don't own in my office is a crystal ball. That's very difficult to predict. Some people will resolve spontaneously. I've been at meetings where we've tried to find the average duration of - of pain with CRPS, and the average of the - this - these were meetings where there were a large number of patients with this condition, and basically we surveyed them to see how long they'd had it. The average person that was there had had it for eight years.
>
> Q. The average?
>
> A. The average. I've seen people who've had it for 25 - 30 years.
>
> Q. Okay.
>
> A. I have - really, it's open-ended.

[138] As I have explained, notwithstanding Dr. Yabsley's opinion to the contrary that it was improbable Ms. Sharpe's back and hip pain were related to the accident, it was open to the jury to reject this view, and accept the position advanced by the

respondent's own health care professionals. Accordingly, as a threshold question, I am not prepared to say that the jury's findings which must have led them to conclude that Ms. Sharpe was entitled to a sizeable award for non-pecuniary damages were unreasonable, or not available on the evidence.

[139] However, I do conclude that the amount of the award under this head of damage reflects palpable and overriding error. The award itself cannot stand when measured against decisions of this court and other appellate courts involving appeals from awards challenged as being perverse.

[140] The respondent cites several cases as justifying her general damage award here. For example, **Marinelli v. Keigan** (1999), 173 N.S.R. (2d) 56 (CA) $80,000.00; **Woods v. Hubley** (1995), N.S.R. (2d) 97 (CA) $95,000.00; **Binder v. Mardo Construction** (1994), 136 N.S.R. (2d) 20 (CA) $100,000.00; and **Jaillet v. Allain** (1995), 165 N.B.R. (2d) 161 (Q.B.) $150,000.00 is also cited. Adjusting these cases for inflation would, so the respondent argues, lead to present day awards of: **Marinelli** - $94,200.00; **Woods** - $118,500.00; **Binder** - $128,000.00; and **Jaillet** - $187,100.00 respectively. We were also referred to **Lee v. Dawson**, (2006) 224 B.C.A.C. 199; and **Dilello v. Montgomery**, 2005 BCCA 56.

[141] In my respectful view practically all of these decisions are clearly distinguishable from the matter under consideration in this appeal. For example, in **Woods v. Hubley**, supra, a thirty-one year old female suffered severe lumbar strain in a motor vehicle accident. There was disc protrusion in the lumbar spine, mechanical back pain with right sciatica, chronic pain and total disability. The plaintiff was unable to sit or stand or walk without pain for any length of time. She spent much of her time in bed.

[142] In **Binder**, supra, the forty-four year old claimant suffered injuries in a motor vehicle accident leaving her with pain in her neck, left arm, low back, right leg, and persistent severe pain from bursitis in her right hip which required surgery but brought no relief from pain. Her untreatable injuries caused such severe and persistent pain that she could neither sleep nor concentrate on her work. All treatments tried were unsuccessful in relieving her pain. She was compelled to quit her work on medical advice. Her injuries were so severe as to be described by this court on appeal as:

> (w)hile she was left with functioning limbs, the disruptive effect of the injuries on Ms. Binder's life could hardly have been greater had she been paralysed . . .

[143] In **Jaillet**, supra, the thirty-three year old claimant was hurt when the vehicle in which he was seated was extensively damaged after being struck in the rear and then pushed into a second vehicle with considerable force. He suffered a severe hyper-extension/flexion trauma, causing a significant injury to his cervical spine with resulting complications of reflex sympathetic dystrophy, leaving him with a severely dysfunctional right upper limb, chronic pain, headaches, sensitivity in his right hand, cognitive deficits, intolerance to walking and sitting, and difficulty sleeping.

[144] In **Lee v. Dawson**, supra, to which we were referred, the plaintiff was seventeen years old when he was injured in a motor vehicle accident. He suffered a traumatic brain injury, personality changes, permanent psychological injury, major chronic depression, permanent facial scarring, and other physical injuries causing permanent, constant and disabling pain. At trial the jury awarded $2,000,000.00 in non-pecuniary damages, and the trial judge reduced the award to $294,000.00, that being the present day value of the trilogy "cap." That reduction for general damages was upheld by the British Columbia Court of Appeal.

