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NOVA SCOTIA COURT OF APPEAL
Cite as: Descrosiers v. MacPhail, 1998 NSCA 159
Freeman, Hallett and Bateman, JJ.A.

BETWEEN:

DR. JACQUES DESROSIERS and JEAN PALMER	)	Daniel M. Campbell, Q.C. & Colin J. Clarke for the Appellants
Appellants	)	
- and -	)	Robert L. Barnes, Q.C. for the Respondents Wanda & Craig MacPhail
WANDA MacPHAIL, CAROL M. NEWBURY, WILLIAM EDWARD NEWBURY, CRAIG MacPHAIL, SUSAN ARSENAULT and OSCAR ARSENAULT	)	Suzanne M. Fougère for Wanda MacPhail Appellant on cross-appeal
	)	Ronald Pizzo and Pauline A. Doucette for the Respondents Carol M. & William Newbury
Respondents	)	
	)	Appeal Heard: May 20, 1998
	)	Judgment Delivered: September 10, 1998

THE COURT: Appeal on liability dismissed and appeal on damages allowed per reasons for judgment of Hallett, J.A.; Freeman and Bateman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of MacLellan, J. He found the appellants were negligent and assessed damages at $724,547.66.

The appellant Dr. Desrosiers is a gynecologist/obstetrician. The appellant Palmer is a nurse who worked at the Morgentaler Clinic in Halifax where the respondent had an abortion on the morning of March 24th, 1993. Dr. Desrosiers performed the abortion. Ms. Palmer counselled the respondent prior to the abortion and gave her a one milligram dose of a sedative, Ativan. While driving home, following the abortion, the respondent, at about 1:50 p.m. crossed the highway and hit a Ford Bronco head on.

At the time of the accident the respondent was employed as a nurse in the Intensive Care Unit at the Victoria General Hospital in Halifax. She was married and had four children whose ages (at the time of the trial) were 5 to 12. Subsequent to the accident she and her husband separated. She has been unable to resume her career as an intensive care unit nurse due to the injuries she received.

The abortion was without complications and performed under a local anaesthetic. Following the procedure the respondent was taken to a recovery room where she remained for a period of between 30 and 60 minutes. She was released in apparently satisfactory condition. The appellants were aware, prior

to performing the abortion, that the respondent intended to drive home a distance of some 25 miles. On the drive home the respondent was hungry so she stopped at a restaurant for 20 to 30 minutes. She testified that she was crying at the restaurant over having had the abortion. She left the restaurant and proceeded on Highway 103 to be home by 2 p.m. While driving she testified that she was tearful and wiped away tears as she drove. She testified, as found by the trial judge, that she remembered passing Exit No. 4 on the Highway and that the next thing she remembered was seeing a blue truck in her windshield directly in front of her. She said to herself, "Oh my God, I'm on the other side of the highway". She thought she had blacked out just prior to the collision. She has a partial disability caused by the injury of her right knee and some mild memory deficiency.

Mr. and Mrs. Newbury, who were passengers in the Ford Bronco, were injured. They have commenced a separate action against the respondent and the appellants. Prior to trial, the parties consented to an order dated April 30th, 1997, which provided that the two actions would be heard together because of the common issues involved but that the assessment of damages with respect to the Newburys' claim would be held at a later date. The parties agree that the collision occurred when the vehicle driven by the respondent, without warning, crossed the centre line into the path of the Ford Bronco and caused the head-on collision.

The theory of the plaintiffs' case was that she fainted; that the faint was caused by a severe emotional reaction to the abortion and that the appellants were negligent in allowing her to drive home. In support of the plaintiff's case two orthopaedic surgeons and one gynaecologist/obstetrician testified that in their opinions either the abortion should not have been performed as the appellants knew the respondent intended to drive home or, alternatively, the appellants were negligent in having performed the abortion in not warning her of the danger of driving home. Their view was that following a surgery a person should not be allowed to drive for a period of time well in excess of the two or three hours that had transpired from the time of the abortion until the accident.

The appellants' position at trial was supported by the evidence of Dr. Desrosiers and two other gynecologist/obstetricians in whose opinion a patient can be allowed to drive following an abortion if there were no complications, and if the patient had not had a general anaesthetic and the patient had a period of time in the recovery room so that she could be assessed by staff as to her ability to drive. The doctors testified that there is nothing in the medical literature that fainting is a risk following an abortion other than immediately after the abortion. The position of the defence at trial was that if there are two standards of care, the meeting of either of the standards absolves the providers of medical services from liability.

The Trial Judge's Decision:

The trial judge reviewed the evidence, including the conflicting medical opinions on the issue of whether an abortion should be performed if the patient does not have a driver with her. The trial judge concluded there was no standard practice in Halifax and proceeded to fix a standard of care.

After reviewing the evidence the trial judge stated that there was no obvious reason why the plaintiff's vehicle crossed the centre line of the highway. He concluded that the one milligram of Ativan (a relaxant) given to her by Nurse Palmer prior to the abortion did not cause her to lose control of the vehicle. He concluded that, as she was normally a very competent driver, familiar with the highway, that the accident was not caused by inattention.

He then stated:

> The plaintiff in this case had a severe emotional reaction to the fact of the abortion. Consistent with the medical evidence, I find that she was more affected by the procedure because she had a number of children at home. I believe she agreed to have the abortion only because she felt forced into it because of her family situation. She did not discuss the matter with anyone except her husband. He was obviously upset with the pregnancy, and I believe his reaction was significant to the choice she made. Her evidence is that she had severe moral and ethical concerns about terminating her pregnancy. That was exhibited when she asked to take the baby home to bury. Obviously, by that comment, she felt she was aborting a baby and not a "product of conception".

