NOVA SCOTIA COURT OF APPEAL

Citation: Halifax (Regional Municipality) v. Cheevers, 2006 NSCA 54

Date: 20060505
Docket: CA 253062
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Francis F. Cheevers

Respondent

Judges:	Saunders, Freeman and Oland, JJ.A.
Appeal Heard:	March 23, 2006, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs and cross appeal is dismissed with costs per reasons for judgment of Freeman, J.A.; Saunders and Oland, JJ.A. concurring.
Counsel:	Michael E. Dunphy, Q.C. and Michelle Kelly, for the appellant Brian Awad and Devin Maxwell, for the respondent

Reasons for judgment:

[1] This appeal is from the decision of a trial judge who awarded damages to the respondent electrician after finding he had been injured by an unusual explosion in the electrical control panel he was working on, caused not by negligence on his part but because it had been negligently maintained by its owner, the appellant, the Regional Municipality of Halifax.

[2] The findings reached on the facts by Justice Gerald Moir of the Supreme Court of Nova Scotia were reasonable ones based upon evidence sufficient to support his conclusions that they had been proved to a balance of probability. I am not persuaded that he committed palpable and overriding error in his assessment of the facts and damages, nor that he erred in law. For the reasons that follow I would dismiss the appeal, and dismiss a cross appeal for lost earning capacity.

Overview

[3] The respondent Francis F. Cheevers was engaged by the appellant to install controls for new equipment at the appellant's sewage treatment plant at Woodside, across the harbour from Halifax. The controls are described in clear detail in the decision of Justice Gerald R.P. Moir which is reported in [2005] N.S.J. No. 244 (Q.L.); (2005), 234 N.S.R. (2d) 125; and (2005) 140 A.C.W.S. (3d) 101. Briefly, the electrical controls for the entire plant are housed in a motor control center consisting of a walk-in room with a wall of heavy-gauge sheet metal boxes called cells or wrappers, each enclosing a disconnect switch, a fuse assembly and a starter switch for the particular motorized unit it relates to, usually a fan or a pump, three floor-to ceiling silver-plated brass rods called bus bars which carry 600 volt current from the transformer to the cells. The bus bars are located out of reach behind the cells and are not visible to inspection without some disassembly of the control panel. The rods are not insulated but they are separated by blocks of insulating material, perpendicular to the rods and horizontal to the floor. Power passes from the bus bars to the cells through metal prongs or fingers set in an insulated "stab block" which grasp the bus bars. The current flows through heavy insulated cables through the stab block to the disconnect switch in the upper left hand corner of the cell. Current cannot flow beyond the disconnect switch to the other components of the cell when it is turned off. A stab block is mounted in a 4.5 by 2 inch rectangular cut at top center of each cell, projecting into both the cell

and the bus-bar chamber, where it creates a narrow horizontal shelf within about an inch of the bus bars. Within the cell proper, current passes from the open disconnect switch through a fuse assembly to the starter unit, the on-off switch which controls a fan or pump. The disconnect switch is behind an insulating shield and only the top is visible when the metal door of the cell is open.

[4] Through the contractor managing an upgrading project, the appellant contracted with the respondent's company to install two new cells to control new fan units. The respondent discovered the requisite new cells were not readily available. He reported this to the project manager and was authorized to refurbish two existing cells which were not being used instead of installing new ones. The contract was not altered to specify the manner in which the existing cells were to be refurbished. The respondent decided to install new components without removing the cells from the control panel, which would have required the plant to be shut down. He satisfied himself that he could safely do his work by switching off current to the cell with the disconnect switch while the cell remained in place. He completed work on the first cell, replacing the switching unit for one fan, and tested the installation to ensure that it was working. He began work on the second cell. He shut off power to the cell with the disconnect switch, which he tested to make sure it was functioning. He was replacing a neutral wire to a coil in the starter assembly on the right hand side of the cell. Suddenly a violent explosion occurred in the vicinity of the disconnect switch, blowing the respondent off his seat and flinging him backwards. He received burns to ten per cent of his body. After the explosion it was determined that the silver plating on the bus bars had deteriorated and was flaking off, accumulating on insulators and elsewhere in the cell units. The respondent sued the appellant in tort, alleging negligence for failure to inspect, clean and maintain the bus bars, and failure to warn.

[5] The trial judge found the respondent was not negligent in the way he carried out his work. He determined the explosion was caused by the flaking of the silver coating off the bus bars, which released silver fines to be carried by air currents to cause a fault across the disconnect switch. He found the appellant negligent for failing to have a program of preventive maintenance which would had disclosed the deterioration of the bus bars. He awarded damages including damages for lost past income, and for pain and suffering and loss of amenities, but not specifically for lost earning capacity. The appellant appealed, raising the following issues:

1. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in failing to find the Respondent negligent, or, contributorily negligent and responsible for the explosion and his resulting injuries?

2. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in finding that the explosion was caused by an accumulation of silver fines on the top of the disconnect switch inside the cell?

3. Did the Learned Trial Judge make errors of law and palpable and overriding errors in the assessment of the facts in setting the standard of care to be met by the Appellant and in finding the appellant breached the standard of care?

4. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in finding that the Respondent's past loss of income was $68,119.00 rather than $55,345.00?

The respondent cross-appealed, seeking damages for lost earning capacity.

The Standard of Review

[6] While error of law is always reviewable by appeal courts, appellate restraint is the governing principle when reviewing for alleged errors of fact. The appellant fairly set out the standard of review for alleged errors of fact in civil cases, including alleged errors in drawing inferences and the assessment of damages, with citations and sub-citations from **Leddicote v. Nova Scotia** (2002), 203 N.S.R. (2d) 271 (C.A.), **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **H.L. v. Canada**, [2005] 1 S.C.R. 401; **Flynn v. Halifax (Regional Municipality)** (2005), 232 N.S.R. 293 (C.A.) and **Kern v. Steele** (2003), 220 N.S.R. (2d) 51 (C.A.).

[7] The legal principles set out in these cases are not in controversy in this appeal and are well summarized in this introductory passage from **Housen**:

> A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is some times stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

The First Ground of Appeal

> 1. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in failing to find the Respondent negligent, or, contributorily negligent and responsible for the explosion and his resulting injuries?

[8] The appellant broke down this ground of appeal into four components, all involving allegations that the trial judge made errors of fact or law in not considering whether Mr. Cheevers had taken reasonable steps to satisfy himself that all of the components in the cell, including the disconnect switch, were in satisfactory condition "for reuse".

[9] As mentioned above, Mr. Cheevers' firm's contract was to provide two new cells. Due to their unavailability he obtained permission from the project manager to use two old cells that had been out of service for perhaps ten years and supply new components. The trial judge found the amended contract called for removal of some old parts and replacement with new parts. "This was a contractual solution to a contractual problem without any expressed scope of work beyond the installation of the new parts." Responsibility for cleanliness of the cell was a question of tort law, not contract law.

[10] The appellant submits:

> Mr. Cheevers merely obtained approval to use the two spare cells and to utilize them for the project. It was up to Mr. Cheevers to refurbish them. There is no evidence that there was a specific term of the contract to install new parts. Justice Moir was wrong in his assessment of the facts and had no basis for the finding of fact. He did not address the issue whether Mr. Cheevers ought to have taken reasonable steps to satisfy himself that all of the components in the cell were satisfactory for reuse. In particular he did not consider this issue in the context of tort law–whether Mr. Cheevers had an obligation to do so and failed in that obligation.

[11] In my view, respectfully, it is not material whether Mr. Cheevers was under a contractual duty to ensure that all or any of the components of the cell were satisfactory for reuse. Whether or not that standard was a term or implied term of the contract, there was no evidence to suggest Mr. Cheevers had a duty to do his work in a certain order. If he did have a duty to determine the disconnect switch

was suitable for reuse as part of his contract, that might have been his first step on his list or it might have been the final one. Having safely completed his work on the first cell he was working on the other components of the second one, specifically the starter assembly, when he was burned. He had already determined that the disconnect switch functioned to shut off power to the cell, enabling him to work in safety so far as he could reasonably ascertain. The work had to be completed before it could have been meaningfully determined whether it had been performed to a standard the appellant could expect, which might have included suitability for reuse of all components. While the work was going on the question relevant to this ground of appeal is whether Mr. Cheevers had taken reasonable care for his own safety. There was evidence to support the trial judge's findings that he had.

[12] Justice Moir considered the evidence carefully and at length, reviewing the various steps Mr. Cheevers took to ensure he could work safely inside the cell, and found he was not negligent. He concluded:

> [82] I find that, having contracted to refurbish the two cells and replace most of their interior equipment, it was within Mr. Cheevers' discretion to work with the cells in place or to shut down the whole plant and work much more easily with the cells at a bench. The latter would be the safer choice and, in this case, it would have avoided the injury. However, the former is prudent if one goes about one's work with due care and it is the more common approach in practice. I find Mr. Cheevers went about working inside the cell carefully. He proceeded carefully when he performed his test and his visual inspection, although those measures did not eliminate every possible peril. As I said when discussing in reference to causation the cramped working conditions where the cell was left in place, I am satisfied Mr. Cheevers' skill and experience are such that he was able to work without touching live connections and without disturbing the insulated live wires. No neglect on his part occasioned the injuries he suffered.

