NOVA SCOTIA COURT OF APPEAL
Citation: Hayter v. Bezanson, 2009 NSCA 113

Date: 20091113
Docket: CA 310804
Registry: Halifax

Between:

Travis Hayter

Appellant
Respondent on cross-appeal

v.

Alan Bezanson

Respondent
Appellant on cross-appeal

Judges: Oland, Fichaud, Beveridge, JJ.A.

Appeal Heard: October 16, 2009, in Halifax, Nova Scotia

Held: The appeal and cross appeal are dismissed without costs per reasons for judgment of Fichaud, J.A.; Oland and Beveridge, JJ.A. concurring.

Counsel: Sheree Conlon, for the appellant
Jean McKenna, for the respondent

Reasons for judgment:

[1] Mr. Hayter's golf shot hit Mr. Bezanson's wrist. Mr. Bezanson sued for negligence and succeeded at trial. Mr. Hayter appeals against liability and damages. Mr. Bezanson cross appeals for higher damages.

1. Background

[2] Alan Bezanson was 38 years old at the trial, married with three young children. He is a woodsman, but pre-existing carpal tunnel problems unrelated to the golf injury have diminished his earning capacity. He lives with his family on a 254 acre property, half cultivated and half wooded, owned by his father.

[3] On June 18, 2002, accompanying a wedding celebration, Mr. Bezanson went golfing with Travis Hayter and, completing their foursome, Marvin Weeks and Jamie Bezanson, Alan's cousin.

[4] They brought an inventory of Baja Rosa tequila, marijuana and Wildcat beer to the course. They teed off accompanied by the beer, which had to be replenished before the back nine. Alan Bezanson smoked marijuana on the front nine. At the turn, Mr. Hayter retrieved the tequila from the car. Mr. Hayter acknowledged that, by the sixteenth hole, he had consumed nine beer and a half pint of tequila.

[5] On the sixteenth hole, Mr. Hayter hit his drive into the trees, then a provisional onto the fairway. The others, believing Mr. Hayter was done on the tee, moved ahead toward their balls. The trial judge described what happened next:

> According to the plaintiff, at this point he heard someone call, "Heads up, he's going to hit again." He looked over his shoulder and saw the defendant behind the ball, then taking a run at the tee before hitting it, a so-called "Happy Gilmore" shot (named for a film character). Prior to the call of "heads up", the plaintiff testified, there was no warning that the defendant was going to take another shot. Jamie Bezanson's evidence was that he was about ten to 20 yards up the fairway, beyond the end of the cart path, when he heard someone yell "heads up." He and the plaintiff turned around and faced the tee. The plaintiff was ten yards behind him on the fairway. The two of them were looking back towards the defendant while moving left, towards the trees. They had not reached the trees when the defendant ran up and hit the ball. Mr. Bezanson said the ball came straight at the plaintiff, who had a "millisecond" to react. Mr. Bezanson

> said he had thought the defendant would walk back to the ball in the normal manner, which would give himself and the plaintiff time to get out of the way. Instead, the defendant made a “Happy Gilmore” shot, running from five to ten feet behind the ball and hitting it on the run. Mr. Bezanson had seen the defendant do this before. He considered it a difficult shot to control.
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> As to the impact itself, the plaintiff testified that he saw the ball coming towards him, straight and fast. He put his hand up. The ball hit his left wrist, glanced off, and hit him in the chest. He dropped to the ground. According to Jamie Bezanson, it looked like the plaintiff had been shot or struck in the head.
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> With respect to the location of the other players, the defendant agreed that Jamie Bezanson and the plaintiff were close together, with the plaintiff nearer to him. He agreed that after his second shot it would have appeared to them that he would play that shot, as it was on the fairway, and that therefore they could proceed up the fairway safely. He knew that they were ahead of him and to the left, but he hit his "Happy Gilmore" shot without waiting for them to get out of the way. He agreed that he did not tell them that he was about to hit a "Happy Gilmore." The defendant maintained that he can reliably hit a "Happy Gilmore" shot.
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> I am satisfied that the plaintiff and Jamie Bezanson were in the positions indicated by Jamie Bezanson when the defendant, having already made a provisional “mulligan” shot that landed on the fairway (thus leading the other players to believe he was finished at the tee) and took a running wind-up in order to shoot a “Happy Gilmore” shot, which flew directly at, and hit, the plaintiff.