> I believe she put on a brave face while at the clinic particularly because she knew some of the personnel there. I also believe that the fact that she ran into people she knew affected her even more. Now people with whom she had worked with were aware of her personal situation.
>
> I believe that after leaving the clinic and having something to eat the reality of what had happened hit her. She was going home to face her children and husband and as she got closer to home the reality of facing them became more intense. She first started to cry at the Burger King. Later as she drove home, I believe the intense emotional turmoil of aborting, what she described as a baby, caused her to faint. This resulted in her losing control of her vehicle and letting it cross the center line of the highway and being struck by the other vehicle.

The trial judge then considered the standard of care issues. He stated:

> ... The central issue is whether the health care professionals should have been aware that the plaintiff could be affected in her ability to drive a motor vehicle by either the sedative given to her prior to the abortion, the local anaesthetic administered during the procedure, or by the possibility that she would faint after leaving the [clinic] as a result of the emotional impact of having had an abortion.
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> In order to impose liability on the defendants, I must find that the defendants should have been aware of these dangers to the plaintiff and that they did not act to ensure that she was not at risk. I must also find that the negligence on the part of the defendants was the determining cause of her accident which resulted in her injuries.

The trial judge then referred to the conflicting evidence of the medical experts on the issue of driving after an abortion under local anaesthetic and concluded that there was not a “clear cut standard being applied in the medical community in Halifax.”

Then follows the critical finding in his decision:

> I find that it is not disputed that fainting is often caused by emotional stress and that an abortion always causes emotional stress, therefore, I find it is reasonable to expect that a woman might faint after undergoing an abortion. I further believe that a faint might occur up to 12 hours after an abortion, and therefore, a woman should not drive during that time period.
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> I believe that the staff at the Morgentaler Clinic should have been aware of the possibility of a faint especially in the case of the plaintiff in light of the fact that she had children and her comments about taking the baby home to bury. I believe that her particular situation should have raised more red flags to stop her from driving. Instead, I believe that Jean Palmer deferred to the plaintiff because she was a nurse. She let her decide herself if she was okay to drive. I believe that Jean Palmer would have told a non-nurse acquaintance that she should not drive. (emphasis added)

The trial judge then stated that the duty of care could easily have been discharged by staff members advising the respondent against driving and that such precaution would have averted a terrible accident with such severe consequences. The trial judge then found no fault on the part of the respondent. He found that it was reasonable for her to assume that if she had been in any danger from driving home that a member of the staff at the Clinic would have dissuaded her from doing so.

The trial judge continued:

> The plaintiff was obviously not aware that a strong emotional reaction could cause fainting. I believe the strong emotional reaction by the plaintiff was not to the medical procedure itself which was relatively uneventful, but to the fact that she

> had just had an abortion and was now going home to her family. Once that reality set in, her body reacted as was so ironically forecasted by Dr. Morgentaler in his text book.
>
> I believe the clinic staff were negligent in not recognizing that an emotional reaction can be delayed and cause fainting some hours after an abortion. The fact that the doctors testifying before me were not aware of woman fainting some hours after an abortion does not convince me that fainting spells have not occurred. If a woman feels faint while sitting in a car, or at home, the consequences are minor that the episode might not even be reported to a doctor on a follow-up visit. Unless there are consequences to a fainting spell normally it is not significant and might simply be attributed to the medical procedure itself instead of the emotional reaction of having had an abortion.

After finding Janet Chernin, a member of the Clinic staff, not to be at fault, he found:

> ... that Dr. Desrosiers and Jean Palmer breached their duty of care to the plaintiff by not ensuring that they, or some staff member, advised her not to drive. I believe that Dr. Desrosiers really saw nothing wrong in letting her drive assuming that the abortion was without complications. When there were no complications, he saw no reason to discuss with her the issue of her driving. He relied on the recovery room nurse to ensure that she was not exhibiting symptoms which would cause a concern.
>
> I find that the recovery room staff did not observe obvious symptoms of drowsiness or excessive pain and therefore let the plaintiff drive. That was consistent with Dr. Desrosiers' evidence as to what he would have looked for before letting her leave the clinic. Once again, the recovery room staff appeared to act contrary to the clinic policy that patients having an abortion should not drive after the procedure.
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> Based on the lengthy evidence of possible complications from surgery, such as an abortion, and considering its [acknowledged] emotional impact on all women, I find that to permit a patient to drive after an abortion was a breach of

> the standard of care I would expect from health care professionals providing that medical service.

The evidence was that the Clinic had a policy that required a patient who was coming in for an abortion to have someone to drive her home.

The doctors who testified on behalf of the respondent took a strong view that a patient, following any sort of invasive surgical procedure, should not be allowed to drive for a number of hours as fainting is unpredictable.

The doctors who testified on behalf of the appellants testified that there was no danger in allowing a patient to drive home after an abortion provided there was no general anaesthetic, no complications and that the patient had a suitable period of time in the recovery room.

Although the trial judge's language is not always consistent, I have concluded that he found the appellants breached the standard of care in failing to warn the respondent not to drive following the abortion.

The main ground of appeal is that the trial judge erred in law in determining a standard of care which was completely unsupported by evidence and is contrary to the evidence.

Scope of Appellate Review

The Supreme Court of Canada in a series of recent cases has emphatically stated that conclusions on matters of fact by trial courts are not to be overturned by Courts of Appeal unless there is a gross and overriding error. However, appellate courts can interfere with such findings and should do so if the findings are clearly unfounded or based on a misunderstanding of the evidence. The most often quoted statement of the Supreme Court of Canada on this issue is that of McLachlin, J., in **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.),* [1993] 4 S.C.R. 141, at pp. 188-89 (*per* L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (*per* Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (*per* Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of fact does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of

the trier of fact, in this case the trial judge.