[13] This conclusion does not reflect error of law or palpable and overriding error of fact. I would dismiss the first ground of appeal.

The Second Ground of Appeal

2. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in finding that the explosion was caused by an accumulation of silver fines on the top of the disconnect switch inside the cell?

[14] The appellant expanded on this issue as follows:

> The appellant submits that the Trial Judge made inferences which were not based on proven facts that would allow him to draw these inferences. He engaged in speculation and conjecture on the following critical findings on causation:
>
> (a) that the sliver plating that flaked off the bus bars included silver fines that passed into the cell.;
>
> (b) that the silver fines were transported into the cell by normal air currents in the back of the cell;
>
> (c) that there was sufficient accumulation of silver fines on the disconnect switch to cause an explosion.

[15] The appellant correctly points out that the respondent had the burden of proving causation to the balance of probabilities standard. It criticizes the evidence of Mr. Cheevers' expert witness because his opinion was partly based on misapprehension resulting from his misreading of the report of another expert, that there was an accumulation of silver dust on the inside of the cell when there was no evidence of any. In my view Justice Moir was aware of this difficulty and allowed for it in weighing the evidence. The appellant says the respondent failed to introduce evidence as to whether failing silver plating breaks down into tiny particles, or "fines", or how it might have been distributed by air currents; therefore there was no evidence to support Justice Moir's conclusion that the silver did break down into fines and was transported into the cell by air currents.

[16] There was, however, agreement among the witnesses that the silver plating had broken down into flakes large and small that were abundantly present in the compartment housing the bus bars behind the cells. The bus bars had not been inspected or maintained for ten years or more and the deteriorated condition of the silver plating was not known before the accident. The control room, and the cells,

were cleaned up soon after the explosion and before the silver dust theory was developed as a possible cause. The flaking was an unusual occurrence, outside the experience of any of the electrical experts and electrical engineers who testified. There was, however, agreement that a slow process of deterioration of electrical equipment began as soon as it was installed, though it was often long-lasting. There was evidence of air currents in the room, which was ventilated and heated, and evidence that the cells were not airtight, although the apertures in them were small. The witnesses agreed that the use of cells in motor control centers is considered a common and safe practice in plants such as the appellant's. None could recall another explosion in a cell such as the one which injured Mr. Cheevers in their experience, and they could not offer a satisfactory explanation. It fell to Justice Moir to determine whether causation had been proved.

[17] Justice Moir considered all the possibilities suggested by the evidence, including the possibility that Mr. Cheevers might have inadvertently caused the explosion. He considered Mr. Cheever's testimony, his reputation as an electrician, and the condition of the screwdriver he was using, which was not consistent with it having caused the electrical arc. He ruled out all possibilities but arcing caused by conductive silver dust from the deteriorating silver plate. He studied photographs of the flaking silver and its tendency to accumulate in drifts along horizontal surfaces which existed near the bus bars. "If there were bigger flakes and smaller flakes that were visible to the camera, would we not expect still smaller flakes, say fines?" he asked. The silver, he noted, may have had years or decades to accumulate. Air currents had been present, and there were apertures large enough to admit silver dust carried by air currents. "I find there was a clear pathway for silver, broken away as fines or crumbled into fines in a drift of flakes, to pass into the cell and onto the switch block."

> [38] . . . Considering the evidence as a whole but particularly the fact of the explosion and the presence of silver, I am satisfied on a balance of probabilities that silver caused the electrical explosion. But for the build-up of silver in the bus bar compartment, Mr. Cheevers would not have been injured. Did the build-up result from the defendant's breach?

[18] The appellant's submission is that the trial judge "made inferences which were not based on proven facts that would allow him to draw these inferences. He engaged in speculation and conjecture . . ."

[19] The distinction between a proper inference and conjecture can sometimes be narrow.

[20] In his conclusion the trial judge focused on two key facts: the crumbling silver was present and the explosion occurred. The trial judge cannot be held in error for relying on his common sense and his share of common knowledge in drawing inferences from proven facts. Silver was a proven conductor capable of causing an electrical fault, such as power arcing through a disconnect switch which had been turned off. Both the flaking of silver from the bus bars and an electrical explosion in the present circumstances were proven facts. Both were highly unusual, both outside the experience of the electrical experts who testified. That is to say, in their combined experience of 117 years, silver plating did not flake. Nor, in the absence of flaking, did such explosions ever occur. The occurrence together of two such unusual circumstances is highly suggestive, in my view sufficient to raise what might otherwise have been mere conjecture to a proper inference. In my view it was not palpable and overriding error on the part of the trial judge to infer that the flaking silver was more likely than not to have been the cause of the electrical explosion. I would dismiss this ground of appeal.