[6] Alan Bezanson sued Mr. Hayter for negligence. Justice LeBlanc of the Nova Scotia Supreme Court heard the trial over seven days in January 2008, with final submissions on March 28, 2008, and issued a written decision on September 26, 2008. (2008 NSSC 280).

[7] The judge held that Mr. Hayter was negligent:

> The defendant argues that the plaintiff consented to the natural risk of golfing, and had an obligation to take care for his own safety. If he had believed his position was unsafe, he should have taken steps to get out of danger. The

> defendant says the course of the shot was not predictable and, in any event, he was not negligent.
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> I am satisfied that the defendant breached the standard of care owed to other players on the course. Having taken his tee shot, and then a provisional second shot, he was, or ought to have been, aware that the players ahead of him believed he was finished at the tee. He did not give any indication that he was taking a third shot – let alone a "Happy Gilmore" shot – until he was in the process of doing so. I am convinced that the "Happy Gilmore" shot would have been less controllable than a normal tee shot, both because it involved a run-up to the ball (rather than an aimed shot from a stationary position) and because the defendant had been drinking throughout the day. The defendant acknowledged that he knew the plaintiff (as well as Jamie Bezanson) was ahead of him, that he did not announce he was about to take another shot, and that he did not wait for them to get out of the way. I ascribe no relevance to whether the defendant had taken a "Happy Gilmore" shot in the past or to whether any of the other witnesses had seen him do so. The defendant's conduct breached the standard of care required of a golfer playing on a course with other golfers. The defendant's behaviour was not among the "natural risks" of golfing to which the plaintiff can be said to have consented. Nor is it of much significance whether the defendant usually pulled or sliced the ball.
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> (5) On June 8, 2002, the plaintiff was hit by a golf ball in the palmar area of the left wrist, distal from the thumb. The ball hit the thumb-side of the wrist, not the centre of the wrist. The ball was hit by the defendant, Travis Hayter, who took an uncontrollable shot from a running start, without adequate warning, while under the influence of alcohol. The plaintiff did not have time to get out of the way of the shot. I am satisfied that the defendant was negligent and that there is no question of contributory negligence.

[8] The judge reviewed the lay testimony and the conflicting medical evidence concerning Mr. Bezanson's golf injury, its causation, and the effect of Mr. Bezanson's pre-existing medical impairment. The judge found that the ball strike permanently damaged Mr. Bezanson's radial nerve or its distribution from the wrist and that Mr. Bezanson suffered complex regional pain syndrome (CRPS) from the golf injury:

> I am satisfied that the plaintiff regained some of his pre-surgery ability to work at wood-cutting, but I do not accept that he had returned to his full cutting

capacity. The ongoing problems with his hands and wrists had impacted his ability to cut wood. Having said that, I am not satisfied that he would inevitably have been forced to stop cutting wood. He was clearly determined to continue working, as his work records from early 2002 demonstrate. But the evidence does permit the conclusion on a balance of probabilities that the pre-existing problems would have had some effect on the plaintiff's future working ability, particularly given the history of worsening symptoms when his workload increased.

. . .

(6) The impact of the ball was a blunt impact, not a pointed impact. The ball bounced from the wrist area at an angle and struck the plaintiff's chest, causing an injury that later resolved. The ball's shape did not change in flight or at the time of impact with the wrist or chest. The strike by the golf ball caused immediate pain and discoloration in the area of the hand and wrist. In the longer term, the plaintiff suffered pain and injury in the wrist and hand that, on a balance of probabilities, were caused by the ball striking his wrist. The ball caused permanent damage to the radial nerve or to a branch of the radial nerve. The plaintiff's complex regional pain syndrome is directly attributable to the golf ball injury.