In **Schwartz v. The Queen**, [1996] 1 S.C.R. 254, the Supreme Court of Canada reaffirmed its view that an appellate court can only interfere with a trial judge's findings of fact where it can be established that the trial judge made a palpable and overriding error which affected the trial judge's assessment of the facts. The Court further stated that a clear omission by the trier of fact to consider certain evidence is the type of error that can and will justify a reassessment of the balance of probabilities but that in order to disturb the trial judge's findings of fact, an appellate court must come to the conclusion that the evidence in question and the error by the trial judge in disregarding the evidence were overriding and determinative in the assessment of the balance of probabilities with respect to the factual issue. LaForest, J., writing for the majority, dealt with the position of appeal courts in dealing with findings of fact by the trial judge on pp. 278-281. He stated at p. 278:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial.

He cited a number of authorities including his own statements in **Hodgkinson v. Simms**, [1994] 3 S.C.R. 377 at p. 426 in support of the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses.

LaForest, J. went on to state that there were additional judicial policy concerns to justify the rule that appellate courts must treat trial judges' findings of fact with great deference. He stated at p. 278:

> Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R.D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 Adv. Q. 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204. This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge; see *Hodgkinson*, at p. 425.

After making reference to Ritchie, J.'s decision in **The Ship "Kathy K"**, which is the foundation for the statement made by McLachlin, J. in the **Burnaby Hospital** decision, that before an appeal court reverses findings of fact made by a trial judge it must be shown that he made a palpable and overriding error which affected his assessment of the facts, LaForest, J. stated at p. 280:

> What thus constitutes an error justifying an appellate court's intervention in the findings of fact made at trial? In the present case, the respondent successfully argued before the Federal Court of Appeal that the trial judge had clearly omitted to consider documentary evidence that contradicted the appellant's testimony regarding the allocation made by the parties of the damages. It is now accepted that a clear omission of evidence by the trier of fact is the kind of error that can and will justify a reconsideration of the evidence by an appellate court. In *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, the appellant sued the Province of Quebec after being unjustly convicted of causing the death

> of another person during a fist fight. The Quebec Superior Court and the Court of Appeal both dismissed Chartier's claim. The trial judge, whose findings were endorsed by the Court of Appeal, mentioned only the depositions of the provincial police officers and disregarded evidence relating to the baldness of the true assailant which had been observed by four eyewitnesses and which had not been taken into account by the Quebec Police Force in preparing a composite sketch. Pigeon J., for the majority, found that a reconsideration of the trial judge's findings of fact in that case was justified.

> LaForest, J. concluded at p. 281:

> An appellate court will be justified in interfering with the trial judge's findings of fact if certain relevant evidence was not considered. This means that the appellate court will be justified in conducting its own assessment of the balance of probabilities, taking into consideration the omitted elements. It does not necessarily mean, however, that the appellate court will come to a different conclusion from that arrived at by the trial judge. It could be that a reconsideration of the evidence, taking into consideration the omitted evidence, calls for a different conclusion on a given factual situation. It could also be that the omitted evidence, even when considered, would not have led to a different conclusion, in view of the weight to be given it. In that sense, the appellate court must, in order to disturb the trial judge's findings of fact, come to the conclusion that the evidence in question and the error made by the trial judge in disregarding it were overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue.

In **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at paragraphs 88 and 90 the Supreme Court of Canada again affirmed its view that in appeals involving questions of fact that it is not every error of fact which justifies appellate intervention but rather only errors that are overriding and

determinative in the assessment of the balance of probabilities with respect to the particular factual issue.

The principle of non-interference applies to all evidence at trial, including documentary records and the testimony of expert witnesses but as noted in the **Burnaby Hospital** decision, the principle does not apply with the same force with respect to inferences drawn from conflicting testimony of expert witnesses, where the credibility of those witnesses is not in issue. But, as noted by Justice McLachlin, that does not change the fact that the weight to be assigned to various pieces of evidence, including expert testimony, is essentially the province of the trier of fact.

Disposition of the Appeal on Liability

I agree with counsel for the appellant that Justice MacLellan misunderstood the evidence. However, I am satisfied that the trial judge's conclusion that the appellants were negligent and that their negligence was the sole cause of the collision is supportable for reasons other than those expressed by the trial judge.

I will first address the argument raised by appellants' counsel and then set out my reasons why the appellants should be found liable despite the trial judge's apparent errors.

The trial judge erred in concluding that it was "not disputed" that fainting is often caused by emotional stress and that an abortion always causes emotional stress. On the basis of these two findings he concluded that it would be reasonable to expect that a woman might faint after undergoing an abortion and that the faint might occur up to 12 hours after an abortion. Therefore, he concluded that a woman should not drive during that time period. This is the essence of his reasoning. This key paragraph had been immediately preceded by a paragraph in which he stated that there was enough undisputed medical evidence that permitted him to fix a standard of care in regard to driving after an abortion. A careful review of the testimony of the medical experts shows that the premises for the trial judge's conclusion that it was reasonable to expect a woman might faint were very much in dispute.

The medical experts called by the appellants were not of the opinion that fainting is often caused by emotional stress. Medical witnesses who discussed vasovagal fainting were of the opinion that such a faint is in response to a stimulus and while certain medical experts agreed that an emotional shock might produce that stimulus it was clear that it would have to be a sudden shock and not mere emotional turmoil and not something that would occur several hours after an abortion. Physicians who testified on behalf of the appellants indicated that fainting is occasionally seen either during the procedure or immediately following the procedure. The faint is caused by a sudden drop in blood pressure when a patient moves from a lying down position to sitting or

standing up; the flow of blood to the brain is reduced thus causing the faint. When a person faints he or she falls into a horizontal position. As a result of the fall an adequate supply of blood to the brain is restored and the person then regains consciousness. Syncope is a medical term for fainting.

