2009 Hfx. No. 315567

SUPREME COURT OF NOVA SCOTIA

B E T W E E N:

ALBERT CARL SWEETLAND and BARBARA FONTAINE

Plaintiffs

- and -

GLAXOSMITHKLINE INC. and GLAXOSMITHKLINE LLC

Defendants

Proceeding under the *Class Proceedings Act,* S.N.S 2007, c. 28

PLAINTIFFS' BOOK OF AUTHORITIES RE:

MOTION FOR SETTLEMENT APPROVAL

HEARING DATE – JANUARY 29, 2019

Wagners
Suite PH301, Historic Properties
1869 Upper Water Street
Halifax, NS B3J 1S9
Solicitors for the Plaintiffs
Filed: December 14, 2018

AUTHORITIES

Authorities Referred to in Brief:

1. *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294
2. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372
3. *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.)
4. *Lozanski v. Home Depot, Inc.*, 2016 ONSC 5447
5. *Martin v. Roman Catholic Diocese of Antigonish*, 2009 NSSC 331
6. *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527
7. *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572
8. *Stewart v. General Motors of Canada Ltd*., [2008] O.J. No. 4426 (Ont. S.C.J.)
9. *Voutour v. Pfizer Canada Inc*., 2011 ONSC 7118

Authorities Referred to in Schedule "C":

10. *Briffet v. Gander & District Hospital Board*, [1996] N.J. No. 34
11. *Dillon v. LeRoux*, [1994] B.C.J. No. 795
12. *Gros v. Victoria General Hospital*, 2000 MBQB 172
13. *Hewlett v. Henderson*, 2006 BCSC 300
14. *Marchand v. Jackiewicz*, 2010 ONSC 1796
15. *Potrie v. Langdown*, [1996] B.C.J. No. 318

SCHEDULE "B"

LEGISLATION

16. *Class Proceedings Act*, S.N.S. 2007, c. 28

Most Negative Treatment: Check subsequent history and related treatments.

2010 ONSC 4294
Ontario Superior Court of Justice

Ainslie v. Afexa Life Sciences Inc.

2010 CarswellOnt 5672, 2010 ONSC 4294, [2010] O.J. No. 3302, 191 A.C.W.S. (3d) 1053, 191 A.C.W.S. (3d) 728

DAVID AINSLIE and MURIEL MARENTETTE (Plaintiffs) and AFEXA LIFE SCIENCES INC., GRANT THORNTON LLP, JACQUELINE J. SHAN, GORDON G. TALLMAN and HARRY BUDDLE (Defendants)

G.R. Strathy J.

Heard: June 28, 2010
Judgment: August 5, 2010
Docket: 07-CV-336986PD1

Counsel: William Sasso, Jay Strosberg for Plaintiffs / Moving Parties
Patrick O'Kelly, Simon Bieber for Defendants / Respondents, Afexa Life Sciences Inc. & others
Matthew Fleming for Defendant / Respondent, Grant Thornton LLP

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iii Agreements respecting fees and disbursements
Headnote
Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous
Multiple factors considered — Plaintiffs were two individuals who purchased shares in CV Inc. between December 11, 2006 and March 23, 2007 (class period) — Plaintiffs alleged that CV Inc. misrepresented its financial results during class period — Plaintiffs further alleged that when CV Inc. issued public correction on March 26, 2007, this caused sharp decline in trading price of its shares — Plaintiffs commenced action in Ontario against CV Inc. and its auditors for negligent misrepresentation — Parties reached settlement — Plaintiffs sought to certify action under Class Proceedings Act — Proposed class was defined as persons who acquired CV Inc. shares during class period and held them on date of public correction — Plaintiffs brought unopposed motion for certification — Motion granted — There was properly

pleaded cause of action for negligent misrepresentation — Class definition was objective and enabled class members to identify themselves — It was appropriate to certify global class — Given that CV's shares traded only on TSX, purchasers could reasonably expect that their rights would be determined by courts of Ontario — Proposed common issue was acceptable for certification and avoided duplication — Proposed settlement fulfilled goals of judicial economy, access to justice and behaviour modification — Many individual claims would be for relatively small amounts and would be uneconomical to pursue — Plaintiffs adequately represented interests of class and diligently prosecuted claim to successful conclusion.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

Approval of settlement for negligent misrepresentation of corporate financial results.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Agreements respecting fees and disbursements

Table of Authorities

Cases considered by *G.R. Strathy J.*:

Allen v. Aspen Group Resources Corp. (2009), 81 C.P.C. (6th) 298, 2009 CarswellOnt 7620, 67 B.L.R. (4th) 99 (Ont. S.C.J.) — considered

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — followed

Bilodeau v. Maple Leaf Foods Inc. (2009), 2009 CarswellOnt 1301 (Ont. S.C.J.) — followed

Boulanger v. Johnson & Johnson Corp. (2010), 2010 CarswellOnt 2857, 2010 ONSC 2359 (Ont. S.C.J.) — followed

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — followed

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2002), 22 C.P.C. (5th) 346, [2002] O.T.C. 317, 2002 CarswellOnt 1601, 26 B.L.R. (3d) 281 (Ont. S.C.J.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — considered

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094, [2005] O.T.C. 208 (Ont. S.C.J.) — followed

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — followed

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — considered

Garland v. Enbridge Gas Distribution Inc. (2006), 56 C.P.C. (6th) 357, 2006 CarswellOnt 9605 (Ont. S.C.J.) — considered

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — considered

Martin v. Barrett (2008), 2008 CarswellOnt 3151, 55 C.P.C. (6th) 377, 2008 C.E.B. & P.G.R. 8296, 67 C.C.P.B. 102 (Ont. S.C.J.) — considered

McKenna v. Gammon Gold Inc. (2010), 2010 ONSC 1591, 2010 CarswellOnt 1460 (Ont. S.C.J.) — followed

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — considered

Osmun v. Cadbury Adams Canada Inc. (2009), 85 C.P.C. (6th) 148, 2009 CarswellOnt 8132 (Ont. S.C.J.) — followed

Osmun v. Cadbury Adams Canada Inc. (2010), 2010 ONSC 2752, 2010 CarswellOnt 3350 (Ont. S.C.J.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — followed

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — followed

Parsons v. McDonald's Restaurants of Canada Ltd. (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 195 O.A.C. 244 (Ont. C.A.) — considered

Pysznyj v. Orsu Metals Corp. (2010), 2010 ONSC 1151 (Ont. S.C.J.) — considered

Queen v. Cognos Inc. (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — followed

Ramdath v. George Brown College of Applied Arts & Technology (2010), 2010 CarswellOnt 2038, 2010 ONSC 2019 (Ont. S.C.J.) — considered

Silver v. Imax Corp. (2009), 66 B.L.R. (4th) 222, 2009 CarswellOnt 7874 (Ont. S.C.J.) — considered

Stone Paradise Inc. v. Bayer Inc. (April 16, 2006), Doc. 45604CP (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — followed

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

s. 29(2) — considered

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 138.5 [en. 2002, c. 22, s. 185] — considered

MOTION by plaintiffs for orders certifying class proceeding and approving settlement and legal fees.

***G.R. Strathy J.*:**

1 This is a proposed class action in which the plaintiffs claim that the defendant CV Technologies Inc. (now known as "Afexa Life Sciences Inc." and referred to herein as "CV"), the manufacturer of a cold and flu medicine known as "Cold-fX®", misrepresented its financial results, causing the price of its shares to be artificially inflated. The plaintiffs claim that they and other shareholders suffered a loss when the truth was disclosed. They seek to hold CV, and its auditors Grant Thornton LLP ("GT"), responsible for the loss. After three years of litigation, the parties have reached a settlement in the amount of $7.1 million, inclusive of costs. That settlement is subject to court approval.

2 The plaintiffs now move for an order certifying this proceeding as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") and approving the settlement. For the reasons that follow, that order will be granted. The plaintiffs also ask for approval of class counsel's fee of $1,378,749.49, plus disbursements. I approve immediate payment of two-thirds of that fee, plus all disbursements and G.S.T. Approval of the balance of the fee will take place after class counsel makes a final report to the court requesting authorization for the distribution of the settlement.