(7) Since the golf ball incident, the plaintiff has been unable to return to his former work as a woodsman on account of the persisting injury caused by the defendant hitting him with the golf ball. He has done light farm work, including driving a tractor.

This is a case where there is significant conflict in the views of the experts for the respective parties. I am satisfied, however, that the mechanics of the actual impact are of crucial significance. To be absolutely clear, I find that the plaintiff's wrist injury resulted from being struck by a golf ball on the radial nerve, a branch of the radial nerve or within an adjacent "zone of injury" that caused an adverse effect on the radial nerve or a branch thereof.

[9] The judge awarded $85,000 non-pecuniary damages:

The plaintiff's injury has resulted in extensive pain and discomfort which has affected his everyday life, as well as his working ability, to a severe degree. He has been required to take narcotics in an attempt to quell the pain, as well as go through surgery and the placement of an implant. I am satisfied from the evidence that the plaintiff's pain and discomfort, and the resulting effect on his daily life, is severe and chronic, and appears unlikely to fully resolve. The

consequences of the defendant's action have been far more serious than the defendant would argue. . . .

[10] He awarded $67,500 for past lost income:

I am unable to agree with the figures advanced by either party. By the time of the accident in 2002, the plaintiff was working full-time, but with a reduced capacity and requiring a helper. Based on his-pre accident condition, I accept that total annual earnings of $15,000.00 would be realistic, an amount that I reduce by 25 percent in order to reflect the need to pay a helper's wages. This results in an annual income to the plaintiff of $11,250.00. I find that an appropriate figure for past loss of income is $67,500.00 between 2003 and the present.

[11] He awarded $75,000 for lost future earning capacity:

The evidence of the plaintiff's income from wood-cutting demonstrates that it was erratic. There is little basis upon which to conclude that his income would have risen to $25,000.00 per year, particularly given the reduced capacity he was working at even before the injury to his hand. While the plaintiff's assumption of an income of $25,000.00 per year is, I find, higher than the income he would actually have collected, I do not accept the defendant's view that the plaintiff should be denied a damage award simply because he could theoretically do jobs for which he has neither experience, aptitude, training or interest. On this basis, I find that the plaintiff's lost earning capacity should be valued at $125,000.00. I reduce this amount by 40 percent to reflect the fact that I am satisfied that the plaintiff would have been forced to leave wood-cutting eventually due to his pre-existing health conditions. This leaves an award for lost earning capacity of $75,000.00**.**

[12] The judge denied Mr. Bezanson's claim for diminished domestic capacity:

The Plaintiff seeks damages for past and future loss of valuable services and future care costs. The defendant says there is no claim, noting that the plaintiff works extensively around the farm, hunts, fishes and has helped build a new house. As to costs of future care, the defendant says there was no evidence of such costs advanced, and that any award would be no more than guesswork. I am not satisfied that the evidence establishes a claim for damages for loss of services or for future care.

2. Issues

[13] Mr. Hayter appeals. He submits that (1) he was not liable because of Mr. Bezanson's consent, (2) Mr. Bezanson was contributorily negligent, (3) there was no causation, (4) the judge over-calculated any damages for past lost earnings, and (5) there was no proof of Mr. Bezanson's diminished future earning capacity.

[14] Mr. Bezanson cross appeals, saying that the judge under-calculated the damages for (1) past lost earnings, (2) diminished future earning capacity and (3) non-pecuniary loss, and (4) erred by denying damages for diminished domestic capacity.