In answering whether fainting or syncope is a risk associated with abortion the appellant, Dr. Desrosiers, testified:

> A. It can happen during procedure, but that would be very rare. Most likely it would be at the very end of the procedure when the person goes from the lying to a sitting position suddenly. Then they might have a sudden fall and drop in blood pressure ... There or within the next two or three minutes, maybe, while getting up and walking to the recovery. After that, very, very unusual.
>
> Q. What can you say about syncope two to three hours later?
>
> A. I've never heard of it.
>
> Q. What -- you've never heard of it in your practise? What followup ---
>
> A. I've never come across any discussion of it in any medical literature I've read and I've never come across it in my practise.

Dr. Desrosiers testified that information accumulated by the Morgentaler Clinic and the Victoria General Hospital in Halifax did not report a single episode of fainting in all their cases that were followed up.

Dr. Robert Fraser, the former Head of Gynaecology at the Victoria

General Hospital and Dalhousie University testified to the same effect:

> Q. In your experience, Dr. Fraser, what is the risk of vasovagal reaction in connection with therapeutic abortion?
>
> A. From our experience, were that to occur, we would expect it to occur during or very shortly after the procedure was performed. To my knowledge, we have no information based on several studies that we have done in followup of patients, and from the cards that patients were requested to fill out concerning delayed reactions or delayed complications after they left the unit of that occurring.
>
> Q. You anticipated my question. What is your history in the hospital with respect to such reactions occurring one or two hours following the procedure?
>
> A. I think that would be infinitesimally unlikely and I have personally not heard of that.

Dr. Hugh Allen, former Head of Gynaecology at University of Western Ontario, testified to the same effect. On direct examination he said:

> Q. What do you say of the likelihood of one -- a vasovagal reaction occurring one to two hours following a procedure?
>
> A. I've never seen it.
>
> Q. Have you seen it reported in the literature?
>
> A. No, I've never seen it reported in the literature.

On cross-examination he was asked about the studies conducted by his institution:

> Q. Are you aware of any scientific research, studies and -- reported studies where there has been a followup of the risk of fainting post-abortion? Are you aware of anything you can point me to right now that would talk about that

> particular issue?
>
> A. Our own studying?
>
> Q. All right. And there was a question in that study with respect to fainting?
>
> A. Oh, absolutely. Absolutely. Absolutely. That was one of the very important things that we needed to know.

Even Dr. Morgentaler's text which the trial judge referred to in his reasons in support of his finding that the respondent had fainted did not state that the release of tension after the abortion is over could occur hours after the procedure. Dr. Morgentaler stated at p. 81:

> A syncope can also take place after the operation. Some patients will experience severe cramps as a result of the contractions of the uterine muscles. Mild cramps are a normal and desirable response, because this is an indication of a good contraction of the uterine muscle, the mechanism that halts the bleeding. However, when intense, some women might overreact to the cramps to the point of syncope.
>
> Anxiety over imagined complications may trigger a fainting spell, especially if the woman interprets any symptom as an indication of imminent disaster. Paradoxically, the release of tension after becoming aware that the much-dreaded abortion is over may have the same effect.

With the exception of the last sentence, Dr. Morgentaler's comments on fainting seem to be premised on a patient who is suffering from <u>severe</u> cramps (that is pain) or that the patient interprets a post-operative symptom as one of <u>imminent disaster</u>. These statements seem to lend support to the views

expressed by the appellants' experts that fainting/syncope is associated with pain or sudden shock rather than emotional turmoil which occurs a few hours later unassociated with either pain or sudden shock. With respect to Dr. Morgentaler's comment that the release of tension after the abortion may cause fainting, it is to be noted that he does not give any time parameters when the faint might occur. However, it would be consistent with the opinions of Dr. Desrosiers and Dr. Fraser that such a faint would likely occur immediately after the abortion, not two or three hours later. A paradoxical statement is one that is seemingly absurd, although perhaps actually well-founded. It is a statement contrary to accepted opinion. Certainly the experts called by the appellants testified that there is no data or experience to support a finding that fainting unaccompanied by pain or sudden shock could occur two or three hours after an abortion.

In summary, evidence called on behalf of the appellants from their medical experts did not support the finding by the trial judge that it was <u>not disputed</u> that fainting is often caused by emotional stress. Their evidence was to the effect that fainting caused by emotional stress would have to be as a result of a sudden shock or pain that was not present at the time the respondent allegedly fainted at the wheel of her car at least two hours after the abortion.

The second finding that the learned trial judge stated was "not disputed" is that an abortion <u>always</u> causes emotional stress. While the

evidence shows that there are undoubtedly emotional reactions involved in a woman having an abortion, there was a significant body of expert evidence offered that the emotional reaction is not one of stress but of profound relief. Dr. Fraser was asked in cross-examination:

> Q. You've never seen a patient who was so overwrought by the procedure after it was over that you would have had reservations about allowing them to drive?
>
> A. No, sir. My experience with people who've had the procedure is that the vast majority are relieved...

Dr. Desrosiers was asked on cross-examination:

> Q. Would you agree with the description of abortion as being an emotionally charged procedure?
>
> A. It certainly often is. I'd say from my experience it always has a certain amount of emotional response associated with it. My main reaction through the years with the women I've seen is one of being struck by how well women do deal with it and accept the responsibility of their decisions and cope well with it. Yes, there is always a certain amount of emotional charge in the decision and the procedure.

While Dr. Desrosiers stated that there is always a certain amount of emotional response associated with an abortion, it is clear from a review of all of the evidence that it is not always a stressful emotion. It is to be noted that the respondent's testimony was that she was in an emotional turmoil before the abortion, for a number of reasons, and that she was in a distraught state while driving home. In a letter she had written to an adjuster some five months after the accident, however, she stated that while driving home she was relieved that

the abortion was behind her. This is consistent with statements extracted from Dr. Morgentaler's text on abortions in which from his experience the vast number of women had a sense of relief when the abortion was finalized. Therefore, there is a significant body of evidence that an abortion is not always emotionally stressful.