[145] In **Dilello**, supra, the plaintiff was nineteen years of age when she sustained severe multiple fractures of the vertebrae in her neck, injury to her spinal cord, soft tissue neck injury, inner ear injury and mild traumatic brain injury in a motor vehicle accident. She suffered from headaches, neck pain, depression, fatigue, altered sensation in her hands, upper limb weakness, temperature sensation, decreased manual dexterity, cognitive deficits, memory difficulties, dizziness, and low back pain. She was in hospital for six weeks but returned to high school shortly after her discharge and graduated that year. At trial the jury awarded $362,000.00 in non-pecuniary damages. The trial judge reduced the award to $281,000.00 to conform to the present day value of the rough upper limit. On appeal the court conducted an extensive review of a number of appeal cases from jury awards for non-catastrophic cases, and reduced the sum for non-pecuniary damages to $200,000.00.

[146] Having regard to this sample of cases, and the others to which we were referred, I would conclude that this court's decisions in **Kern v. Steele** (2003), 220 N.S.R. (2d) 51 (C.A.), and in **Marinelli**, supra, taking the required functional approach, provide the closest parallel to a consideration at the appellate level of a set

of injuries and ongoing complaints similar to those which have befallen the respondent.

[147] In **Kern**, supra, this court upheld the trial judge's award of general damages of $60,000.00 to a woman whose injuries and continuing problems included TMJ disorder, poor concentration, cognitive deficits, poor sleep, fatigue, and other psychological and emotional difficulties experienced post accident. The claimant's initial myofacia pain eventually developed into fibromyalgia. Measured in today's dollars, the award would produce a sum of $70,600.00.

[148] In **Marinelli**, this court upheld compensation of $80,000.00 for non-pecuniary damages awarded by a trial judge sitting without a jury. That sum in 1999 dollars would be adjusted for inflation to $94,200.00 in today's currency. Obviously, the jury award in this case amounting to almost 2 ½ - 3 times the sums approved by this court in **Marinelli** and in **Kern**, is on its face a wholly erroneous estimate of damages, reflecting palpable and overriding error. It is obviously so substantially outside the range of acceptable awards that it must be reduced.

[149] No one case or series of cases provides a perfect guide. A functional approach to non-pecuniary damages is not an analysis that lends itself to mathematical certainty. I am attracted to the approach suggested by Chief Justice Finch in **Stapley**, supra, where he described the standard that might be applied when judging whether a jury's award should be found to be "inordinate, out of all proportion, or wholly erroneous." In his view, comparing jury awards to those made by trial judges is no longer a particularly useful exercise. It is impossible to know what facts the jury used to support their award and consequently impossible to compare the factual basis of the jury's award to the facts found by trial judges sitting alone in "comparable" cases. He opines that while the cap of $100,000.00 in catastrophic cases has been increased for inflation over the years, that upper limit has not been adjusted in other ways to reflect current community values, such that the "valuable corrective" jury trials were meant to provide "has been substantially, if not entirely, negated."

[150] With great respect, there is much to commend this approach and I would apply it to this case. Upon being satisfied that the findings which must have led to the jury's award are reasonable and also find support in the record, the further step in the analysis, as I have already explained, is to ask whether the appellant has shown,

as a question of fact, palpable and overriding error on the jury's part in fixing the amount of the award, having regard to both the evidence, and as measured against appellate decisions involving appeals from jury awards in like cases.

[151] I commented earlier that both **Kern** and **Marinelli** offered close parallels. Adjusting the **Marinelli** award of non-pecuniary damages for inflation yields $94,200.00 in current dollars. However, **Kern** and **Marinelli** were cases decided by a single judge. In my opinion, there ought to be an upward adjustment from those awards to account not just for inflation, but also the fact that it arose on appeal from the decision of a judge alone. There should be some added factor or margin to account for the fact that Ms. Sharpe's losses were assessed by a jury. As noted by Smith, J.A., in **Boyd v. Harris**, 2004 B.C.C.A. 146, quoted with approval by Finch, C.J.B.C. in **Dilello**, supra, at ¶ 49:

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

The appellants have shown that the jury award of $225,000.00 for non-pecuniary damages is so substantially outside the acceptable range as to require our intervention. I would allow the appeal of the jury's award for non-pecuniary damages and would reduce the award from $225,000. to $100,000.