Background

3 The plaintiffs bring this action on behalf of certain holders of securities of CV, which is a public company. Although CV is incorporated under the laws of the Province of Alberta, it maintains a corporate office in Toronto and its securities are publicly traded only on the Toronto Stock Exchange ("TSX").

4 The proposed class is defined as:

> All persons, other than Excluded Persons, who acquired securities of CV on the TSX during the class period and who held some or all of those securities on March 26, 2007.

5 The class period is December 11, 2006 to March 23, 2007.

6 Before May, 2006, CV had marketed its product in Canada. In May, 2006, it began to market Cold-fX® in the United States and it reported significant revenues from U.S. sales in its audited financial statements for the fiscal year ended September 30, 2006 and in its unaudited financial statements for the first quarter of 2007, ended December 31, 2006.

7 On March 26, 2007, CV issued a press release stating that:

> While reported U.S. sales in the fourth quarter of 2006 and the first quarter of 2007 were $8.6 million, this primarily represented sales to retailers for stocking their shelves. The actual sell through to consumers has been disappointing and is estimated to be $1.5- $2.5 million for the first six months of 2007. Slow U.S. sales will likely result in rebalancing of seasonal inventory by some retailers. *Significant rebalancing and product returns could have a serious impact on the Company's cash position and working capital. The anticipated second quarter loss is dependent upon the degree and extent of possible returns.*
>
> [Emphasis added.]

8 Following the issuance of this press release, the price of CV's shares declined by approximately 20 per cent from $2.37 (the closing price on March 23, 2007, which was the last trading day before March 26, 2007) to $1.89, the closing price on March 26, 2007.

9 On April 11, 2007, CV issued a second press release announcing that its financial statements for 2006 and for the first quarter of 2007 required restatement due to a revenue deferral issue in the U.S. Following this disclosure, the price of CV's shares declined by approximately 6 per cent from $1.47 (the closing price on April 10, 2006) to $1.38 (the closing price on April 11, 2007).

10 The restated financial statements for 2006 were released on June 14, 2007. They disclosed that CV's net sales were approximately 12 per cent lower than originally reported, before-tax earnings were approximately 51 per cent less than originally reported, and net earnings were approximately 85 per cent less than originally reported.

11 The restated consolidated financial statements for the first quarter of 2007 disclosed that CV's net sales were 10 per cent lower than originally reported, earnings before income tax were 141 per cent lower than originally reported, and net loss was 130 per cent greater than originally reported.

12 Contemporaneous with the release of these restated financial statements, CV issued a press release stating that:

> [i]n the fourth quarter of fiscal year 2006, the Company entered the U.S. market and recognized revenue with the same revenue recognition criteria as used in Canada, a market with a strong history and nominal product returns. Given that the U.S. was a new market and that Cold-fX® was a new product for this market, the Company has now realized that in the absence of any history of returns, the criteria to recognize revenue were not met. The appropriate application of the revenue recognition policy would have prevented the recognition of such revenues until the right of return has expired.

13 The plaintiffs allege that CV misrepresented its financial results, including its income, revenue and earnings, during the class period and that the individual defendants and GT participated in the misrepresentation.

14 The plaintiffs allege that, as a result of the misrepresentation, the trading price of CV's common shares was artificially inflated during the class period. It is alleged that the sharp decline in the trading price of CV's shares following the March 26, 2007 public correction of the misrepresentation, caused loss to investors who had purchased CV securities during the class period and continued to hold those securities at the time of the correction.

15 There is a parallel class action in the province of Alberta. As part of the settlement, that action has been dismissed, on consent, but the order is being held in escrow pending the outcome of this motion. The class members in the Alberta action are included in the proposed class in this action. There are no other known actions in Canada that have been commenced against CV, GT or the individual defendants relating to the claims at issue in this action.

16 The principal terms of the proposed settlement are as follows:

(a) the total settlement amount is $7.1 million. The defendants, other than GT, will contribute $6.6 million and GT will contribute $500,000;

(b) the settlement will apply to all class members in Canada or elsewhere who acquired CV securities during the class period;

(c) there is no right of reversion or opt-out credit available to the defendants. The settlement amount will be distributed, after payment of any administration costs and legal fees and expenses as awarded by the court, among all class members who submit valid claim forms to the administrator on a timely basis;

(d) in exchange for the payment of the settlement amount, it is intended that the defendants will be released from all claims of class members;

(e) the Alberta action will be dismissed;

(f) there is an opt-out threshold, which gives the defendants the ability to terminate the settlement if opt-outs exceed the threshold;

(g) approximately $5.325 million of the settlement will be available for distribution to members of the class, after payment of administrative expenses ($129,950), notice costs ($100,000) and the fees and disbursements claimed by class counsel ($1,541,900);

(h) notice will be published in the manner described below;

(i) Marsh Risk Consulting Canada will provide claims administration services and disputes as to entitlement will be resolved by Ms. Reva E. Devins, an experienced and well-respected referee;

(j) the plan of allocation creates a user-friendly claims process - there is no requirement that each claimant prove reliance upon the alleged misrepresentation. Each class member will complete a claim form and will submit evidence of purchase and sale of CV shares;

(k) allowable claims will be pro-rated against the settlement fund;

(l) prior to distribution of the settlement fund to eligible claimants, class counsel and the administrator will report to the court;

(m) the court will continue to supervise the administration, implementation and distribution of the settlement;

(n) in the event that there is a surplus of the settlement available after distribution to all eligible class members, the court will receive further submissions on an appropriate *cy-pres* award.

17 An opt-out threshold is a common form of protection for a defendant wishing to settle a class action. The defendant does not want to pay a large amount of money to settle, only to find that an unanticipated number of class members opt-out, leaving it exposed to their claims. The opt-out threshold is confidential to the settling parties, for obvious reasons. I have been informed of the threshold and I am satisfied that it is appropriate.

18 Notice of settlement approval will be given to the class by short-form and long-form notices, which will be disseminated to class members pursuant to the settlement agreement and the plan of notice. These notices will advise class members of the court's approval of the settlement agreement and will provide them with information concerning their right to participate in the settlement by filing a claim form or to opt out of the action by submitting an opt-out form.

19 Class members will have 60 days after the date of publication of the short form notice to opt out of the settlement.

20 A long form notice of settlement approval will also be sent by direct mail to as many class members as possible, using the services of Broadridge Financial Solutions Inc., a company specializing in communications with corporate shareholders. Class counsel are confident that notice of settlement approval and of the claims process will come to the attention of a large number of class members.

Certification

21 In order to give effect to the settlement, and to make it binding on members of the class who do not opt out, it is necessary that the action be certified as a class action under the *C.P.A.* Section 5 of that statute provides that the court *shall* certify the action as a class proceeding where the following test is met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class;

(ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and

(iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

22 It is well-established that the requirements for certification need not be as rigorously applied in the settlement context - the certification test will be satisfied if there is a *prima facie* case favoring certification: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 24; *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (Ont. S.C.J.) at para. 21.

23 I do not propose to review these criteria in detail. The defendants support the settlement and certification is necessary in order to give effect to the settlement. There is no opposition to the settlement in spite of extensive publication of notice of this hearing. A similar sort of case, involving alleged misrepresentation in the secondary securities market,

Silver v. Imax Corp., [2009] O.J. No. 5585 (Ont. S.C.J.), has been certified on a contested basis and others have been certified for the purposes of settlement: see *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 (Ont. S.C.J.).

