

NOVA SCOTIA COURT OF APPEAL
Citation: *Brandt v. Kouyas*, 2025 NSCA 27

Date: 20250404
Docket: CAC 532960
Registry: Halifax

Between:

Pamela Brandt

Appellant

v.

Yota Kouyas, as representative of the estate
of George Kouyas, Dina Kouyas and Ross McInnis

Respondents

Judges:	Bryson, Van den Eynden and Gogan, JJ.A.
Appeal Heard:	April 1, 2025, in Halifax, Nova Scotia
Facts:	The appellant sustained injuries from a slip and fall incident and sought damages from the respondents. The jury awarded her \$75,000 in general damages, reduced by 20% for contributory negligence, but did not award any damages for pecuniary losses (paras 1-4).
Parties Submissions:	<p>Appellant: Argued that the trial judge erred in instructing the jury on the standard of proof for assessing general and pecuniary damages, particularly failing to distinguish between "balance of probabilities" and the degree of probability for hypothetical or future losses (paras 5, 8, and 11).</p> <p>Respondents: Contended that no amounts should be awarded for pecuniary losses, or alternatively, only nominal awards should be considered.</p>

Legal Issues:	Did the trial judge err in instructing the jury on the standard of proof for assessing general and pecuniary damages?
Disposition:	The appeal was dismissed with costs of \$10,000 inclusive of disbursements (headnotes, para 17).
Reasons:	Per Bryson, Van den Eynden, and Gogan JJ.A.: The court found that while the trial judge's instructions on the standard of proof for pecuniary loss could have been more explicit, they were not so deficient as to affect the jury's verdict or cause a substantial wrong or miscarriage of justice. The instructions were considered in the context of the submissions of counsel, the issues, and the evidence presented at trial. The appellant's credibility was a significant issue, impacting the value of her expert reports (paras 6-16).

<p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 17 paragraphs.</i></p>

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Appeal Heard: April 1, 2025, in Halifax, Nova Scotia

Written Release: April 4, 2025

Held: Appeal dismissed, with costs, per reasons for judgment by the Court

Counsel: Brian J. Hebert, for the Appellant
Cory Withrow, for the Respondents

Reasons for judgment:

- [1] Pamela Brandt brought proceedings against the respondents for injuries sustained in a slip and fall.
- [2] She elected trial by judge and jury.
- [3] The jury assessed general damages in her favour in the amount of \$75,000.00, reduced by 20 percent for her contributory negligence.
- [4] The jury assessed no damages for claims for pecuniary losses.
- [5] Ms. Brandt appeals alleging the judge erred in his instructions to the jury respecting the standard of proof regarding the assessment of general and pecuniary damages.
- [6] The standard of review for adequacy of jury instructions requires a functional approach based on the evidence at trial, the live issues raised and the submissions of counsel (*R. v. Melvin*, 2016 NSCA 52 at para. 28 and *R. v. Howe*, 2015 NSCA 84 at para. 67).
- [7] To set aside a jury award based on inadequate instructions from a judge, there must be an error in those instructions capable of affecting the jury's verdict or potentially causing a substantial wrong or miscarriage of justice (*Horne v. Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20 at para. 62).
- [8] Ms. Brandt takes no issue with the judge's description of the general burden of proof on a balance of probabilities. She objects that he was not sufficiently forthcoming when he described the burden of proof regarding the likelihood of pecuniary losses.
- [9] With respect to future or hypothetical events, the trial judge relied on the Supreme Court in *Athey v. Leonati*.¹

41 The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. *Future or hypothetical events can be factored into the*

¹ 1996 3 SCR 458 at para. 41.

calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. [...]

[Emphasis added]

[10] With respect to calculation of lost income he said:

As stated, future or hypothetical events can be factored into the calculation of damages according to degrees of probability. There's some guesswork involved there.

The amount for past loss and future loss of income, as set out in the Krofchick Valuations report, Exhibit 9, page 5, which is supported by Schedules 1 and 4 on page nine 9 and page 12, it assumes that Ms. Brandt would have returned to full-time employment, and what she would have earned based on the average wage and salaries earned by workers in the NOC 6320 category.

It will be left for you to decide the degree of probability of this happening in Ms. Brandt's case. You should also take into consideration the plaintiff's failure to seek out other work other than as a cook.

[Emphasis added]

[11] Ms. Brandt argues that the trial judge did not sufficiently distinguish between “balance of probabilities” and degree of probability or possibility associated with a hypothetical or future loss.

[12] Among other things, the judge’s instructions must be considered in relation to the submissions of counsel. In this case, Ms. Brandt’s counsel said this to the jury:

So, again, the idea would be to go through these and then ask yourselves, you know, why is this needed. Is, is there some – is there a substantial possibility that Ms. Brandt is going to need the therapies, for example, that Dr. Sangha said she would likely need when she has flareups. So you would look at that and say "okay, are you satisfied that there are – you know, that there is a chance that she's going to get that?" You can discuss what the percentage chance of that is going to be. And, and, and then look at the numbers. There's a high and a low.

[13] Neither the judge nor the respondents objected to the foregoing submission by Ms. Brandt’s lawyer.

[14] Counsel for the respondents took the position that no amounts should be paid for claimed pecuniary losses. Alternatively, the jury could make nominal awards. It would have been apparent from these submissions that awarding

damages for pecuniary losses would not be an “all or nothing” proposition to which a balance of probabilities standard applied.

[15] It is also clear from the record and the submissions of counsel that Ms. Brandt’s credibility was very much a live issue for consideration by the jury in this trial. Since her expert reports depended on the integrity of Ms. Brandt’s evidence, any serious impairment of that evidence would have an adverse impact on the value of the expert reports.

[16] While the instructions in this case regarding the standard of proof for pecuniary loss could have been more explicit, considering the submissions of counsel, the issues and evidence, they were not so deficient as to constitute an error capable of affecting the jury’s verdict or potentially causing a substantial wrong or miscarriage of justice.

[17] The appeal is dismissed with costs of \$10,000.00 inclusive of disbursements.

Bryson, J.A.

Van den Eynden, J.A.

Gogan, J.A.