The Third Ground of Appeal

> 3. Did the Learned Trial Judge make errors of law and palpable and overriding errors in the assessment of the facts in setting the standard of care to be met by the Appellant and in finding the appellant breached the standard of care?

[21] Justice Moir found that the electrical fault which caused injury to Mr. Cheevers resulted from flaking of the conductive silver coating of the bus bars through which 600 volts of electricity was transmitted to the cells in the motor control center of the appellant's sewage treatment plant. No one knew of this deterioration of the bus bars because they are housed in a compartment immediately behind the cells and not visible when the cells are open.

[22] Based on the evidence of Wayne Collins, the supervisor of the plant, Justice Moir found the appellant municipality knew the following about the interior of the cells and the bus bar compartment at the time Mr. Cheevers was injured:

> [46] . . . Likely, no one had ever exposed the bus bar compartment for inspection or cleaned it since the plant was built in 1974. Likely, no one had seen

> the bus bars exposed since 1986 when the motor control center was last upgraded. Almost certainly, no one had inspected or cleaned the spare cells since 1986. Certainly, no one had ever been known to have inspected or cleaned or thermographically tested the bus bars, the rest of the bus bar compartment or the cells.

[23] The appellant had no program or policy of preventative maintenance; corrective maintenance was relied on to remedy problems when they occurred. Justice Moir held:

> [68] In my opinion a reasonable person would cause a bus bar compartment to be inspected every few years.
>
> [69] . . . The defendant (appellant) made no inspections. As a result, dust accumulated. The dust was conductive. It caused arcing that led to three powerful shorts from phase to ground. The intense heat reflecting from those powerful shorts burned Mr. Cheevers severely.

[24] He found that operators of plants with motor control centers drawing 600 volts of electricity at lethal amperages would, on an objective assessment, reasonably foresee risks of malfunctions causing death or serious personal injury to employees and independent contractors such as cleaners and electricians. He found a prima facie duty of care, with no policy considerations to reduce or negate it. This finding was not appealed. The issues relate not to the duty of care but to the standard of care.

[25] The appellant referred him to **Warren v. Camrose** (1989), 92 A.R. 388 (C.A.) in which Côté, J.A. of the Alberta Court of Appeal stated at ¶ 19:

> The consensus of the recognized experts in a field on what is safe does not absolutely bind the courts. Neither does the uniform practice of a profession or industry. But they are very strong evidence . . . Indeed, leading authorities go much beyond questions of evidence and make such a consensus or uniform practice a substantive defence to a charge of want of care (subject to one exception) . . . It is not enough for a plaintiff to show that other precautions were possible, if they were not commonly used by the profession or trade in question, unless their omission was clearly very unreasonable . . . Nor need a defendant warn that an unusual precaution is omitted, or recommend its use . . . The test is what was the generally accepted practice at the time of the accident . . . (Nor is the test a precaution introduced since . . .) Nor does a plaintiff rebut the generally

> accepted practice by producing one respected expert or textbook which advocates a precaution not generally followed . . . The court can override expert evidence and brand a universal practice as negligent only in a strong case; the experts' thinking or the profession or trade's practice, properly understood, must offend logic or common sense, or flow from a gross error in weight. . . . (References omitted).

[26] Justice Moir accepted this statement with two "slight reservations":

> [42] Firstly, the phrases "uniform practice" and "universal practice" are too strong. A general practice qualifies to inform the standard of care: Lewis N. Klar, QC, *Tort Law* 3rd ed. (Carswell, Toronto, 2003), p 321. Secondly, evidence of practice is informative but not determinative of standard of care. The over-arching principle establishes the standard of care by reference to an objective assessment of what the reasonable person would do in like circumstances.

[27] The appellant also cited **Moss v. Ferguson** (1979), 35 N.S.R. (2d) 181 (T.D.) in which Justice MacIntosh, following the leading English cases of **Marshall v. Lindsey County Council**, [1935] 1 K.B. 516 and **Morton v. William Dixon Limited**, [1909] S.C. 807, held:

> [28] The burden of proof to establish negligence is on the plaintiff. The authorities indicate that the trade custom is *prima facie* proof of a standard of reasonable care and that the burden is on the plaintiff to establish that such was not the case.

[28] This is consistent with **ter Neuzen v. Korn**, [1995] 3 S.C.R.674 in which Sopinka J. cited Fleming, *The Law of Torts* (7th ed., 1987) with approval:

> [39] . . .
>
> > *Conformity* with general practice, on the other hand, usually dispels a charge of negligence. It tends to show what others in the same "business" considered sufficient, that the defendant could not have learnt how to avoid the accident by the example of others, that most probably no other practical precautions could have been taken . . .
> >
> > All the same, even a common practice may itself be condemned as negligent if fraught with obvious risks.
>
> Sopinka, J. stated that:

> . . . The question as to whether the trier of fact can find that a standard practice is itself negligent is a question of law to be determined by the trial judge irrespective of the mode of trial.