24 In summary:

(a) the pleadings disclose a properly pleaded cause of action for negligent misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at p. 110; *Elliott v. NovaGold Resources Inc.*, 2010 ONSC 2683;

(b) the class definition is set out in objective terms and enables members of the class to readily identify themselves as such. The definition is not dependent on the merits of the case and satisfies the purposes of the class definition set out in leading case of *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.). In securities class actions the class is typically those who owned the securities at the material time: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 20; *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.) at paras. 14-15;

(c) I am satisfied that in the circumstances of this case, where the shares of CV were traded only on the TSX, it is appropriate to certify a "global" class as was done in *Silver v. Imax Corp.*, above. A purchaser of securities of CV, a Canadian company with a presence in Ontario, a reporting issuer under the Ontario *Securities Act*, with shares trading only on the TSX, could reasonably expect that his or her rights in relation to those securities would be determined by the courts of Ontario. There is a real and substantial connection between the claims asserted in this action and Ontario and this province is a natural forum for the action. The requirements of order and fairness will be met by a comprehensive notice plan that will ensure, to the extent reasonably possible, that actual notice is received by all members of the class: see *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.) ; *Ramdath v. George Brown College of Applied Arts & Technology*, [2010] O.J. No. 1411 (Ont. S.C.J.); *Silver v. Imax Corp.*, above, at para. 117; *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2002), 22 C.P.C. (5th) 346 (Ont. S.C.J.) at para. 12; *Elliott v. NovaGold Resources Inc.*, above, at paras. 11-12;

(d) the common issue proposed by the plaintiff[1] is acceptable for certification and meets the requirement of avoiding duplication of fact finding and legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39. A similar common issue was approved by van Rensburg J. in *Silver v. Imax Corp.*, above. In *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.), I declined to certify a common issue based on common law misrepresentation in the securities context because of the need to establish reliance as an element of the cause of action. In this case, the settlement will extend to all members of the class regardless of whether they relied upon or were even aware of the alleged misrepresentation. Accordingly, bearing in mind the relaxed test for certification on settlement, the common issue is appropriate;

(e) the requirement that a class proceeding be the preferable procedure for the determination of the common issue is of less significance in the context of the settlement of this case because the settlement provides a mechanism for ensuring compensation of all eligible class members. I am satisfied that the proposed settlement is an efficient and manageable method of resolving the claims of the class and that it fulfills the goals of judicial economy, access to justice and behaviour modification.: *Hollick v. Metropolitan Toronto (Municipality)*, above, at paras. 27-28. Many individual claims by shareholders would be for relatively small amounts and would be uneconomical to pursue individually. Without an action of this kind, it is probable that the claims of most shareholders would not be satisfied. The action also supplements the deterrent effects of regulatory oversight and encourages public companies to take precautions to protect investors: see *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (Ont. S.C.J.) at paras. 144-5;

(f) the proposed representative plaintiffs fairly and adequately represent the interests of the class. Both purchased shares of CV during the class period and continued to own them after the corrective disclosures were made. They have a clear interest in the litigation and there is no evidence that they have any conflict with the

> class. They have diligently and faithfully prosecuted the claim to a successful conclusion by way of settlement. I am also satisfied that the litigation plan, as set out in the settlement agreement, is a workable method of resolving the action.

25 The settlement agreement incorporates the plaintiffs' damages theory that the value of CV's shares was artificially inflated by the misrepresentation made by the defendants during the class period and that the inflation was removed from the share value as a result the March 26, 2007 corrective disclosure.

26 The class members' entitlements under the settlement agreement will be calculated in a manner analogous to the damages provisions in s. 138.5 of the *Securities Act*, R.S.O. 1990, c. S.5 ("*O.S.A.*"). The plan of allocation sets out formulae to calculate damages: (a) for shares disposed of on or before the tenth trading day following the corrective disclosure; in this case, on or between March 26 and April 9, 2007; (b) for shares disposed of after the tenth trading day following the corrective disclosure; in this case, after the close of trading on April 9, 2007; and (c) for shares that have not been disposed of, or are otherwise still held by the claimant.

27 Ultimately, the amount of each class member's actual compensation will depend upon: (i) the number and the price of shares purchased by the class member; (ii) the time and the price at which the class member sold such shares; and (iii) the total number and value of claims for compensation filed with the administrator.

28 I agree with class counsel that the plan of allocation methodology treats the class members fairly and that the plan of allocation is a fair and reasonable manner of distributing the settlement proceeds to authorized claimants under these circumstances.

Settlement approval

29 Section 29(2) of the *C.P.A.* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. A settlement need not be perfect. It need only fall "within a zone or range of reasonableness": *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 (Ont. S.C.J.) at paras. 45-46; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 69; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at pp. 439 -440; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) at paras. 70, 89.

30 In determining whether to approve a settlement, the court may take into account factors such as:

- the likelihood of recovery or likelihood of success;
- the amount and nature of discovery, evidence or investigation;
- the proposed settlement terms and conditions;
- the future expense and likely duration of litigation;
- the recommendation of neutral parties, if any;
- the number of objectors and nature of objections;
- the presence of arm's-length bargaining and the absence of collusion;
- the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;

- the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and

- the recommendation and experience of counsel.

See: *Bilodeau v. Maple Leaf Foods Inc.*, above, at para. 47; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 117; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 10; *Parsons v. Canadian Red Cross Society*, above, at paras. 126-132.

31 The "zone of reasonableness" concept is helpful in guiding the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented - as they clearly are in this case - by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

32 As stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

33 In this case, I accept the submission of class counsel that the settlement was the product of hard negotiations at arm's length in the face of formidable opposition by experienced counsel for the defendants. The settlement appears to be favourable to the class, consistent with a reasonable risk-based analysis of the potential recovery after trial, grounded in a principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

34 The following factors are particularly significant in leading me to conclude that the settlement is fair, reasonable and in the best interests of the class:

> (a) at the time the settlement was reached, there was uncertainty regarding how the leave test in Part XXIII.1 of the *O.S.A.* would be interpreted and a significant risk that the leave test would not be met and/or that the court would not certify the claims in Part XXIII.1 of the *O.S.A.*;
>
> (b) there was, at least in my respectful view, a serious risk that the court would not certify the common law misrepresentation claims - I declined to do so in *McKenna v. Gammon Gold Inc.*, above, although I recognize that there is authority to the contrary;
>
> (c) the statutory limits of liability in Part XXIII.1 of the *O.S.A.* would be in the range of $14 million to $17.2 million if the action was entirely successful and the total value of the settlement (before costs and expenses) is about 50 per cent of that;
>
> (d) the plaintiffs' expert estimated the total damages recoverable by the class in the range of about $9.8 million - this figure would no doubt be disputed by the defendants and there is at least a possibility that the damages would be less than this amount;
>
> (e) on a practical level, there is no guarantee that a judgment would be fully collectible. CV's liability insurance is $10 million, inclusive of defence costs, and counsel for CV advises that costs have eroded the insurance to

around $8 million at this time. If the matter were to proceed to a contested trial and possibly appeals, there is a probability that the available insurance would be less than the amount of the settlement; and

(f) there were at least some issues concerning the underlying merits of the plaintiffs' claims as the defendants took the position that there had in fact been disclosure during the class period as a result of management discussion and analysis reports that were delivered to shareholders at the same time as the financial statements.

35 All these considerations support my conclusion that, viewed objectively, the settlement falls within the zone of reasonableness and is a fair reflection of the merits of the claim and the risks of litigation, taking into account as well the value of an early settlement. The settlement comes with the recommendation of experienced counsel, the support of the representative plaintiffs and, despite extensive pre-hearing publication, there is not a single voice raised in opposition to the settlement. If the opt-out threshold is exceeded, the defendants will be entitled to terminate the settlement and the proceedings will continue. Absent that, any shareholder who does not wish to accept the settlement and to "go it alone" and maintain an individual action, may opt out of the action and the settlement.

36 *Approval of Fees of Class Counsel*

37 Class Counsel request a fee of $1,378,749.48, including taxes. Disbursements are claimed in the amount of $163,150.52. The costs of administration are fixed at $129,950.00, the costs of the notice plan at $100,000.00 and the cost to receive objections at $3,150.

38 The task for the court on a motion of this kind is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.) at paras. 13 and 56.

39 In *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

40 It seems to me that one of the most important factors in this list, particularly where the lawyer seeks a contingent fee, as is invariably the case in class actions, is the result achieved in relation to the amount at issue and the complexity of the case. An excellent result will deserve a higher fee than a modest result. All other things being equal, the settlement of a $7 million claim for $7 million would deserve a greater fee than the settlement of a $70 million claim for $7 million. It is important to ask, then, what was the client's claim "worth" and what did they get for it? Regard must always be had

to the complexity and difficulty of the case, because the $7 million claim may have been a "slam dunk" whereas the $70 million claim may have been a "long shot", settled only through the persistence and skill of counsel.

41 A second important factor is the time spent and financial risks incurred by the lawyers. What fee are the lawyers requesting in relation to the time they have spent on the case and the costs and risks they have incurred in prosecuting it? In this case, the lawyers have incurred some $500,000 in unbilled fees and over $150,000 in actual disbursements, in a period of more than three years.