The trial judge's finding that it was reasonable to expect that a woman might faint after undergoing an abortion was based on his finding that it was not disputed that fainting is often caused by emotional stress and an abortion always causes emotional stress. This finding shows that the trial judge misunderstood the evidence.

In the course of his reasoning, leading to his conclusion that the appellants were negligent, the learned trial judge stated:

> I believe the clinic staff were negligent in not recognizing that an emotional reaction can be delayed and cause fainting some hours after an abortion. The fact that the doctors testifying before me were not aware of woman fainting some hours after an abortion does not convince me that fainting spells have not occurred. If a woman feels faint while sitting in a car, or at home, the consequences are minor that the episode might not even be reported to a doctor on a follow-up visit. Unless there are consequences to a fainting spell normally it is not significant and might simply be attributed to the medical procedure itself of the emotional reaction of having had an abortion.

There was no evidence to support this finding; it was pure speculation

which was contrary to the evidence of the appellants' experts that studies they had undertaken did not disclose that abortion patients had delayed faints following the abortion. Furthermore, none of the medical experts called on behalf of the respondent had any knowledge of delayed faints.

Therefore, the trial judge made significant errors in arriving at his conclusion that the appellants were negligent.

The appellants submit as a further ground of appeal that Justice MacLellan erred in law, in that, having found that two standards of care were supported by the evidence, he failed to hold that compliance with either of them would satisfy the legal duty of care. With respect, the trial judge did not find that two standards of care were supported by the evidence. In this regard he found that:

> ....the evidence before me does not establish a clear standard of care on the issue of driving a vehicle after an abortion. I have conflicting evidence from respected experts on both sides of the issue. . .
>
> Because of this conflicting evidence, I am not able to say that there is in fact a clear cut standard being applied in the medical community in Halifax. However, that does not mean that this would absolve the defendants because I must go on to determine despite the lack of generally accepted practice on this issue, whether in this case, the defendants met the standard which would be imposed.

The trial judge stated that he had conflicting opinions from respected

experts but went on to find that there was a “lack of generally accepted practice”. That finding is as far as he went; he did not find that there were two acceptable standards.

I would also infer that the trial judge meant that even if there was a clear cut standard of care, he could nevertheless, on the facts of this case, find that compliance by the appellants with the standard might nevertheless constitute negligence. In my opinion, this is a valid observation as this proposition necessarily flows from the decision of the Supreme Court of Canada in **ter Neuzen v. Korn**, [1995] 3 S.C.R. 674 where Sopinka, J., writing for the court, stated at paragraph 64:

> I conclude from the foregoing that, as a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.

I have reviewed the trial record. As previously expressed, I am satisfied that the trial judge, while he committed errors in his reasons process, and misunderstood the evidence, he did not err in finding that the appellants were negligent in the circumstances.

On a reading of the trial judge's decision as a whole, I am satisfied that the trial judge's misunderstanding of the medical opinions of the appellants' experts was not the determining factor that led him to conclude that the appellants were negligent.

The evidence supports a finding that the respondent was emotionally disturbed about having the abortion; the appellants were aware of this fact prior to the abortion procedure. The respondent was urged to take one milligram of a sedative Ativan which would relax her, but which can produce drowsiness. Evidence of the toxicologist called by the respondent proves that the drug would still have a high degree of effectiveness at the time of the collision.

It is clear from the evidence that the policy of the Clinic was that abortion patients must be accompanied by a person to drive them home after the abortion. The evidence supports a finding that this is a sound medical practice. The facts disclose that in approximately 2000 abortions carried out at the Clinic only one person, to staff's knowledge, drove her motor vehicle upon leaving the Clinic.

A reading of the trial judge's decision as a whole discloses that the trial judge <u>implicitly</u> accepted the opinions of Drs. Piver, Yabsley and Petrie who testified for the respondent. The trial judge implicitly concluded that a faint, following an abortion, is totally unpredictable. He expressly found that such a faint could occur up to 12 hours after an abortion. These conclusions are an implicit acceptance of

Dr. Piver's opinion and a rejection of the opinions of Doctors Fraser, Allen and Desrosiers. It is also implicit from the trial judge's decision that he found that a woman's decision to have an abortion, particularly if she has children, is charged with emotion. This was the opinion of Dr. Piver. Dr. Desrosiers agreed that an abortion is an emotionally charged decision for a woman.

It is clear from the evidence that an abortion is an invasive procedure. The evidence of Doctors Yabsley and Petrie's (discovery) was to the effect that a patient, following an invasive procedure, ought not to drive a motor vehicle as it is not possible to assess the impact of the procedure on the individual patient. In their opinion, the safe course to follow is not to allow them to drive. In their opinion if a patient intends to drive upon leaving the facility and the doctor is aware of this, the procedure should be cancelled.

Near the end of his written decision on the liability issue the trial judge stated:

> ... I find that doctors and other health care professionals owe a duty to patients and to the driving public generally not to permit a patient who has had an abortion to go on a high speed highway driving a vehicle.

This conclusion is an implicit acceptance of the opinions of Doctors Piver, Yabsley and Petrie. Although the trial judge did not expressly state that he accepted their opinions, his conclusions lead to the irresistible inference that he accepted their opinions over that of the appellants' experts.

This finding, coupled with my own assessment of the evidence, has led me to reject the opinions of Doctors Fraser, Desrosiers and Allen that it is safe to allow a patient to drive upon leaving the hospital or a clinic where an abortion is performed under local anaesthetic on an out-patient basis even where there are no complications and the patient has had an hour or so to recover from the procedure and be assessed by staff as to her ability to drive.

I am satisfied from the evidence that the accident was caused by a faint or by the respondent's inattention moments before the collision. I find that the faint or her inattention was caused by the effects on the respondent of the treatments and procedures she received at the Clinic. I find that the appellants ought to have reasonably foreseen that the respondent, who they knew intended to drive home, would be at risk if the abortion was performed and she was allowed to drive home. The negligence of the appellants was in proceeding with the abortion under the circumstances.