[29] The respondent cited **ter Neuzen,** *supra* and **Roberge v. Bolduc**, [1991] 1 S.C.R. 374:

> . . . trial courts have discretion to assess liability despite uncontradicted evidence of common professional practice at the relevant time. The standard in regard to the particular facts of each case, must still be that of a reasonable professional person in such circumstances.

[30] The appellant submits it had established the universal practice of sewage treatment plants operators in Nova Scotia (and those engaged in similar activities) was to maintain their motor control centers through corrective maintenance and not through preventative maintenance programs. The evidence showed, however that a sewage treatment plant in Kentville, whose operator was an electrical engineer, had adopted preventative maintenance. The evidence of practice across the province was anecdotal, based on 117 years combined experience of the five knowledgeable witnesses, two of them electrical engineers. It was not differentiated as to the type of industry or the size of the power load and in my view fell short of establishing a standard or general practice.

[31] Don Matheson, the expert called by Mr. Cheevers, and Mark Wentzell, the appellant's expert, both electrical engineers, testified that the industry recommends preventative maintenance for motor control centers. Mr. Matheson referred to the publication of recommended practices by the Institute of Electrical and Electronics Engineers which begins its maintenance chapter with the statement: "It is impossible to predict when an abnormal electrical condition will occur. . . . " He also produced the National Fire Prevention Association" publication "Recommended Practice of Electrical Equipment Maintenance" which was approved by the American National Standards Institute. It recommends "preventative maintenance of industrial-type electrical systems and equipment. Also in evidence was the Westinghouse Siemens "Instruction Guide" for motor control centers similar to the appellant's. It recommends inspections once a year to look for any accumulation of dust or dirt and includes examination of "stab fingers and vertical bus" such as those involved here. After reviewing the evidence of

practices followed in Nova Scotia, as well as the recommended standards, Justice Moir stated:

> [61] I find that it was not the practice to perform preventative maintenance in motor control rooms at sewage treatment plants in Nova Scotia or at smaller commercial operators such as saw mills or at similar plants operated by municipalities. I find that preventative maintenance is usually practiced in industry and in provincially or federally operated works and at sea. I am satisfied that if an electrical engineer were responsible for a sewage treatment plant there would be a program of preventative maintenance for the plant including the motor control room. I accept Mr. Wentzell's explanation for the lack of preventative maintenance in municipal works and smaller commercial operations: education–the benefits, both in safety and profit, are not understood; histories of problem-free operations with the value of preventative maintenance becoming stark only when that history is brought to an abrupt turn; and budgets, that is, short-term or short-sighted budgets that fail to recognize that economy as well as safety is served by programs of preventative maintenance.

[32] The appellant changed its practice with respect to preventative maintenance at the Woodside plant but argued that what it did after the event was not relevant to the applicable standard of care. Justice Moir was referred to the Newfoundland Supreme Court case of **Winsor v. Marks & Spencer Canada Inc.** (1995), 129 D.L.R. (4th) 189 where Justice Mercer said at ¶ 11: "Early English and Canadian authorities suggest that post-accident measures are not logically probative of negligence." At ¶ 15 he stated:

> In many Canadian jurisdictions evidence of post-accident measures are generally accepted as relevant and receivable in evidence. Though such evidence would not, standing alone, be sufficient to support a finding of negligence it is properly considered with other evidence in that determination. (References omitted by Justice Moir). This is now the prevailing view in Canada and I accept its applicability to Newfoundland.

[33] Justice Moir followed the opinion of Justice Mercer. It was not a departure from the standard of correctness on questions of law for him to admit the evidence and to hold that "Mr. Cheevers' injury drew the benefits of preventative maintenance on motor control centers to the attention of the municipality." In itself, it was not determinative of the outcome. He then analyzed the effect of industrial practice with respect to the standard of care.