42 The third important factor is the fee agreement between class counsel and the representative plaintiff, which of course impacts the reasonable expectations of the class as to the amount of the fees. The fee formula in this case, a contingent fee on a sliding scale of 25-30-33.3 per cent depending on the timing of settlement, is typical. In this case, class counsel say that they are actually requesting a fee that is 19.4 per cent of the gross recovery, which is somewhat less than the fee to which they would be entitled under the fee agreement with the plaintiffs.

43 A fourth important factor is the level of fees awarded in other proceedings of a similar nature, with a view to achieving predictability and consistency in fee awards.

44 After examining all these factors, it is important to ask whether the work of class counsel has fulfilled the goals of the *C.P.A.* by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers. It is also important to recognize that the achievement of these goals demands that there is an available pool of experienced and skilled lawyers of high repute, who are prepared to take on the onerous and risky responsibility of class counsel. Where counsel achieve successful results, they render a service not just to the class but to the legal system itself, by providing access to justice and by achieving judicial economy. Their fees should not be assessed simply on the basis of *quantum meruit* - they should be enhanced in appropriate cases to recognize and reward successful performance and to serve as an incentive to counsel to take on class action litigation

45 Turning to the above factors, what was the result achieved in relation to the amount at issue and the complexity of the case? What was the case worth? I have mentioned that the upper limit of recovery, based on the *O.S.A* limits, was between $14 and $17 million, but that the plaintiffs' expert put the recoverable damages in the range of $9.8 million and that, as a practical matter, there was insurance available (after deduction of defence costs) of around $8 million. Viewed practically, a settlement at $7.1 million must be regarded, as I have found, as being in the zone of reasonableness - it appears to be a good settlement.

46 I also accept the submission that there were significant risks undertaken by class counsel in taking on the case. It was by no means a "slam dunk". Class counsel had every reason to believe that it would be vigorously defended by experienced counsel.

47 The fee agreement between class counsel and the plaintiffs contemplated a fee of 25 per cent of the recovery if the action was settled prior to discovery, as it was. This is a common provision in contingent fee agreements. The fee sought is less than the amount of class counsel's contractual entitlement. It is comparable to the percentage fees awarded in other recent proceedings.

48 The following chart summarizes four awards, including the award I made on settlement approval in *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Ont. S.C.J.):

Decision	Amount Recovered	Fee	Percentage
Martin v. Barrett [2]	$13,926,195	$4,086,870	29%
Garland v. Enbridge Gas Distribution Inc. [3]	$22 million plus savings	$10.13 million	27%
Stone Paradise Inc. v. Bayer Inc. [4]	$3,321,712 plus interest	$834,000	25%

Osmun v. Cadbury Adams Canada Inc. [5]	$5,340,940	$1,335,235,12	25%

49 For the reasons set out earlier, I am satisfied that the services of class counsel have resulted in a settlement that fulfills the objectives of the *C.P.A.* It will result in real access to justice for real investors. It has achieved significant judicial economy. It will result in behaviour modification not only by the defendants, but in the securities industry generally. The significance of these accomplishments should not be understated.

50 The remaining issue is whether the fee should be payable immediately or whether all or some part should be deferred until the claims process has been completed. It was vigorously argued by Mr. Strosberg that all the criteria necessary to assess the reasonableness of the fee are known at this time and that there is no reason to defer compensation. It is also fair to note that class counsel has gone without compensation for some three years, all the while incurring disbursements, paying lawyers and incurring substantial overheads. Deferred compensation means less compensation.

51 I have concluded that there are several reasons why it is more fair and reasonable to approve payment of two-thirds of the amount claimed as fees now and to defer approval of the balance until after the results of the claims process are known. This is similar to the procedure I adopted in *Boulanger v. Johnson & Johnson Corp.*, [2010] O.J. No. 1913 (Ont. S.C.J.) and I believe that it is appropriate to do so in this case.

52 First, in the case of a results-based fee, there is nothing inherently unfair in requiring the lawyer to wait for payment until the client actually receives his or her money. Any delay in payment can be compensated by interest.

53 Second, an important test of the value of the settlement will be the number and amount of claims actually paid to the class as a result of the settlement and the extent to which the settlement fund is sufficient to satisfy the claims of the class. If the projections of counsel and their expert are correct, and if all eligible class members make claims, each class member might be expected to receive around 50 per cent of his or her loss. If, at the end of the claims process, the recovery is substantially less than that, one might have reason to question the value of the settlement. If, on the other hand, there are a very small number of claims, or the total amount of compensation awarded is small, one might question the real value of the settlement in terms of access to justice.

54 Third, class counsel acknowledges an ongoing responsibility to the class to respond to inquiries concerning the claims process, to supervise the implementation of the settlement and to report to the court prior to the distribution of funds. The responsibilities of class counsel after settlement are important and the court must rely on class counsel to ensure that the settlement is in fact efficiently implemented in accordance with its terms. It is no reflection on the diligence of class counsel to suggest that the fee should not be paid in full until such time as counsel's responsibilities have been fully discharged.

55 For this reason, I will order payment of two-thirds of the fees claimed by class counsel, together with all disbursements, at this time. The balance of counsel's fees will be reviewed at the same time as the request for distribution of the settlement.

56 The draft form of order submitted by class counsel at the hearing of the motion is generally satisfactory. Counsel may submit to me, care of Judges' Administration, a clean copy, approved as to form and content.

Motion granted.

Footnotes

1 "Did the Defendants, or any of them, misrepresent the results of CV's revenue for fiscal 2006 and the first quarter of 2007?"

2 *Martin v. Barrett*, [2008] O.J. No. 2105 (Ont. S.C.J.)

3 *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (Ont. S.C.J.)

4 *Stone Paradise Inc. v. Bayer Inc.* (April 16, 2006), Doc. 45604CP (Ont. S.C.J.) .

5 *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Ont. S.C.J.).

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Most Negative Treatment: Check subsequent history and related treatments.

1998 CarswellOnt 2758
Ontario Court of Justice, General Division

Dabbs v. Sun Life Assurance Co. of Canada

1998 CarswellOnt 2758, [1998] I.L.R. I-3575, [1998] O.J. No. 2811, 22 C.P.C. (4th) 381, 40 O.R. (3d) 429, 5 C.C.L.I. (3d) 18, 80 A.C.W.S. (3d) 956

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Sharpe J.

Heard: May 4-5 and June 5, 1998
Judgment: July 3, 1998 *
Docket: 96-CT-022862

Proceedings: set aside or quashed *Dabbs v. Sun Life Assurance Co. of Canada* (September 14, 1998), CA C30326, M22971, M23028 (Ont. C.A.)**Proceedings: refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* (October 22, 1998), 26855 (S.C.C.)**

Counsel: *Michael A. Eizenga*, *Michael J. Peerless* and *Charles M. Wright*, for the plaintiff.
H. Lorne Morphy and *Patricia D.S. Jackson*, for the defendant.
Michael Deverett, for three objectors.
Gary R. Will and *J. Douglas Barnett*, for eleven objectors.

Subject: Civil Practice and Procedure; Insurance
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles
Civil practice and procedure
XXIV Costs
XXIV.4 Offers to settle or payment into court
XXIV.4.a Offers to settle
XXIV.4.a.i General principles
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.h Miscellaneous
Headnote
Practice --- Parties — Representative or class actions — General
Parties settled plaintiff's proposed class action — Parties moved for certification of action as class proceeding and approval of settlement — Plaintiff claimed that defendant misrepresented period for which premiums were payable with respect to "vanishing premium" life insurance policies — Plaintiff's statement of claim disclosed cause of action respecting common issue shared by identifiable class of plaintiffs — Class proceeding was most efficient manner to deal with potential claims of 141,000 class members in Ontario — No basis existed for denying certification — Agreement did not fail to provide for subclass of plaintiffs who had additional claim for further improprieties respecting sale of

insurance policies — Right to opt out of settlement provided adequate protection to any class member who wished to pursue further or alternative claim against defendant — Action was certified as class proceeding.