I am satisfied the respondent was not negligent. She was entitled to assume that if there was a risk in driving home she would have been so advised by the appellants.

Although the trial judge misunderstood critical aspects of the evidence in arriving at his conclusion, I am satisfied the evidence supports a finding that the appellants were negligent and their negligence was the sole cause of the collision.

I would dismiss the appeal of the liability issue.

The Damage Issue

The appellants assert that the trial judge erred in failing to take negative contingencies into account in calculating the damages for future loss of income and that the trial judge further erred in that the award for this head of damages is inordinately high in that he made the award by adjusting the actuarial evidence based on total disability rather than considering the economic consequences of partial disability.

In arriving at his award for loss of future income, the trial judge considered the opinions of the orthopaedic surgeons who examined the respondent. He considered the report of Dr. David B. King, a neurologist, who examined the respondent in 1995 at the request of the appellant's counsel. Dr. King concluded his report with the following statement:

> Interpretation of her memory difficulties was complicated by on-going orthopaedic pain, the use of medication and marital difficulties at home which had pre-dated the accident. There is no indication on mental status examination or the details surrounding her head injury of any serious brain trauma. It is my clinical impression that the difficulties that she has with her memory are largely related to her on-going orthopaedic pain, medication usage and preoccupation with finances and martial difficulties at home.

The trial judge considered the evidence of Dr. Thomas Loane, a

specialist in physical medicine and rehabilitation, who had been called by the appellants as an expert as to the type of work the respondent might be expected to perform which would not involve stressing her knee, the trial judge concluded that she suffered some very serious injuries but that she has recovered substantially from most of the injuries except the memory problem and the injury to her right knee. He found that she will not be able to return to her work as a hospital nurse and that it is reasonable to expect that in the future she will require a knee replacement which should not take place until she is over 50 years of age. He found the respondent's mobility is severely restricted and that she continues to require the assistance of a cane. He accepted her evidence as to the pain she was experiencing; he could find no evidence that she is embellishing her medical problems. He made an award for general damages which is not under appeal. He made an award for loss of past wages which is not directly under appeal although it seems to have been raised collaterally with respect to the appeal of the award for loss of future earnings.

In dealing with the loss of future earnings the trial judge stated that the parties are far apart on what is an appropriate amount. He made reference to the fact that the defendants acknowledge the plaintiff cannot return to her former occupation but that she will be able to return to some type of work in which she will have an income. He concluded that she will, in fact, be able to generate some income from employment. He accepted Actuary Burnell's approach that any calculation of her loss of future income should assume that she would have

returned to full time employment in the year 2000 had the accident not occurred. At the time of the accident she was working part-time due to the fact that her children were still young but she intended to return to full time work. The trial judge also accepted Mr. Burnell's assumption that she would not retire until she was 65 years of age. Mr. Tarrel, the actuary called on behalf of the defendants, suggested that her retirement date would likely be at age 59: (i) as the average retirement age for nurses in New Brunswick, where statistics are available, is 59; and, (ii) in Nova Scotia a nurse, retiring at age 60, does not suffer any loss of pension.

The learned trial judge accepted the suggestion made by the plaintiff's counsel that he approached the question of residual future earning capacity by applying a percentage reduction to her earning capacity had she not been injured. The trial judge concluded that her residual future earning capacity should be set at 25% of what she would have earned had the injury not been sustained. In effect, this works out to something in the order of $11,000.00 a year as the evidence shows that prior to the accident she had a capacity to earn approximately $43,000.00 a year as a full time nurse.

Counsel for the appellants take the view that the trial judge erred in this approach as well as his failure to take into consideration negative contingencies. It is clear from a review of his reasons that the trial judge did not consider contingencies, either negative or positive, in arriving at his award. He apparently

accepted Mr. Burnell's actuarial evidence that the present value of the plaintiff's future income had she not been injured, and assuming that she would have returned to full time work in the year 2000 and have worked to age 65, would have been $722,352.00. He then proceeded to deduct 25% from that sum, being his estimate of her residual earning capacity after the accident thus arriving at a figure of $541,764.00 for the loss of future earning capacity from which he deducted the Section B benefits of $25,467.00 that had been paid, leaving a present value of loss of future earnings of $516,297.00.

The essence of the appellants' argument on appeal is that the trial judge should have accepted the evidence of the appellants' experts as to the respondent's potential for employment in the future. That evidence is that there would be jobs available to her, considering her partial disability, that would enable her to earn in the range of $27,500.00 per year.

The appellants propose the following formula for calculating the respondent's residual earning capacity:

1. March/1993 - 1995 - no income earned

2. 1995 - June, 2004 - part-time employment at $13,750.00 per annum
   ($13,750.00 is 50% of $27,500.00; $29,315.00 - average earning level for females in Canada who have completed post-secondary diploma and are working full-time, full year in 1994 - Tarrel report)

3. June, 2004 - 2020 - full-time at $27,500.00 per annum

*Loss of past income - reduced by two years x $13,750.00
for period of 1995 - 1997 = $27,500.00. (AF - p. 79)

From this premise, as to her annual residual earning capacity ($27,500), coupled with the assumption that she would retire at age 60 in the year 2000, rather than at age 65, the appellants' submit that her residual earning capacity (before applying contingency deductions) applying the multipliers found in Mr. Burnell's revised report, is as follows:

From trial to June 2004	= $13,750 times 6.407 = $88,096
From June 2004 to June 2020	= $27,500 times 10.812 = $297,300
Total	= $385,426

The appellants recognize that the negative contingencies have increased with respect to her potential earning capacity as a result of the accident and they apply a contingency deduction of 14% from the residual earning capacity of $385,426.00, thus reducing it to $331,466.00. It is not spelled out clearly in the appellants' factum how this residual earning capacity "off-set" so-called was to be treated in assessing the appellant's reduction in earning capacity nor did the factum set out a sum that appellants' counsel felt would be an appropriate award in the circumstances.