3. Standard of Review

[15] The judge must be correct on legal issues. The standard for facts and mixed questions of fact and law with no extractable legal error, is palpable and overriding error. This means a plainly identified error that is shown to have affected the result. *H.L v. Canada (Attorney General)*, [2005] 1 SCR 401, at ¶ 65 and 69; *Housen v. Nikolaisen*, [2002] 2 SCR 235, at ¶ 8, 10, 19-25, 31-36. In *H.L.*, Justice Fish for the majority elaborated:

> 72 I have not overlooked that, according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is "not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts" which, in its view, implied a stricter standard (para. 21 (emphasis in original)). The apparent concern of the majority was that, in drawing an analytical distinction between factual findings and factual inferences, the minority position might lead appellate courts to involve themselves in reweighing the evidence (Justice Fish's emphasis para. 22). As well, the majority stated:
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> > If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can inference with the factual conclusion. [emphasis in original; para. 23]
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> 73 These passages from the majority reasons in *Housen* should not be taken to have decided that inferences of fact drawn by a trial judge are impervious to review though unsupported by the evidence. Nor should they be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the

> primary findings upon which they are founded and the process of reasoning by which they were reached.
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> 74 I would explain the matter this way. Not infrequently, different inferences may reasonable be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally – or even more – persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority reasons in *Housen*. [Justice Fish's emphasis]

More recently, in *F.H. v. McDougall*, [2008] 3 SCR 41, at ¶ 55, Justice Rothstein for the court said:

> [55] An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

[16] In *Woelk v. Halvorson*, [1980] 2 SCR 430, at p. 435 Justice McIntyre for the Court discussed appellate review of damages awards:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

Justice McIntyre drew this exposition from *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] AC 601, at p. 613, a statement of principle that this court has followed: for example, *Fraser v. Hunter*, 2000 NSCA 63 at ¶ 8; *Kern v. Steele*,

2003 NSCA 147, at ¶ 43 and *Campbell v. Force Construction Ltd.*, 2009 NSCA 20, at ¶ 9. See also *Saturley v. Lund*, 2008 NSCA 84 at ¶ 5 and cases there cited.

4. Consent

[17] Mr. Hayter submits that Mr. Bezanson consented to the risk. His factum says:

> As noted, the law in Nova Scotia, as in other jurisdictions, confers implied consent to the natural risks of a sport. That consent, however, is subject to intent to do real and excessive harm to an opponent. However, no such intent is present in the case at hand. Accordingly, the Respondent should be deemed to have consented to the ordinary risks involved in golfing, including golf balls unintentionally going astray, whether in so doing, the rules were broken or not. It is in an inherent and expected part of the risk accepted in every sport that the rules may be broken during the course of the game.

[18] The plaintiff's consent may be presumed to the ordinary risks of the sport in which the plaintiff has chosen to engage. Linden, Allen M., and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis, Butterworths, 2006) at 73-74. *Matheson v. Governor of Dalhousie College and University* (1983), 57 N.S.R. (2d) 56 (T.D.) at ¶ 85-86. The trial judge found that Mr. Hayter's "behaviour was not among the 'natural risks' of golfing to which the plaintiff can be said to have consented" (above ¶ 7). I agree. Golf isn't a running game, and has no line of scrimmage from which a player sprints to the ball. A golfer at least attempts a controlled flight path from a stationary stance, though his shots may still sail wayward. Mr. Hayter's running whack, toward his playing partners ahead, deliberately abdicated control and was not an ordinary feature of the game. The trial judge made no error of law or palpable and overriding error of fact.

5. Contributory Negligence

[19] Mr. Hayter's factum next says that (1) Mr. Bezanson "has an obligation to care for his own safety. If he had deemed his position unsafe, he should have taken steps to ensure he was in a position of safety" and (2) "the Trial Judge's findings on [Mr. Bezanson's] location and the lack of adequate warning were not 'reasonably supported by the evidence', justifying intervention". He submits that Mr. Bezanson was contributorily negligent.

[20] Respectfully, this submission has no merit. The judge found that Mr. Bezanson moved forward because Mr. Hayter led him to believe that, with his provisional (second) drive, Mr. Hayter was finished on the tee. The judge found that Mr. Hayter "did not give any indication that he was taking a third shot – let alone a 'Happy Gilmore' shot – until he was in the process of doing so". The judge cited evidence that Mr. Bezanson had a "millisecond" to react and found: "the plaintiff did not have time to get out of the way of the shot . . . there is no question of contributory negligence" (above ¶ 5 and 7). The judge's findings were not palpably wrong. Mr. Hayter gave Mr. Bezanson no pause to employ the measured reaction for which he would now hold Mr. Bezanson accountable. The judge did not err by declining to find contributory negligence.