Practice --- Disposition without trial — Settlement — General

Insured and insurer settled proposed class action for alleged misrepresentation in sale of life insurance policies — Parties moved for approval of settlement — Settlement merits approval where in all circumstances it is fair, reasonable and in best interests of those affected by it — Settlement was strongly recommended by experienced counsel — Same settlement agreement had been approved by courts of British Columbia and Quebec — Under settlement, class members had right to receive either "no proof" benefits or benefits determined according to summary claims resolution process — Alternatively, class members had right to opt out of settlement and sue on own behalf — Proposed settlement was approved.

Table of Authorities

Cases considered by *Sharpe J.*:

London & South Western Railway v. Blackmore (1870), L.R. 4 H.L. 610, 39 L.J. Ch. 713 (U.K. H.L.) — referred to

Podmore v. Sun Life Assurance Co. (January 16, 1998), Tannenbaum J. (C.S. Que.) — considered

Romanchuck v. Sun Life Assurance Co. (November 28, 1997), Brenner J. (B.C. S.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — pursuant to

s. 5 — referred to

s. 5(1) — considered

MOTION by plaintiff and defendant for certification of plaintiff's action as class proceeding and for approval of settlement agreement reached by parties.

***Sharpe J.*:**

1. Nature of Proceedings

1 This action is a proposed class proceeding pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6. The claim arises from the sale of so-called "vanishing premium" life insurance policies. The plaintiff alleges that in marketing these policies, the defendant Sun Life Assurance Company of Canada ("Sun Life") and its agents represented to purchasers that dividends to policy holders would pay the required premiums within a specified number of years. Sales illustrations projected a "premium offset date" after which no further premiums would be required. In fact, in the plaintiff's case and in a large number of similar cases, dividends have been lower than projected and policy holders have been or will be required to pay premiums for a longer period than the projected premium offset date. The defendant Sun Life has made it clear that it denies the allegations of misrepresentation.

2 Together with similar Quebec and British Columbia actions, this action was settled by written agreement, dated June 16, 1997. The settlement is subject to and conditional upon court approval in all three provinces. The settlement has been approved in Quebec and British Columbia. On this motion, the plaintiff and defendant seek certification of the action as a class proceeding and approval of the settlement.

3 Following my earlier ruling on the procedure to be followed on this motion, released February 24, 1998, further material was filed by the plaintiff and by certain of the objectors. The motion was then heard over three days in accordance with the terms set out in my procedural ruling. I am now in a position to rule on certification and the request for approval of the settlement.

2. Certification

4 The test for certification is set out in the following terms in the *Class Proceedings Act*, s. 5:

> 5 (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
>
> (a) the pleadings or the notice of action discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

5 The defendant supports the motion for certification, but only on the condition that the settlement be approved at the same time. Subject to certain submissions relating to the subclass issue discussed below, the objectors focused their attention on the settlement and did not seriously contend that this was not a case for certification.

(a) Cause of Action

6 I am satisfied that the statement of claim discloses a cause of action. The plaintiff asserts claims on his own behalf and on behalf of a proposed class for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. The allegations in the action primarily concern the use of sales illustrations, combined with oral and written representations made by the defendant and its agents with respect to the date upon which dividends would be sufficient to fully pay up the policies. While it is clear from the position it has taken on this motion that the defendant would deny these allegations if the action were to proceed, the plaintiff does plead a tenable cause of action.

(b) Identifiable Class

7 The plaintiff proposes that the class be defined as follows:

> all owners of Class Policies purchased in Ontario, or who are resident in Ontario on April 30, 1997 and whose Class Policy(ies) were purchased outside Quebec or British Columbia.
>
> "Class Policy" is defined as
>
> any participating whole life policy issued by Sun Life in Canada between January 1, 1980 and December 31, 1995 which is in force as of April 30, 1997 (a "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and April 30, 1997 (a "Lapsed Class Policy"), except those policies in respect of which the owners have released Sun Life from claims related to premium offset or to the sale of the policies.

8 The proposed definition of the class does, I find, represent an identifiable class of two or more persons that would be represented by the representative plaintiff. It is common ground that there are approximately 141,000 members of the proposed class in Ontario and approximately 400,000 class members in Canada.

(c) Common Issue

9 I also find that the statement of claim does raise a common issue, namely the following:

> Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Sun Life with respect to a specified offset date despite the terms of the policy itself and the terms of any illustration?

(d) Preferable Procedure

10 I find that a class proceeding is the preferable procedure for the resolution of the common issue. As already noted, there are approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. The litigation of these claims on an individual basis would be costly and time consuming. Indeed, if these claims had to be litigated on an individual basis, few members of the class would be able to present their claims because of the costs, risks and delays involved. I have no doubt that a class proceeding is the most efficient manner to deal with these claims from the perspective of both the litigants and the court, and that a class proceeding will result in increased access to justice.

(e) Representative Plaintiff

11 Mr. Dabbs filed an affidavit on this motion and was cross-examined before me. Mr. Dabbs impressed me as being an honest and informed lay person with a genuine perception of having been mislead by an agent as to the number of premiums he would have to pay. I am satisfied on the basis of all the evidence that he has made a sincere and genuine effort to represent the interests of the proposed class and that he has no conflict of interest with other members of the class. I find as well that the representative plaintiff has produced a proper plan for the resolution of this proceeding.

(f) Subclass

12 Mr. Deverett submitted that certification should be denied on the ground that the agreement failed to provide for a subclass for those who have claims for "twisting", a practice whereby a policy holder is improperly induced by an agent to replace an existing policy with a new policy of less value to the policy holder. In my view, there is no evidence that would indicate that there has been a significant problem with "twisting" among Sun Life policy holders. Class counsel did not ignore the issue. The statement of claim contains an allegation that would deal with twisting. However, Mr. Ritchie testified that from class counsel' s interviews with over 200 policy holders, there emerged no evidence of a systemic problem. In my view, in the absence of any evidence or reasonably supported belief that twisting may be a wide-spread problem among class members, there is no basis for denying certification on the ground that there is no subclass for "twisting". The right to opt out provides adequate protection to any class member who wishes to pursue a claim for "twisting".

3. Terms of the Settlement

13 The settlement agreement is a document of some considerable complexity, but it will facilitate analysis to provide a simplified explanation of it main features.

(a) Right to Opt Out

14 Under the terms of the settlement, all class members retain the right to opt out of the settlement and sue on their own behalf for whatever claim they wish to assert. The right to opt out arises at two stages. A class member may opt out immediately and have nothing to do with the settlement. There is also a right to opt out that arises in one area of the alternative claim resolution process, discussed in greater detail below.

(b) Global Benefits

15 The proposed settlement contains two types of benefits for class members. First are Global Benefits. These might be described as "no-proof" benefits. They are available to all class members without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. All members of the class are automatically entitled to an annual dividend improvement of 50 basis points ($^{1}/_{2}$%) higher than would otherwise apply for a period of three years. For a special category of policies known as "enhanced policies", there is a further benefit of a 25% reduction in the cost of term insurance for the enhanced term of such policy.

16 A member of the class may also elect the Optional Dividend Benefit. This is also a "no-proof" benefit, available without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. This benefit entitles the policy holder to an annual dividend interest rate that is 75 basis points (3/4%) higher than would otherwise apply for the term of the policy. However, to obtain this benefit, the policy holder must waive the Special Maturity Dividend. The Special Maturity Dividend is not a right secured by any policy, but an enhancement the defendant has voluntarily provided to its policy holders. It represents an enhanced cash value or payment on death determined by the length of time the member has held the policy. To determine the relative values of the Optional Dividend Benefit and the Special Maturity Dividend the policy holder must give up, it is necessary to examine the policy holder's individual circumstances. The plaintiff and the defendant submit that in most cases, the value of the Optional Dividend Benefit will greatly exceed the value of the Special Maturity Dividend. I will return to the question of the value of the Optional Dividend Benefit below.

(c) Alternative Claims Resolution Process

17 The second type of benefit is that available through the Alternative Claims Resolution Process ("ACRP"). The ACRP provides a mechanism whereby a policy holder presents evidence of the nature of the actual misrepresentation made at the time of sale of the policy. A class member who elects to submit an ACRP claim is, subject to an exception described below, not entitled to receive the "no-proof" benefits just described. The ACRP provides for submission of a claim on the basis of affidavit from the policy holder and certain documentary evidence.