> [64] When the authorities refer to a "practice of a profession or industry", I do not understand them to allow for an artificial particularization. So, for example, in the case of **Anderson v. Chasnery**, [1949] 4 D.L.R. 71 (MCA) affirmed [1950] 4 D.L.R. 223 (SCC) proof that a surgeon followed the practice of all those at a particular hospital was not proof of "a practice followed by surgeons generally". What matters is "the general practice of those engaged in a similar activity": **Klar**, cited above at para 42, a p. 321. In my assessment, industry has gone a long way to establishing a practice of preventative maintenance for heavy electrical equipment and the systems that service it. When Mr. Cheevers was hurt, some segments of industry were leading the way and some were lagging behind. In the absence of a good reason for holding municipal sewage treatment plants to a different standard than industrial operations or provincial or federal public works, I would not treat the finding that sewage treatment plants did not have preventative maintenance as a finding of a general practice informing the standard of care. On the other hand, where the practice is led by the universal opinion of electrical engineers and the recommendations of manufacturers and authoritative expressions of standards, it seems that the others really are lagging behind. The law ought not to lag behind with them. Although the practice of providing preventative maintenance to motor control centers is by no means universal, it is sufficiently established to inform the standard of care.
>
> [65] Even if "corrective maintenance" were the general practice, I would have great difficulty allowing that approach to inform the standard once a duty is found in the first place. For one thing, a corrective maintenance standard of care shifts the responsibility back to those very people the duty is supposed to protect, the employees and independent contractors.

[34] In **ter Neutzen** Sopinka J. noted that as a general rule a standard practice is to meet the standard of care in negligence. He stated:

> [43] . . . The question that remains is under what circumstances will a professional standard practice be judged negligent? It seems that it is only where the practice does not conform with basic care which is easily understood by the ordinary person who has no particular expertise in the practices of the profession. That is, as Professor Fleming suggests (in *The Law of Torts*, 7th ed. [Sydney: Law Book Co., 1987]) where the common practice is fraught with danger, a judge or a jury may find that the practice is itself negligent.

[35] In holding that "a reasonable person would cause a bus bar compartment to be inspected every few years" Justice Moir was not imposing a burdensome or unreasonable standard of care on industry where it is known that high voltage equipment at a dangerous amperage begins slowly deteriorating from the time it is

installed. The entire cost of everything done by way of equipment repair and maintenance on account of the explosion was $25,000.

[36] I agree with Justice Moir and would dismiss this ground of appeal.

The Fourth Ground of Appeal

> 4. Did the Learned Trial Judge make errors of law and palpable and overriding errors in his assessment of the facts in finding that the Respondent's past loss of income was $68,119.00 rather than $55,345.00?

[37] Justice Moir established a baseline annual income that Mr. Cheevers could have expected to earn but for the accident from his employment by SuperCity Machining and Electric Motor Incorporated, of which he was one of the principals and founders. The trial judge adopted a year-by year approach and awarded damages for lost income for each year in which Mr. Cheevers' earnings fell short of the baseline. He awarded nothing for years in which his earnings exceeded the baseline. The appellant says it was entitled to be reimbursed for the amount by which his income exceeded the baseline in good years. That would have reduced the award for lost earnings during the relevant period from $68,119.00 to $55,345.00.

[38] The appellant submits, citing **Ratych v. Bloomer**, [1990] 1 S.C.R. 940, that:

> [45] . . . where pecuniary damages are at issue, it is the actual pecuniary loss sustained by the plaintiff which governs the amount of the award .
>
> [49] . . . damages awarded to the plaintiff should be confined to his or her actual loss, as closely as that can be calculated. The damages should be in an amount which will restore the plaintiff to his pre-accident position. Where pecuniary losses, such as loss of earnings, are at stake, the measure or damages is normally the plaintiff's actual financial loss.

[39] Calculation of Mr. Cheevers' lost income was complicated by the fact that he was employed by SuperCity. The company was incorporated in 1995 and had achieved some successes but had been experiencing growing pains; Mr. Cheevers and the two other principals had high hopes for it but accepted incomes that reflected narrow profit margins. Justice Moir estimated that Mr. Cheevers' annual income was about $35,000 at the time of the accident in September, 1998; he

found the company had moved beyond the threshold of profitability and was improving rather than stagnating. He found Mr. Cheevers' injuries caused the failure of SuperCity in April of 1999.

[40] Mr. Cheevers was paranoid and depressed after the explosion and his left arm, which had been severely burned, had the strength of a baby's. He was not considering work in the electrical field. In 1999 after SuperCity failed he delivered fried chicken. In 2000 he delivered newspapers for eight months. In February, 2001 he worked six weeks at sea, then as one of 400 electricians working on a cement plant in the United States. In 2002 he worked on other projects, some of them offshore, and began doing odd electrical jobs. In 2003 Mr. Cheevers began winning electrical contracts and building up a steady residential business. Justice Moir projected Mr. Cheever's anticipated earnings at SuperCity year by year and awarded him the difference for the years when his actual earnings fell short of the projections, $33,119 in 1999, $33,500 in 2000, and $1,500 in 2002.

[41] The appellant submits that Mr. Cheevers would have earned a projected $277,500 between 1999 and the trial in late 2004 and early 2005. Justice Moir found he actually earned $222,155 during that period. The difference was $55, 345. If the entire period were essential to the calculation this submission might seem to accord with the principle expressed in **Ratych v. Bloomer** "that damages awarded to the plaintiff should be confined to his or her actual loss, as closely as that can be calculated."