6. Causation

[21] Mr. Hayter then contends that the judge erred by finding that the golf ball's impact caused Mr. Bezanson's injury. He makes several submissions.

[22] First, Mr. Hayter's factum says:

> In particular, the Appellant submits that the Trial Judge erred in law and principle in admitting into evidence and relying on the opinions of
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> a) Dr. Brennan, regarding the "zone of injury" and causation, where such opinions were not included in Dr. Brennan's report; (Decision, para. 36; Appeal Book Vol. 1, p. 36-7) and
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> b) Dr. Parkhill, regarding causation, where such opinion was not included in Dr. Parkhill's report. (Decision, para. 37, Appeal Book Vol. 1, p. 37)

[23] Dr. Brennan's consultation note of February 19, 2003 said that Mr. Bezanson has "neurogenic pain from where the golf ball hit him. I think he has a neuroplaxic injury, giving him this deep burning dysesthetic type pain, his major problem". At the trial, Mr. Hayter's counsel did not oppose Dr. Brennan's qualifications as an expert in hand surgery and the nerves associated with the hand or the admission of the documents containing his opinions, or object to his testimony. When Dr. Brennan demonstrated the zone of injury surrounding the circumference of a golf ball, Mr. Hayter's counsel made no objection, then interrupted the direct examination to pose her own questions.

[24] Dr. Parkhill’s consultation notes of April 23 and 25, 2003 and June 22, 2006 say:

> In June of last year he was struck on the volar radial wrist by a golf ball close to the tee ... An unrecognized ganglion or diffuse soft tissue injury may explain the presentation.”
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> ... he may still have an entrapment of his radial nerve up in this area, which is where he was hit.
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> ... Wartenburg syndrome ... may be secondary to a contusion if his radial nerve secondary to when a golf ball struck him in the arm.”

[25] Mr. Hayter's counsel had no objection to Dr. Parkhill’s qualifications as an expert in surgery respecting the hand and wrist or to the admission of his reports. The portion of the judge's reasons entitled "Argument on Causation" accepted the opinions of Drs. Bush and Beauprie, and Dr. Brennan’s zone of injury, discounted the evidence of Dr. King, called by Mr. Hayter, and did not refer to Dr. Parkhill's testimony.

[26] The judge did not err in law by accepting the qualifications and admitting the written opinions of Drs. Brennan and Parkhill. Their consultation notes referred to the golf incident as a cause of injury. Dr. Brennan's testimony about the "zone of injury" provoked no objection, inhabited his qualifications and was properly in evidence. The judge did not rely on Dr. Parkhill’s testimony respecting the contested issue of causation. The judge did not err in law or principle respecting his admission or use of the testimony of Drs. Brennan or Parkhill.

[27] Mr. Hayter next submits that the trial judge erred by accepting Dr. Beauprie’s opinion that Mr. Hayter’s golf shot caused the injury. Mr. Hayter’s factum says:

> 77. The Appellant does not dispute that the Respondent’s radial nerve is currently injured or that he suffers from CRPS. However, the Appellant does dispute that the Respondent met his burden of proving his condition was caused by the strike from the golf ball and submits that the Trial Judge made a palpable and overriding error in so finding.

[28] Mr. Hayter's submission operates from the premise that Mr. Bezanson was hit on the palm side of his wrist, toward the centre, not on the edge of the wrist overlaying the radial nerve. From this palm impact, Mr. Hayter says, citing medical evidence of Drs. Sapp and King, there would be no injury to the radial nerve. Rather, one would expect an effect on the median nerve distribution.