18 The settlement agreement contemplates that a policy holder who submits an ACRP claim will be placed in one of five categories. These are described in greater detail and with more precision in the agreement, but for present purposes, the following simplified definitions will suffice:

> *Category 1*: the member provides evidence showing that the defendant or its agent made a written representation that the policy would be fully paid-up after a specified number of premiums had been paid.
>
> *Category 2*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and the agent confirms that such representation was made.
>
> *Category 3*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent neither confirms nor denies that such representation was made.
>
> *Category 4*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent provides an affidavit denying that such representation was made.
>
> *Category 5*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and there is evidence that a written statement was provided at the time of sale which contradicts the member's version of the misrepresentation.

19 The rights and benefits attaching to these classifications is as follows. Category 1 and 2 claimants are entitled to the same premium offset entitlement that was represented to them. Category 3 claimants are entitled to a premium offset date which is half way from the premium offset date represented at the time of sale to the premium offset date shown as applicable on the first policy anniversary date after March 1, 1997. Category 4 and 5 claimants are entitled to no relief. However, Category 4 claimants have two options available after their claims have been classified as falling into Category 4. First, they have the right to opt out of the settlement entirely, thereby preserving any common law action right they may have. Second, Category 4 claimants have the right to re-elect and take either of the "no-proof" benefits described above.

20 The settlement agreement provides for a summary and mechanical process whereby claims are to be assessed and classified. The ACRP does not allow for viva voce evidence, nor does it permit a right to cross-examine and or include any right to make oral representations. The defendant Sun Life is required to establish a Claims Administration Facility which bears primary responsibility for determining the claims. The Claims Administration Facility is, however, subject to audit by class counsel and rejected claims are subject to review by a Review Panel consisting of a lawyer designated by Sun Life and a designated member of settlement class counsel. In the event of disagreement between the members of the review panel, there is further review by the "Designate", defined as a retired judge or comparable individual.

21 The agreement requires the parties to provide to the court for approval a list of statements which are to be considered to constitute clear and unqualified guarantees as contemplated for Category 1 and 2 claims. To protect the integrity of the ACRP, the lists are filed with the court under seal, but I have reviewed them. I find that they represent a useful, fair and reasonable collection of the sort of statement that would meet the standard required under the agreement.

22 Sun Life is also required to provide a toll free telephone information line on which class members may make inquiries and obtain policy status information. Class counsel are required to monitor that "hot line" to ensure that appropriate information is given to class members. I note as well that class members who opt for the ACRP are entitled to access to the Sun Life file. Counsel for Sun Life stated to the court that before having to decide whether to accept the Global Benefits, elect the Opitional Dividend Benefit or pursue a claim under the Alternative Resolution Process, a class member would be able to obtain from Sun Life a print-out setting out information as to the class member's policy that would include the value of the Special Maturity Benefit.

(d) Value of the Optional Dividend Benefit

23 The value of the "Optional Dividend Benefit" is of considerable significance. It is available to all policy holders on a "no-proof" basis and as it provides the fall-back position available to those policy holders who swear that a misrepresentation was made but who are denied any relief under the ACRP when met with a sworn denial by the agent.

24 I asked for further evidence of the value of this benefit. The plaintiff answered this request with a further affidavit from an actuary who had been retained to provide an expert opinion on the overall worth of the settlement. It is apparent that the actuary's opinion is based upon background information with respect to policies, dividends and benefits provided by the defendant. While neither of the groups of objectors showed any concern about the value of the Optional Dividend Benefit until I raised the point, both counsel submitted that there should be a more searching inquiry into the background information that had been provided to Mr. Huff. The defendant takes the position that this information is of a confidential nature and that if it were to be made a matter of public record, the defendant would suffer thereby. Upon Mr. Huff depositing with the Registrar of the Court copies of the material and information he had been provided by the defendant, I reserved my decision on the appropriate course to follow.

25 My ruling on this point is that the question I asked has been answered by Mr. Huff's evidence and that without looking at the material provided by the defendant to Mr. Huff, I have been provided sufficient information to permit me to assess the fairness of this settlement. I reach this conclusion for the following reasons. First, Mr. Huff impressed me as a reliable witness who took his role as an independent expert seriously. He did not exaggerate or use the witness

stand as a platform to advocate the cause of the party that retained him. His evidence was measured and balanced. He indicated that by its very nature, virtually all of the information he needed to formulate his opinion had to come from the defendant. There is simply no independent source for the number and types of policies, the rights attached to those policies and the formulae for calculation of benefits. To the extent possible, he was able to verify that the information provided by the defendant was internally consistent and the necessary actuarial calculations were tested.

26 I was urged by the objectors represented by Mr. Deverett to question the reliability of data supplied by the defendant because of an adverse credibility finding made against a senior officer of the defendant by another judge of this court in another action. In my view, it would be entirely inappropriate to accept such a submission. Each case falls to be decided on its own merits and on the evidence presented and the information at issue here is not the same as the evidence rejected in that other proceeding.

27 I am satisfied that an honest and significant effort has been made to respond to the question I asked. Mr. Huff and his associates devoted over 100 hours of professional time, 50 hours of paraprofessional time and 30 hours of clerical time, the greater part of which was related to the verification of offset dates. No further review is required. I would add that inherent in the approval of a settlement is the need to assess issues on a less than complete factual record. To require proof of all relevant facts to the standard required at trial would defeat the very notion of a settlement where the parties ask the court to approve an arrangement reached on a less than perfect record.

28 Mr. Huff's evidence is that over 90% of policy holders would achieve offset reductions of between 30% and 70% through the Optional Dividend Benefit. The weighted average reduction for policies he tested with meaningful offset reductions (ie. excluding those where the current offset was the same as that indicated at the time of issue) was 56%. It is apparent that these are averages and that to assess the situation of any individual policy holder, it would be necessary to consider the particulars of that individuals situation. Mr. Huff confirmed that the examples provided by Sun Life in the Question and Answer booklet provided to Class members are accurate.

(e) Lapsed Policies

29 The agreement also makes provision for lapsed policies. The holder of a lapsed policy who is able to provide evidence of insurability is entitled to a new policy similar to the lapsed policy with a 50% reduction in the first annual premium. The holder of a lapsed policy may also apply under the ACRP. If the member's claim is classified as Category 1,2 or 3, the policy may be reinstated without evidence of insurability upon payment of past due premiums, loans and interest.

4. Analysis of the Proposed Settlement

(a) The standard for approval

30 In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October, 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

31 I have had the benefit of three full days of cross-examination of deponents on affidavits filed in support of the settlement and submissions by counsel representing the parties and the objectors. I have received answers to certain questions I posed to the parties. After considerations of the points that have been made both in favour of and against

approval of the settlement, for the reasons that follow, I have reached the conclusion that this settlement should be approved.

(b) Recommendation of Class Counsel

32 The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. Moreover, in the case at bar, the settlement was not the result of a solo effort. As there were proceedings brought in British Columbia and Quebec as well, there was a team of class counsel from three different provinces. Moreover, class counsel also sought and obtained the advise of counsel from the United States who have experience in "vanishing premium" litigation.

(c) Risks of Proceeding to Trial

33 While the plaintiff presents an arguable case, there is no doubt that there is a risk that if the case went to trial, the common issue would be resolved against the class. Misrepresentation is often difficult to prove. Here, the standard sales illustration which forms the basis of most claims contains an explicit waiver which the members of the class would have to overcome. While the specific terms vary, typical language is: "This illustration assumes a continuation of the current scale of dividends and Special Maturity Dividends (SMD). Dividends may be higher or lower; they will be based on Sun Life's interest, expense, and mortality experience." The policies themselves typically contain language indicating that the premium is payable throughout the term of the policy: "Total Premiums payable by owner due [Month, Day and Year] and yearly thereafter while life insured lives." It is certainly possible that the defendant might persuade a court that such language provided class members with a clear statement that the dividends might or might not be sufficient to fulfill the hoped for result of the illustration. In addition to the legal and factual risks are certain practical concerns. The case would be factually, legally and procedurally complex. It would almost certainly take several years to get to trial and to then exhaust appeals.

(d) Fairness of the ACRP

34 The ACRP is at the core of this agreement. It plainly does not offer the procedural guarantees of a trial as there is no right to cross-examine, present oral evidence or to make oral submissions. On the other hand, there would be no point to the settlement if it did not provide for some form of summary resolution of claims. The provision of a cost-free process to claimants who would otherwise be forced to abandon their claims or bear the costs of litigation represents a significant benefit.