Whether to mention a "range" in a case like this one

[152] Before leaving the subject of non-pecuniary damages, I wish to briefly address counsel for the respondent's invitation to this court to endorse the principle that a trial judge ought to give directions to a jury on a range of damages in cases that approach the "upper limits." A review of the transcript and in particular the exchanges between Justice Edwards and counsel before he charged the jury makes it clear that at the instance of the respondent, an effort was made to provide better guidance to the jury with regard to the non-pecuniary head of damage. However, while acknowledging that such a direction might be appropriate in "upper limits"

cases, appellants' counsel would not agree to such instructions based on their view that Ms. Sharpe's claim in no way approached the catastrophic bodily injury category of cases.

[153] This whole question is not without controversy in Canada, with strong positions taken on both sides. See, for example, **Quintal v. Datta**, [1988] 6 W.W.R. 481 (leave to appeal denied, [1988] S.C.C.A. No. 488); **Foreman v. Foster**, [2001] B.C.J. No. 94 (C.A.); and **Brisson v. Brisson**, [2002] BCCA 279. I recognize the long-standing practice in Nova Scotia, in non-catastrophic cases of the trial judge not giving a "range" other than in situations when all parties and the judge agree that such a direction is appropriate. Given the sharply divergent positions of the appellants and the respondent about the nature and extent of the injuries for which the appellants were liable, I have difficulty seeing how Justice Edwards could have offered any kind of meaningful advice on a "range" of damages to the jury in this case.

Past Loss Of Income (From The Date of the Accident - October 8, 1998 to the Date of Trial - December 12, 2005): $70,000.00

[154] I am unable to assign any error to this award. The respondent was injured on October 10, 1998. The actuary, Mr. Paul Conrad, prepared a report and testified outlining two scenarios for Ms. Sharpe's past loss of income, the first based on an assumption that she would have become a security guard and started work on July 1, 1999; the second, that she would have secured work as a police officer and after suitable training at the Police Academy, started work on January 1, 2001. The first scenario projected lost income of approximately $75,000.00, the second, $132,000.00.

[155] Evidently the jury preferred the first scenario as being more probable and chose to reduce the actuary's calculation to an even $70,000.00. In light of the evidence that Ms. Sharpe reported income of $11,431.00 in 2000, a year in which she worked part time at the casino, it certainly was not wholly erroneous for the jury to have pegged her entire loss of past income from October 10, 1998 to December 2005 at $70,000.00. I would not disturb this award.

Diminished Future Earning Capacity: $400,000.00

[156] There can be no dispute that the jury award of $400,000.00 for diminished future earning capacity is a very significant amount, especially in light of Ms. Sharpe's employment history. It must be emphasized as well that this award was intended to compensate for diminished earning *capacity* which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income. See **Leddicote v. Attorney General (NS)** 2002 NSCA 47 and **Campbell-MacIsaac v. Deveaux and Lombard**, 2004 NSCA 87. However, the distinctions between these two types of compensation were thoroughly explained by the trial judge in his charge to the jury. After careful consideration I cannot impute any error to the jury in awarding such a sum under this head of damage.

[157] Assuming she worked as a security guard, Mr. Conrad used expected annual earnings of $21,648.00 which, projected to a retirement age of 65 and based on certain reasonable assumptions, led to a capitalized value of $350,000.00 for future loss of income less residual earnings assumed to be $6,760.00 per annum until age 65 starting in one year. Alternatively, if one were to assume that Ms. Sharpe would have become a police officer, then applying expected annual earnings of $46,545.00 would yield a capitalized value for future loss of earnings of close to $926,000.00.

[158] Mr. Conrad's calculations using the security guard assumption were not unreasonable in light of the evidence that Ms. Sharpe, working full time, at minimum wage, would have earned at least $18,000.00 per year. Peter Keagan, her immediate supervisor at the casino, with a similar background in retail security training, who started work in 1995 and made supervisor in 1998 testified to earning an annual income of $40,000.00.