[29] The trial judge considered all the medical opinions. He accepted the opinions of Drs. Beauprie, Bush and Brennan, that the ball hit toward the radial side within a zone of injury that accessed the radial nerve. He rejected the differing views of Dr. Sapp respecting a more palm-centered impact, and Dr. King that the supposed "pointed" impact would not affect the radial nerve outside that point. The trial judge found: (1) "The ball hit the thumb-side of the wrist, not the centre of the wrist." (2) "The impact of the ball was a blunt impact, not a pointed impact." (3) "The ball caused permanent damage to the radial nerve or to a branch of the radial nerve." The judge concluded:

> To be absolutely clear, I find that the plaintiff's wrist injury resulted from being struck by a golf ball on the radial nerve, a branch of the radial nerve or within an adjacent “zone of injury” that caused an adverse effect on the radial nerve or a branch thereof.

[30] The judge's findings are supported by evidence. Mr. Bezanson testified that the ball struck him “at the base of the thumb” and he pointed to the spot for the trial judge. According to the notes of Mr. Bezanson's treating physicians, Drs. Bush and Beauprie, the location of impact was "at the base of the thumb" and "at the base of the thumb on the volar aspect of the left wrist". Dr. Brennan's consultation note said that the "ball apparently hit him at the base of the thenar eminence of the left wrist". Dr. Brennan testified that the impact would affect a zone of injury, and demonstrated to the trial judge by holding a golf ball while describing the zone of injury. Dr. Beauprie said that the pain from nerve trauma was not confined to the injury site, but travels downstream by ephatic transmission. They were cross examined. The judge accepted their evidence and found that the radial nerve was within the zone of injury and affected by the trauma.

[31] It was the judge's role to weigh and assess conflicting testimony that he heard over many days of trial. There was evidence to support his findings, no palpable or overriding error in his analysis, and his inferences were reasonable under the principles stated in *Housen, H.L.* and *F.H.* (above ¶ 15) . The appeal

court reads the dry record, but hears no witnesses, does not sense the friction of cross-examination and, for instance, cannot observe Mr. Bezanson’s indication of the impact’s location or Dr. Brennan's demonstration of the zone of injury. It is not the appeal court's role to just re-weigh the evidence as if the few hours of counsel’s able submissions constituted a *de novo* hearing for this seven day trial. An appeal isn’t a mulligan for the facts.

[32] I would dismiss Mr. Hayter's ground of appeal that challenges the trial judge's finding of causation.

7. Damages

[33] I will consider topically both Mr. Hayter's grounds of appeal, relating to damages, and Mr. Bezanson's grounds of cross appeal.

Past Lost Earnings

[34] The trial judge rejected both parties’ figures for the loss of past earnings. He found that Mr. Bezanson's average past net earnings had been $11,250 per annum and his overall loss of past earnings was $67,500. Mr. Hayter says that the trial judge erred by not drawing an adverse inference from Mr. Bezanson's failure to produce better records of his income and by not expressing a deduction for Mr. Bezanson's actual earnings from working on a blueberry farm for a short time in 2007. Mr. Bezanson’s cross appeal, on the other hand, says that the judge omitted several months from his calculation and under awarded Mr. Bezanson’s lost past earnings by about $2,600.

[35] Mr. Bezanson's forestry activity was erratic, as the trial judge noted, because of both the work’s nature and Mr. Bezanson's physical limitations. With Grade 7 education, he did not keep accounting records. This is not a case where there was a proven amount of actual earnings that the judge just neglected to subtract from the award. There was no evidence of the amount of Mr. Bezanson’s 2007 income from his blueberry work. The judge did not draw an inference adverse to Mr. Bezanson from the deficient income evidence, nor did the judge calculate actual annual income for each year preceding the golf injury. The trial judge chose to address the evidential lacunae by taking a median number for average annual income then adjusting the overall estimate of lost past income

differently from the calculations of both parties. Essentially, he deleted from the calculation a period equivalent to the period of Mr. Bezanson’s 2007 blueberry work. Had the judge undertaken an annual line item analysis, he may have added $2,600 as Mr. Bezanson suggests, but then attributed and subtracted a similar amount for Mr. Bezanson’s 2007 blueberry earnings, and arrived at an equivalent final award.