35 In my view, there can be little doubt that the ACRP offers a fair and reasonable resolution of claims falling in Categories 1 and 2 which afford the claimant precisely the offset date that was represented. I would also find it difficult to question the fairness of the result of a Category 3 claim where the claimant is given half-way relief on the basis of nothing more that the claimants own sworn statement that an oral representation was made. Similarly, I see no reason to question the fairness of a Category 5 claim where there is evidence that a written statement was provided at the time of sale which contradicts the claimant's version of the misrepresentation. It is only fair that there be some control on the extent to which a class member can secure a benefit in the strength of his or her own affidavit. I note here that in answer to a question I posed, it was stated to the court that it was not intended that language of the explicit waiver in the standard sales illustration quoted above would be sufficient to bring the claim within Category 5.

36 The contentious issue is the fairness of Category 4. Mr. Will focused his attention on this point and submitted that, in effect, the agent was given a veto over the rights of the policy holder. It was his submission that there should be some control or constraint on the extent to which agents could defeat a claim by simple denial. The right to confront

and cross-examine the agent could be granted, or there could be a points system that would discount agent denials where the same agent denied more than one claim.

37 In my view, there are a number of factors which have to be considered here. First is the fact that the agent must make the denial on oath. This means that the agent who lies is subject to the threat of perjury. Second, it is not apparent that all agents will perceive it to be in their interest to favour the interests of Sun Life over their clients. Third are the very significant options that remain to a class member whose claim is denied by the agent. The class member has, at that point, the right to opt out and sue the defendant with full knowledge of the case he or she will have to meet. In that sense, the class member loses nothing because of the settlement but gains advance discovery of the case to be met. The class member also has the very significant right to abandon the ACRP and elect the "no-proof" benefits which, as noted, will frequently result in achieving half-way relief. In my view, when considered in light of the balance of the settlement, it cannot be said that the situation of the Category 4 claimants renders this settlement unfair.

38 It is my view, that considered as a whole, the ACRP does provide for an efficient and fair process.

(e) Approval in British Columbia and Quebec

39 Another factor which favours approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec. In the companion case in British Columbia, *Romanchuck v. Sun Life Assurance Co.* (Nov. 28, 1997), Brenner J. (B.C. S.C.) Brenner J. found that:

> ... the settlement is reasonable, fair and adequate. A considerable degree of creativity has been demonstrated by the parties in putting in place, among other things, a form of alternative dispute resolution to allow a cost effective method of resolving the claims in this case...

In the Quebec case, *Podmore v. Sun Life Assurance Co.* (January 16, 1998), Tannenbaum J. (Que. S.C.) Tannenbaum J. of the Quebec Superior Court found that the agreement was "raisonnable, équitable, approprié et dans le meilleur intérêt du groupe visé."

(f) Absence of Statement of Defence and Discovery

40 This settlement was reached at a very early stage of the proceedings. No statement of defence was filed and there has been no discovery. The position of the defendant has not been put formally on the record and has been known to class counsel only through the settlement process. In my view, this is not a reason for refusing approval. It is clearly not the law that a settlement requiring court approval cannot be made at such an early stage of the proceedings. Moreover, I am satisfied that class counsel did adequately consider the position of the defendant. There is evidence before me that before recommending the settlement, class counsel interviewed hundreds of potential class members and a number of Sun Life agents. I am satisfied that a serious and diligent effort has been made to determine the facts. This is by no means the first "vanishing premium" case litigated in North America and class counsel took advice from others with experience in the area.

(g) Exclusion of Other Possible Claims

41 I have already dealt with the matter of "twisting" in relation to certification. It is unnecessary to add anything here except that the settlement preserves the right of any class member to opt out and pursue any such claim.

42 Mr. Deverett also suggested that the failure of the Sun Life policies to perform as indicated in the standard sales illustration might be the fault of Sun Life itself as it has the unfettered right to determine the dividends that are to be paid. Again, I find that the evidence before me fails to show that there is any serious prospect that this is a potentially valid source for a claim by class members. Sun Life does business in a competitive market. The failure of life insurance policies of the kind at issue here to perform was not restricted to Sun Life. There was an industry wide problem which

has been linked to collapse of unusually high interest rates of the 1980's and which produced a number of actions in North America against a long list of insurance companies.

43 A related issue concerns the question of how Sun Life, a mutual insurance company, would pay for the benefits to be conferred upon the policy holders. While that issue was not dealt with in the agreement itself, Mr. Ritchie testified that an understanding was reached during the negotiation of the settlement that future dividend scales would not be affected. That understanding was confirmed by a letter to Mr. Ritchie dated August 29, 1997 from counsel for Sun Life stating:

> I confirm the information provided during the negotiation process.
>
> Sun Life has specified that future dividend scales will be determined as if the settlement had never taken place. No attempt to recoup the costs of the settlement will be made in any manner affecting the existing participating policy holders (including Class Members).

44 That undertaking was confirmed by counsel for Sun Life before me at this hearing. In light of possible demutualization by Sun Life, a further letter from Sun Life's counsel to Mr Ritchie dated May 1, 1998 repeats the above undertaking and states:

> Given the possibility of demutualization, Sun Life has instructed us to advise that the statements made earlier are still true, with the (obvious) clarification that the costs of the agreement may have an impact on the value of the company, which value will be distributed to all eligible policyholders in the event that demutualization proceeds.

45 Another point made in relation to the prospect of other potential claims is that the terms of the release to be given to Sun Life under the agreement are broad. Sun Life and its agents are to be released "from any liability or damages for representations, omissions or other conduct ... that occurred during the purchase or sale of any Settled Class Policy, or in connection with the offering of Global Benefits, the Optional Dividend Benefit, or other benefits or resolutions pursuant to the Agreement." A release in these terms consequent upon a settlement is not unusual or unexpected, and in any event, is subject to being interpreted in accordance with recognized legal principles. It is well established that a release must be interpreted with reference to the context in which it was drafted and that a release will not be construed as applying to facts not known to the claimant at the time the release was drafted: *London & South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.). These principles, together with the right of any policy holder who now believes he or she has a claim against Sun Life that is not embraced by the settlement to opt out, provide an adequate answer to this objection.

(h) Analysis of the Proposed Settlement - Conclusion

46 I find that the plaintiff and the defendant have satisfied the burden of demonstrating that the proposed settlement is fair, reasonable and in the best interests of those affected by it. The Global Benefits afford significant relief to class members on a "no-proof" basis. The ACRP provides for a summary but fair disposition of claims advanced on the basis of representations that were made.

4. Conclusion

47 For these reasons, there shall be an order for the relief requested in paragraphs (a) to (i) of the Notice of Motion appointing Paul Dabbs as a representative plaintiff, certifying this action as class proceeding, approving the proposed settlement and for the further related orders requested.

48 In my February 24, 1998 ruling, I made reference to the issue of costs. Any party who wishes to claim costs shall serve and file a concise written brief within 20 days of the release of these reasons outlining the claim that is made and the basis for the claim. Reply submissions are to be made 10 days thereafter. A date for a hearing of any such claims will be arranged. Failing any such submissions, there shall be no order as to costs of this motion.

49 I will remain seized of this matter for the purpose of any further approvals that are required, including the approval of the arbitration award relating to the fees and disbursements of class counsel.

Motion granted.

Footnotes

* Judgment set aside/quashed (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3269, 41 O.R. (3d) 97 (C.A.); leave to appeal refused (October 22, 1998), Doc. 26855 (S.C.C.).

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Cavanaugh v. Grenville Christian College | 2013 ONCA 139, 2013 CarswellOnt 2500, 32 C.P.C. (7th) 1, [2013] O.J. No. 1007, 304 O.A.C. 163, 225 A.C.W.S. (3d) 613, 360 D.L.R. (4th) 670 | (Ont. C.A., Mar 8, 2013)

1998 CarswellOnt 3539
Ontario Court of Appeal

Dabbs v. Sun Life Assurance Co. of Canada

1998 CarswellOnt 3539, [1998] O.J. No. 3622, [1999] I.L.R. I-3629, 113 O.A.C. 307, 165 D.L.R. (4th) 482, 27 C.P.C. (4th) 243, 41 O.R. (3d) 97, 67 O.T.C. 80, 7 C.C.L.I. (3d) 38, 82 A.C.W.S. (3d) 638

Paul Dabbs, Plaintiff (Respondent) Moving Party and Sun Life Assurance Company of Canada, Defendant (Respondent) and Jack Maclean, Class Member (Appellant)

Laskin, Charron, O'Connor JJ.A.