In oral argument, counsel explained that if the Court wanted to work

out the loss of earning capacity by starting with Mr. Burnell's figure of $722,352.00 which represents the present value of what she would have earned as a nurse to age 65 had the accident not happened and using a valuation date of June 2nd, 1997, counsel suggests that we should deduct 20% from this figure for negative contingencies relating to the possibility of sickness, disability or retirement before age 65. This would produce a figure of approximately $577,600.00 representing the present value of her earning capacity to age 65 had the accident not occurred.

Counsel suggests that we ought then to deduct the residual earning capacity as calculated by the appellants' method ($331,466) from the sum of $577,600.00 which results in a sum of $246,134.00 from which, counsel says that the Section B benefits of $25,467.00 must be deducted producing an award of $220,627.00 to compensate her for the reduction in her earning capacity as a result of the accident.

Counsel for the appellants also argues that the trial judge's award of $516,297.00 is inordinately high giving awards made by this Court in **Stubbert v. Smith** (1993), 117 N.S.R. (2d) 118 and **White v. Slawter** (1996), 149 N.S.R. (2d) 321.

Counsel for the appellants also assert that in arriving at the award the

trial judge ignored relevant evidence.

The task of assessing damages for reduction in earning capacity is assisted by actuarial evidence but that evidence is invariably based on certain assumptions and in the final analysis on the conclusions reached by the trial judge as to the effect of the injuries on the plaintiff's employability, retirement dates, prospects for employment and contingencies, all of which turn on the difficulty of looking into the future.

Dealing with the latter submission first, it is my opinion that the trial judge did not ignore relevant evidence. He considered the evidence and on the key issue as to the respondent's future employability he simply did not accept the evidence of the appellants' experts that the respondent would be able to earn an annual income of approximately $27,500.00 a year commencing in the year 2004.

In my opinion it was open to the trial judge on the evidence to determine what age he would accept as the probable start-up date for the respondent's return to full-time employment and her probable retirement date. Mr. Burnell's calculation of her potential income ($722,352) to age 65 had the accident not occurred, was based on her continuing to work half time to the year 2000 and then full-time to the year 2024 when she would be 65. I have considered Mr. Tarrel's report and the reason he gives for suggesting an earlier

retirement date. However, I am satisfied that there was evidence before the trial judge to support his conclusion as to when she would start full-time work and when she would retire. This was a judgment call for the trial judge which should not be disturbed on appeal.

There was evidence before the trial judge that intensive care unit nurses are in high demand and that, accordingly, when she decided to return to full-time work which was her intention according to her evidence and which was accepted by the trial judge, there would be work available.

While the trial judge's method for calculating damages for reduction in her earning capacity was not that used by the appellants' expert, Mr. Tarrel, and while there was evidence from the appellants' expert concerning future wage rates that in the experts' opinion, could be obtained by the respondent, there is evidence to support the trial judge's finding that the respondent clearly has difficulty in working. This is caused both by the instability of her knee and her memory problems. The evidence discloses that the work she has attempted to do in the interval since the accident was low paying and that she had difficult in performing satisfactorily. The trial judge's conclusion that her residual earning capacity is 25% of her pre-accident earning capacity, in effect, in the $11,000.00 per year range, is supported by evidence that was before him. This type of finding is within the province of the trial judge. A Court of Appeal should be very slow to take a different view of what can be seen in the crystal ball from that of

the trial judge unless his findings are clearly wrong and result in an award that is inordinately high or low.

There is one adjustment that needs to be made to the damage award due to an error by the trial judge and that is his failure to consider the effect of positive and negative contingencies. I have reviewed the record and while there is no obligation on a trial judge to make a deduction from a damage award for negative contingencies the reality is that there normally are negative contingencies that can affect a person's future earning capacity and that they may or may not be offset by positive contingencies. In this case the facts disclose that there were strong employment prospects for the respondent as an intensive care unit nurse but there is also the reality that people do get sick or have an accident or develop disabilities which affects their earning capacity. Furthermore, all employed persons do not work to age 65. In this case, there is evidence that the respondent would not lose out on her pension should she chose to retire at age 60 and evidence that the average age of retirement of nurses is 59 years of age. The nursing profession is a strenuous one and under all the circumstances it would seem to me that a 15% deduction for negative contingencies would be appropriate and in line with the reduction for negative contingencies in the majority of cases dealing with loss of future earnings. The rate of reduction of 15% reflects the fact that in addition to the normal contingencies of life nursing is strenuous and that there is a likelihood that the respondent would have retired before age 65 given the statistics respecting

retirement dates for nurses and the lack of penalty with respect to pension entitlements if a nurse retires before age 65. Therefore, I would adjust the award for a reduction in the respondent's earning capacity as follows:

(i) first, I would deduct 15% for negative contingencies from the sum of $722,352.00. This results in a sum of $614,000.00 which represents the present value of the respondent's earning capacity to age 65 had she not been injured in the accident;

(ii) I accept the implied finding by the trial judge that the respondent has a residual earning capacity that would enable her to earn $11,000.00 a year until the year 2024. The medical evidence supports a finding that she was capable of part-time work since 1995. For the purpose of calculating the present value of the respondent's future earning capacity, both actuaries used June 2nd, 1997, valuation date. Based on Schedule 4 to Mr. Burnell's revised report (Exhibit 15) the present value of the respondent's annual residual earning capacity of $11,000.00 to age 65 is $214,786.00 ($19,526.00 times 11). In order to determine the present value of the reduction in her earning capacity as a result of the injuries she has suffered requires that this sum be deducted from $614,000.00 but before doing that one must also consider the effect of positive and negative contingencies on this residual earning capacity. Counsel for the appellants agree that the increased likelihood of the respondent having down

time from work because of her injuries is real. The evidence indicates that arthritis is developing as a result of the knee injury and it is reasonable to infer that this will likely affect her ability to work in the future. However, in my opinion, it would not be appropriate to make a substantial deduction for negative contingencies because this negative factor has already been factored into the determination of her future annual earning capacity of $11,000.00. The reason for this relatively low potential annual earning capacity is that the respondent has ongoing pain which requires that her work environment be tailored to accommodate this disability. In short, the inability of the respondent to work without interruption has already been considered in calculating her future annual income at $11,000.00. However, there should be a reduction for the contingency of retiring before age 65 and for sickness or disabilities that are unrelated to the injuries she suffered in the accident. I would reduce the present value of her residual earning capacity of $214,786.00 by 10% to recognize this reality.