[36] The trial judge was entitled to balance the evidential strengths and frailties which faced him. He committed no error of principle and his award is not palpably wrong or wholly erroneous under the standard of review. I would dismiss the grounds of appeal and cross appeal respecting past lost earnings.

Diminished Future Earning Capacity

[37] Mr. Hayter submits that the trial judge erred by finding that Mr. Bezanson suffered diminished earning capacity. He says first that Mr. Bezanson's pre-existing carpal tunnel limitations would have forced him to leave wood cutting anyway, even without the golfing accident. Second, he says that Mr. Bezanson could pursue other gainful activity such as blueberry farming, fishing and carpentry, or working in a service station, and the trial judge mistakenly focussed on Mr. Bezanson's loss of a particular job function rather than his overall capacity to earn income. Mr. Hayter suggests also that Mr. Bezanson failed to mitigate.

[38] I respectfully disagree with Mr. Hayter's submissions. The trial judge's findings are quoted earlier (¶ 11). He considered the factors proposed by Mr. Hayter. He rejected Mr. Hayter's suggestion concerning alternate vocations for which Mr. Bezanson had no training or experience. Mr. Bezanson had considered working in a service station but, after inquiring, Mr. Bezanson found that the service stations were not hiring. The judge reduced the award by 40 % because "the plaintiff would have been forced to leave wood-cutting eventually due to his pre-existing health conditions", presumably to another vocation within Mr. Bezanson's limited range of feasibility. The judge made no error of principle in his treatment of Mr. Bezanson's diminished future earnings capacity, and his findings are not palpably or wholly erroneous under the standard of review.

[39] Mr. Bezanson's cross appeal, on the other hand, submits that the judge under calculated his diminished future earnings capacity. He says **(1)** the judge's

projection of diminished income was too low, **(2)** the judge's contingency reduction by 40 % (for the potential that Mr. Bezanson's pre-existing physical limitations would have forced him from wood-cutting anyway) was too high, and **(3)** the judge erred by failing to consider a positive contingency that, but for the golf injury, Mr. Bezanson might have achieved a supervisory position in forestry. Finally he submits **(4)** that a three year start up was required for a blueberry operation, an alternative vocation that Mr. Bezanson had been considering, and the judge erred by not adding three years' lost income for that delay.

[40] I respectfully disagree with Mr. Bezanson's submissions. **(1 and 2)** Apportioning a future potential vocational disability between past separate causative events, in the context of conflicting medical opinions, is a nuanced fact-finding task. The judge's projection of diminished future income and his 40% contingency assessment are shades of gray inferences from evidence for which the trial judge is equipped, by his first hand exposure during the trial, and the Court of Appeal is restricted, unless the judge erred in principle or reached a wholly erroneous conclusion. No such error has been shown. The submissions raise issues of weight and degree, not principle. **(3)** Mr. Bezanson had worked in the woods for over twenty years, without attaining a supervisory job in forestry. There was no evidence that his forestry future included supervisory status, had Mr. Hayter's golf ball missed him, and mere speculation is insufficient to overturn a trial judge's finding. **(4)** The judge awarded $67,500 for past lost income and $125,000 for diminished future earning capacity (before reducing the $125,000 for the 40 % contingency that eventually he would leave the woods even without the golf injury). The time span represented by these awards would cover a start-up period for a hypothetical blueberry operation.

Non-Pecuniary Loss

[41] Mr. Bezanson cross appeals on the ground that the judge's number for non pecuniary loss was too low. The judge awarded $85,000 for pain, discomfort and the deleterious effect of the injury and its treatment on Mr. Bezanson's daily life. With respect, there is no merit to this ground of cross appeal. The judge did not, as Mr. Bezanson suggests, apply a legal "cap" to general damages. Rather, the judge appropriately referred to other authorities for guidance as to the range of award, and considered how Mr. Bezanson's situation differed functionally from that of the

parties in the other cases. The award exhibits no appealable error under the standard of review.