[42] In attempting to calculate damages for lost earnings as closely as possible, however, Justice Moir considered lost earnings on an annual basis, presumably because in his discretion he saw no need to bring years when no losses occurred into the calculation. The accident was devastating to Mr Cheevers and his income was severely reduced in 1999 and 2000. By 2001 his extraordinary efforts to recover a reasonable income were paying off and he exceeded the figure for his projected income from SuperCity. Justice Moir awarded him no damages for that year because there was no basis for doing so; in effect he dismissed any claim for damages for 2001. Mr. Cheevers' income had not yet stabilized, however, and in 2002 he fell below the projected figure and was awarded $1,500 for the shortfall in that year. In both 2003 and 2004 he again exceeded the income projection and no award could be made. Essentially, the period during which Mr. Cheever's income was below the projected level because of the accident ended in 2001, with a minor

setback in 2002. In my view Justice Moir's calculation represented a fairer and more principled way of determining Mr. Cheevers' actual loss of income than that proposed by the appellant. The damages calculated by Justice Moir totaled $68,199. I agree with Justice Moir's approach; he heard at first hand evidence of the various circumstances which made the calculation difficult, and which he took into account.

[43] In **Kern v. Steele** (2003), 220 N.S.R. (2d) 51 (C.A.) Oland J.A., writing for this court, stated the standard of review in an appeal of an assessment of damages as follows:

> [43] A court of appeal is not to alter a damage award made at trial unless it concludes that there was no evidence upon which the trial judge could have reached the conclusion he did, or he proceeded upon a mistaken or wrong principle, or where the result at trial was wholly erroneous: **Woelk v. Halvorson** (1980), 114 D.L.R. (3d) (S.C.C.) at p. 388.

[44] In my view there was sufficient evidence to support Justice Moir's assessment of damages for lost income; it represented a reasonable approach although perhaps not the only one. He did not proceed on a mistaken or wrong principle of law, and the amount of the award was not wholly erroneous, or, as it is frequently expressed, "so inordinately high or low as to be wholly erroneous."

[45] I would dismiss this ground of appeal.

The Cross-Appeal

[46] Justice Moir based compensation for lost wages to the date of trial on projections of what Mr. Cheever's company, SuperCity, might have paid him had it not failed in April, 1999, about six months after the accident. He considered lost earning capacity against that background. By the time of the trial in December, 1999 Mr. Cheevers was re-establishing himself in the electrical business as a contractor who was also active in the residential market. By the trial date he was earning as much as or more than he was projected to have earned through SuperCity and was awarded no damages for lost future income. Justice Moir found he was "well on the way to earning the same as a well-placed manager of a commercial electrical operation," just as he would have been with SuperCity but for the accident. He considered, but decided against, compensating him for the lost

opportunity to realize on the business plan that saw SuperCity more lucrative than projected. In dismissing the claim for lost earning capacity Justice Moir stated:

> [131] . . . [M]y difficulty is that I am unable to assess this possibility or its value realistically. I am not equipped, perhaps no one could be, to realistically compare the chances of the plan succeeding and its value with the chances of the plan failing and its attendant costs. This is too much into speculation to qualify as a compensable hypothetical.

[47] Mr. Cheevers' counsel submitted that Justice Moir erred in this respect. He cited from Cassels, *Remedies, The Law of Damages* (Toronto: Irwin Law, 2000) at page 125:

> In the determination of what has been lost, the focus is not simply upon the plaintiff's lost future earnings. Instead, accident victims are compensated for their diminished ability or power to work productively–a capacity viewed as a capital asset. As Dickson J. stated in Andrews, "[i]t is not the loss of earnings but, rather, loss of earning capacity for which compensation must be made. A capital asset has been lost: what is its value?" . . .
>
> On occasion courts make awards for pure lost earning capacity (even where there is no evidence that the plaintiff would in fact have earned income) , but more often than not (especially where the plaintiff has a reliable work history), the award is based on a projection of the plaintiff's actual future income prospects at the time of the accident . . .

[48] In **Leddicote v. Nova Scotia**, 2002 NSCA 47 Saunders J.A. considered the claim of an accident victim who had lost the ability to do repeated lifting with her right arm which rendered her "less capable of earning an income from all types of employment"

> [69] . . . This, so it is argued, limits the broad range of opportunities available to her before the motor vehicle accident of February, 1995, In the result she says she has become less marketable and less "valuable" as an income earner.
>
> [70] In my respectful view, this argument mistakenly equates "function" with "capacity"
>
> [71] Properly understood in the circumstances of this case, function should be seen as a physical limitation, whereas capacity is intended to mean an ability to earn income. The two are not synonymous and should not be confused.