(iii) The present value of the respondent's residual earning capacity less negative contingencies is, therefore, $193,308.00 which must be deducted from her pre-accident earning capacity adjusted for contingencies to obtain a sum which represents the

present value of her loss of earning capacity as a result of the accident ($614.000.00 minus $193,308.00 = $420,692.00);

(iv) from this sum of $420,692.00 must be deducted the Schedule B benefits of $25,467.00 which would produce an award representing the present value of her loss of future earning capacity of $395,125.00 in contrast to the award made by the trial judge of $516,297.00 and in contrast to the award proposed by the appellants' counsel of $220,627.00

The essential differences between the award I have calculated and that proposed by the appellants' counsel using Mr. Burnell's tables is that counsel suggests (i) a contingency reduction of 20% from the present value of her pre-accident earning capacity. I consider that to be too high; (ii) an acceptance of the appellants' expert opinions that the respondent has a residual annual earning capacity of $27,500.00 which I consider too high; (iii) an acceptance of the assumption that the respondent would retire at age 60. Rather than make the assumption I have taken into consideration that the respondent may retire before age 60 in fixing the percentage reduction for contingencies.

In summary, there is evidence to support the trial judge's finding that the respondent's residual earning capacity is a mere 25% of what it was prior to the accident. The only error the trial judge made was his failure to consider

positive and negative contingencies. The adjustments I have made in his award reflect, in my opinion, what reduction for contingencies would be reasonable under all of the circumstances.

Counsel for the appellants has submitted that an award to the respondent in the $400,000 to $500,000 range for a reduction in future earning capacity is far in excess of previous awards made by this Court in **Smith v. Stubbert (supra)** and in **White v. Slawter (supra)**.

Counsel is correct but the facts of those two cases, relevant to the damage awards, are so different from the relevant facts in this case that the awards do not permit of comparison. The award in **Smith v. Stubbert** was $100,000.00 and in **White v. Slawter** $120,000.00. Both cases involve soft tissue injuries that appear to have questionable lingering affects. In contrast the respondent has, according to all the medical evidence a serious disabling injury that prevents her from continuing her employment as a hospital nurse. The continuing pain makes it difficult for her to put in a full day's work even in a home environment. Every damage award turns on its own facts. While the trial judge might have accepted the evidence of the appellants' actuary and the opinion of Dr. Loane as to a more optimistic employment future for the respondent, he chose to accept the evidence of other witnesses as to the debilitating effect of her injuries on her future employment. I would not interfere with the trial judge's

assessment of this evidence. Given his findings of fact as to her potential for future employment, the award is not inordinately high.

Although not specifically raised by the appellant in its notice of appeal, counsel in its factum argued that the respondent's award for past loss of income should be reduced on the basis that the respondent was able to return to work in 1995 and that the loss of past income award of $64,623.00 from date of accident to date of trial, June, 1997, should be reduced by $27,500.00 being two years part-time employment at $13,750.00 per annum. This submission is made on the basis that the respondent's residual earning capacity was $27,500 a year and that she could have worked half-time in the two years between 1995 and the trial of the action. A review of the trial judge's decision shows that in arriving at the award of $64,623.00 for loss of past income the trial judge accepted the evidence of the appellants' actuary, Mr. Tarrel. Therefore, I would not interfere with his finding, apart from the fact that the issue was not raised in the notice of appeal. I would also note that in the period 1995 to 1997, while her injuries would have permitted her to do sedentary work in a home environment, the effect of the injuries and her pain level would indicate that she had very modest earning capacity in that period. The evidence shows that the only work she tried and had to stop after a year produced an income of about $300.00 a month. I reject the opinion that in this 2 year period she could have earned income from part-time employment at a rate in excess of $1,000.00 a month as suggested in the evidence of the appellants' experts.

Conclusion

I would dismiss the appeal on liability but allow the appeal of the damage award by reducing the award for loss of future earning capacity from $516,297.00 to $395,125.00. The awards for other heads of damages as fixed by the trial judge are to remain as fixed.

As we did not interfere with the trial judge's finding that the appellants were negligent and that their negligence was the sole cause of the collision, it is not necessary to deal with Carol Newbury's cross-appeal.

COSTS

Counsel have asked to be heard on the cost issue after the judgment is released.

We will receive written submissions from the parties on the question of the costs award at trial and costs on appeal. The appellant's counsel is to file his written submissions with a copy to the respondents' counsel on or before September 21st and the respondents' counsel shall file written submissions with the Court with a copy to the appellants' counsel on or before September 28th. We do

not intend to have an oral hearing but if counsel for any of the parties feel one

is appropriate, please advise the Registrar of the Court and we will give consideration to fixing a date for hearing submissions.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.

C.A. No. 144651

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DR. JACQUES Desrosiers and JEAN PALMER

Appellants

- and -

WANDA MacPHAIL, CAROL M. NEWBURY, WILLIAM EDWARD NEWBURY, CRAIG MacPHAIL, SUSAN ARSENAULT and OSCAR ARSENAULT

Respondents

REASONS FOR JUDGMENT BY:

HALLETT, J.A.