Diminished Domestic Capacity

[42] Mr. Bezanson's cross appeal submits that the judge erred by denying damages for his diminished ability to perform valuable domestic services. Mr. Bezanson says that, after the golf injury, his wife and father performed chores around the property that Mr. Bezanson previously had been able to perform. He refers to the head of damages approved in *Carter v. Anderson* (1998), 168 N.S.R. (2d) 297 (C.A.) ¶ 26-27:

> 26 In my opinion, the modern advancement of this area of the law of damages, which is premised on the concept of direct economic loss of the plaintiff whose ability or capacity to perform homemaking or housekeeping tasks has been impaired, should be acknowledged and accepted in Nova Scotia. Future loss of capacity, where proved, should be compensated separately whether or not replacement help has been paid in the past. The award for lost capacity should not simply be part of the non-pecuniary damages as "an element of loss of amenities". Housekeeping capacity is ordinarily not an amenity. Its loss is not an intangible loss comparable to the appellant's loss of ability to dance, to skate, or to ride horses. As noted by appellant's counsel, Mrs. Carter did not go next door and ask to mop her neighbour's kitchen floor because she enjoyed mopping. Managing one's home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value which should be recognized. In another case, it may be more appropriate to compensate most of the loss with a non-pecuniary award for a loss of amenity, if for example, the plaintiff proved that he derives personal gratification from doing housework.
>
> 27 In this case there has been an economic loss for which no compensation has been provided. There is a mother of four children, who is also employed outside the home, and who has been found by the trial judge, to be unable to vacuum, mop floors, scrub the bathrooms, or do heavy chores and has problems lifting. Her limitations were found to be likely to continue "for a very long time, if not for life."

In *Carter*, Justice Roscoe referred to *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 (SCA) leave to appeal denied [1992] 1 S.C.R. vii, which approved a flexible approach to calculate and compensate the economic loss from diminished domestic capacity. See also: *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47, at

¶ 49-51, *Miller v. Folkertsma Farms Ltd.*, 2001 NSCA 129, *Couse v. Goodyear Canada Inc.*, 2005 NSCA 46.

[43] The trial judge denied the claim as being unsupported by evidence. (above ¶ 12).

[44] A summary of the evidence on this point is useful. Mr. Bezanson's wife Jennifer testified that she usually mows the lawn now, carries the groceries, does more gardening work and ties the children's skates. Her husband helps, but his share is less than before. On the other hand, the testimony of either Mr. or Mrs. Bezanson was that he still uses a shovel, pitchfork and wheelbarrow, operates a farm tractor, carries feed, operates the all-terrain vehicle to transport firewood and fence-posting from the woods, and does some farm work. He has hammered fence posts, shovelled snow and used a small power saw, though physical adaptations were needed to lessen the usage of his hand. Since the golfing injury, he has used a screw gun to build a deck, installed siding on his home, used a power saw and operated machinery for haying and potato cultivation. In 2005, he and his uncle built a new home. In 2007 he worked on a blueberry farm. Since 2006, Ms. Bezanson has been employed at a residential care facility. She works 70 hours every two weeks in 12 hour shifts. While she is working, Mr. Bezanson cares for their children, performing domestic functions formerly done by Ms. Bezanson.

[45] These are significant physical and domestic activities by Mr. Bezanson from which it is difficult to infer an overall diminution of domestic capacity with negative economic consequences. Further, the evidence does not differentiate any domestic functional limitation caused by the golf injury from that caused by what the judge accepted as the progression of Mr. Bezanson's pre-existing physical limitations.

[46] The judge did not deny this item on a point of law. Neither did he suggest that Mr. Bezanson performs activities without discomfort. But Mr. Bezanson's discomfort has been compensated under another head of damages. The judge felt there was no evidential basis, beyond guesswork, for a finding of domestic economic loss to Mr. Hayter attributable to this golf injury. I cannot identify a palpable and overriding error in the judge's conclusion. It was not unreasonable under *H.L.* and *F.H.* (above ¶ 15) to decline drawing an inference of lost domestic capacity.

8. Conclusion

[47] I would dismiss the appeal and cross appeal. Each party should bear his own costs.

Fichaud, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.