> [72] Badly broken fingers in a car crash might intuitively lead one to imagine a demonstrable claim for future income loss, were the claimant a potter or a painter or a computer programmer. But such is not a foregone conclusion. Such a claimant may, by the time of trial, have developed other skills enabling the individual to pursue different, but gainful, satisfying employment. In such a case it may be difficult to prove any claim for either future loss of income or a diminution of earning capacity.

[49] It appears from the evidence that Mr. Cheevers suffered injuries to both his function and his capacity. He was left with use of his left arm reduced to 80 per cent and assorted less disabling physical disabilities. These would be examples of loss of function for which it appears he was able to compensate in his new career as an independent electrical contractor. But there was also evidence of loss of capacity that could have diminished his earning ability, although that is difficult to assess in monetary terms when his current prospects are compared with his projected prospects with SuperCity and found to be similar.

[50] An example of evidence of loss of capacity as a capital asset was his diminished stamina. He was accustomed to working seventy hours a week before the explosion, working on bids at night and by day directing an eighteen-man work force, ten of them core employees, and performing hands-on work himself. Now he works forty hours a week.

[51] Mr. Cheevers' career exhibited ambition and a strong work ethic. He was a respected electrician who could deal effectively with contractors and wholesalers and bid successfully for contracts. He planned expansions by SuperCity into related fields. At the time of the explosion he was forty-seven years old and at the top of his game; prospects looked bright. After the explosion he blamed himself; he became paranoid and depressed and lost confidence.

[52] Justice Moir reviewed Mr. Cheevers' own evidence as to the effect the accident had on him with his outlook at the time of the trial:

> [125] Mr. Cheevers says his income earning capacity has been substantially reduced. He thinks it would take forever to rebuild his credibility for commercial contracting and he is too old to work his way back into the industry. His business plan, however, had been really exciting. The focus on business development and the prospect of working on the engineering side of the industry were really

> engaging. He says he was devastated to lose his ambitions and goals for SuperCity.
>
> [126] Mr. Cheevers' plan is to continue doing inspections without anticipating a significant increase in that business, to continue to accept referrals for residential work, to buy and trade in a few properties and to look to retirement. He did some commercial work in 2003 but he testified "People didn't seem to want to deal with me", which says more about Mr. Cheevers than about the people.
>
> [127] Mr. Cheevers remains challenged by some physical limitations. He is not back to full strength. His left hand cramps and prevents him from working. He probably could be more productive without these limitations. However, there is no room for speculation in the present exercise. I cannot say whether he would be making more money today or less money if the electrical explosion had not disrupted the path he was on.

[53] Justice Moir concluded that as a result of the work Mr. Cheevers was doing at the time of trial he was "earning the same as a well-placed manager of a commercial electrical operation, the same position he would have been in if SuperCity had not failed because of his accident." However it is clear from the evidence, and in particular from the above comparison by Justice Moir of Mr. Cheever's outlook at the time of his injury with his outlook at the time of trial, Mr. Cheever's position had worsened considerably despite the similarity of his earnings in the two situations. Mr. Cheever appears to have lost a good deal; this has more to do with what happened to him as an individual than what happened or had been likely to happen to SuperCity. In my view what he lost was earning capacity in the sense that Justice Saunders explained the term in **Leddicote**, above. Or as Professor Cassels stated in the citation above:

> In the determination of what has been lost, the focus is not simply upon the plaintiff's lost future earnings. Instead, accident victims are compensated for their diminished ability or power to work productively–a capacity viewed as a capital asset.

[54] In my view there was evidence of lost earning capacity, although Justice Moir did not award damages under that heading. However in assessing non-pecuniary general damages for pain, suffering and loss of amenities he arrived at a figure of "about $50,000 as basic" and said he would "add something to it for the extraordinary loss Mr. Cheevers suffered on account of damages to his professional life." This approach was approved by this court in the judgment of

Chipman, J.A.in **Newman v. LaMarche** (1994), 134 N.S.R. (2d) 127 (C.A.) at ¶23 and 24 and in Justice Chipman's dissenting judgment in **Marinelli v. Keigan** , [1999] N.S.J. 23, at 130 (Q.L.), on which Justice Moir relied. Justice Moir's award of $90,000 non-pecuniary damages therefore presumably included $40,000 for lost earning capacity. This amount is not so inordinately low as to be wholly erroneous, and in my view there is no basis for appellate intervention. The cross-appeal must be dismissed.

[55] Having dismissed all of the grounds of the appeal individually I would therefore dismiss the appeal with costs fixed at 40 per cent of the costs at trial, plus disbursements, as agreed or taxed. I would fix costs on the cross-appeal at $1,000, plus disbursements.

Freeman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.