[159] While one cannot divine the approach the jury took in calculating her loss, if Mr. Conrad's multiplier were accepted, the jury's award would assume an annual income to retirement of $17,961.58 per year, with no reduction for residual earning capacity. In choosing a figure of $400,000 as representing Ms. Sharpe's diminished future earning capacity, it appears to me that the jury recognized - as reminded by counsel in their summations - that the actuary's projections had already taken into account such negative contingencies as periods of unemployment throughout one's working career. As well, the jury could easily have applied other negative contingencies which the actuary said had not been included in his multipliers, such as higher rates for disability by geographic region, or absences for child rearing. It was also open to the jury to factor in its own assessment of the respondent's spotty

employment history, when considering the extent to which her capacity to earn income was impacted by this accident. I am not persuaded that the jury's award for diminished future earning capacity represents an unreasonable estimate of this portion of her loss.

Cost of Future Care: $50,000.00

[160] While the evidence here was spotty, Ms. Sharpe's chiropractor, Dr. Morgan, did say in his written report dated September 29, 2004 that Ms. Sharpe would benefit from one to two chiropractic treatments per week to help reduce the frequency of flare-ups in pain. He said the cost of these sessions was $45.00 for an initial visit and $30.00 for every subsequent visit and that such a cost was not covered by MSI, but would be an expense borne by the patients personally. From this and other evidence describing Ms. Sharpe's ongoing difficulties, it cannot be said that an award of $50,000.00 for a lifetime of twice weekly chiropractic treatments is unreasonable. I would not disturb this award. As well, one must account for the cost of Ms. Sharpe's medication and (in the absence of evidence to the contrary) the likelihood that all or a portion of those costs will have to be borne by the respondent personally.

Loss of Valuable Services: $5,000.00

[161] In light of Ms. Sharpe's own evidence, the medical reports, and the testimony given by her father, Mr. Bernie Sharpe, it was certainly open for the jury to reasonably conclude that such an award was warranted. In his testimony Mr. Sharpe offered a sad commentary describing his daughter's situation and markedly reduced quality of life. She had tried to move into her own accommodations with her son, but that effort proved unsuccessful. She was unable to cope on her own and had to return to live in her parents' home. Given Ms. Sharpe's significant dependancy on others to help her in everyday domestic chores and child rearing. I would not vary that award.

3. Did the trial judge err in his award of costs?

Costs

[162] Edwards, J.'s order following trial confirms that costs in the amount of $34,850.00, together with disbursements of $23,873.97 were awarded, these sums in addition to pre-judgment interest of $28,125.00.

[163] After receiving post-trial written submissions on the subject, Edwards, J. filed a concise decision on costs dated January 30, 2006. Applying Scale 4 to an "amount involved" of $750,000.00, he fixed costs at $34,850.00 ($8,850.00 + $26,000.00). While noting that counsel for the appellants had asked him not to use the jury award of $750,000.00 as the "amount involved" it would appear to me that he was not provided much assistance by the parties with respect to what other figure he might use, or how better to calculate costs overall.

[164] Given this lacuna of appropriate alternatives, it would be difficult to criticize the trial judge in the approach he took.

[165] My reduction of non-pecuniary damages from $225,000.00 to $100,000.00 has the immediate effect of reducing costs under scale 4 from $34,850.00 to $29,850 ($8,850.00 + $21,000.00).

Conclusion

[166] In summary, I would deny the appeal on all grounds that involve issues of causation or procedural and evidentiary rulings made by the trial judge. I would allow the appeal on *quantum* in respect of a single head of damage by reducing the award for non-pecuniary damages for pain and suffering and loss of amenities of life from $225,000.00 to $100,000.00. In the result Justice Edwards' order following trial is varied to the extent that the respondent is awarded $625,000.00 in damages. Further, the trial judge's award of costs is reduced from $34,850.00 to $29,850.00.

[167] Insofar as costs on appeal are concerned, I would award the appellants costs in the amount of $7,000.00 plus disbursements.

[168] In all other respects, the jury's answers to the questions posed, and the order following trial entering judgment in the amounts determined by the jury, are affirmed.

Saunders, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.