Heard: August 26, 1998
Judgment: September 14, 1998*
Docket: CA C30326, M22971, M23028

Proceedings: refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 1998 CarswellOnt 5823 ((Ont. Gen. Div.)); refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), [1998] S.C.C.A. No. 372, 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n ((S.C.C.)); affirmed *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), 1998 CarswellOnt 2758, [1998] O.J. No. 2811, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 ((Ont. Gen. Div.))

Counsel: *Michael S. Deverett*, for the appellant.
H. Lorne Morphy, Q.C., and *Patricia D.S. Jackson*, for the respondent Sun Life.
Michael A. Eizenga and *Michael J. Peerless*, for the plaintiff.

Subject: Insurance; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iv Appeals

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement

XVI.7.c Enforcement of terms

Headnote

Practice --- Parties — Representative or class actions — General
Parties settled plaintiff's proposed class action — Class action was certified and settlement was approved — Class member appealed approval of settlement — Plaintiff applied to quash class member's appeal — Class member was permitted under Class Proceedings Act, 1992, to participate in settlement approval proceedings but not granted party status — Act confers on court power to appoint class members to be representatives and permit class members to participate in proceedings — Role of party distinguished from role of class member — Class members can participate but not become parties — Under Act, class member may opt out of class action and pursue claim in personal capacity if dissatisfied with conduct of proceedings — Only party has right of appeal — Right of appeal under Act takes precedence over and excludes provision of general right of appeal provided in Courts of Justice Act — Class member must obtain leave to act as representative for purpose of appeal — Class member had not applied to act as representative — Class member had no right to appeal under Act — Class member's alternative motion for leave to permit him to act as representative party for purpose of appeal dismissed — Courts in three jurisdictions had already approved settlement and class member was only one who wanted to set it aside — Wishes of one class member could not govern interests of entire class — Plaintiff's application granted — Class Proceedings Act, 1992, S.O. 1992, c. 6 — Courts of Justice Act, R.S.O. 1990, c. C.43.

Table of Authorities

Cases considered by *O'Connor J.A.*:

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — considered

Silva v. O'Donohue (1995), 30 M.P.L.R. (2d) 162, 130 D.L.R. (4th) 334, (sub nom. *O'Donohue v. Silva)* 87 O.A.C. 161, (sub nom. *O'Donohue v. Silva)* 27 O.R. (3d) 162 (Ont. C.A.) — referred to

792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of) (1996), 94 O.A.C. 384, 30 B.L.R. (2d) 219 (Ont. C.A.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 5 — referred to

s. 8(3) — referred to

s. 9 — referred to

s. 10(1) — referred to

s. 12 — referred to

s. 14 — considered

s. 16(1) — referred to

s. 18 — referred to

s. 19 — referred to

s. 25 — referred to

s. 29 — referred to

s. 30(3) — considered

s. 30(5) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — considered

s. 6(1)(b) [rep. & sub. 1994, c. 12, s. 1] — considered

s. 134 — referred to

Municipal Elections Act, R.S.O. 1990, c. M.53
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 13 — referred to

APPEAL by class member of approval of settlement in class action for damages for misrepresentation; MOTION by class member for leave to appeal approval of settlement; MOTION by plaintiff to quash class member's motion for leave to appeal, reported at 5 C.C.L.I. (3d) 18, [1998] I.L.R. 1-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Ont. Gen. Div.).

The judgment of the court was delivered by *O'Connor J.A.*:

1 These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean for leave to appeal.

The Motion to Quash

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Act*").

3 Maclean is a member of the class and had been permitted under s. 14 of the *Act* to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the *Act* is to achieve the efficient handling of potentially complex cases of mass wrongs. See *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), per O'Brien J. at p.455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the *Act*.

7 The *Act* makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result, they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the *Act*. It provides:

> **30**. (3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the *Act*.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 6(1)(b) provides:

> **6**(**1**) An appeal lies to the Court of Appeal from,
>
> . . . . .
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

He argues that if the *Act* does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[3], then s. 6(1)(b) operates to confer a right where the *Act* has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the *Courts of Justice Act*. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the

special statute as an exception to the general."[4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[5] In this case, the *Act* is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The *Courts of Justice Act* was enacted earlier and is of more general ambit. These rules support the conclusion that the appeal provisions in s. 30(3) of the *Act* take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in *792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of)* (1996), 94 O.A.C. 384 (Ont. C.A.). At p. 389, he said:

> ...I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: *R. v. Greenwood* (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the *Act* is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of *Silva v. O'Donohue* (1995), 27 O.R. (3d) 162 (Ont. C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the *Municipal Elections Act*, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The *Municipal Elections Act* does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the *Municipal Elections Act*. It is the inclusion of the specific appeal provisions in the *Act* which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the *Act*.

17 In summary I am of the view that s. 30(3) of the *Act* provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the *Courts of Justice Act* does not supplement those rights.

Maclean's Motion

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the *Act* to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s

judgment and s.9 of the *Act* to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the *Act*. For the reasons above, I would allow the motion under s. 134 of the *Courts of Justice Act* and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

Order accordingly.

Footnotes

[*] Leave to appeal refused (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.).

[1] See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

[2] Section 35 of the *Act* provides that the rules of court apply to class proceedings.

[3] Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the *Act*.

[4] Elmer Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 227.

[5] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (1991), at p. 301.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Pro-Sys Consultants Ltd. v. Infineon Technologies AG | 2008 BCSC 575, 2008 CarswellBC 943, 167 A.C.W.S. (3d) 250, [2008] B.C.W.L.D. 5650, [2008] B.C.W.L.D. 5653, [2008] B.C.W.L.D. 5655, [2008] B.C.W.L.D. 5656, [2008] B.C.W.L.D. 5659, [2008] B.C.J. No. 831 | (B.C. S.C., May 6, 2008)

2005 CarswellOnt 1095
Ontario Superior Court of Justice

Ford v. F. Hoffmann-La Roche Ltd.

2005 CarswellOnt 1095, [2005] O.J. No. 1117, [2005] O.J. No. 1118, 12 C.P.C. (6th) 252, 138 A.C.W.S. (3d) 19, 138 A.C.W.S. (3d) 20, 74 O.R. (3d) 758

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., and MARCY DAVID (Plaintiffs) and F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-LONZA CANADA INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CANADA LIMITED/LIMITÉE and TANABE SEIYAKU CO., LTD. (Defendants)

Proceeding under the Class Proceedings Act, 1992 (Biotin)

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., OGER AWAD and MARY HELEN AWAD (Plaintiffs) and F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A., AVENTIS ANIMAL NUTRITION S.A., RHÔNE-POULENC CANADA INC., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN (Defendants)

Proceeding Under the Class Proceedings Act, 1992 (Bulk Vitamins)

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID (Plaintiffs) and BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERTSAMUELSON, LINDELL HILLING, JOHN l. ("PETE") FISCHER and ANTONIO FELIX (Defendants)

Proceeding under the Class Proceedings Act, 1992 (Choline Chloride)

GLEN FORD, FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA (Plaintiffs) and RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., NOVUS INTERNATIONAL, INC. and AVENTIS ANIMAL NUTRITION S.A. (Defendants)

Proceeding under the Class Proceedings Act, 1992 (Methionine)

VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA (Plaintiffs) and DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI (Defendants)

Proceeding under the Class Proceedings Act, 1992 (Niacin)

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID (Plaintiffs) and UCB S.A. and UCB CHEMICALS CORPORATION (Defendants)

Proceedings under the class Proceedings Act, 1992 (Supplemental Choline Chloride)

GLEN FORD (Plaintiff) and NOVUS INTERNATIONAL (CANADA) INC. (Defendant)

Proceeding under the Class Proceedings Act, 1992 (Supplemental Ontario Methionine)

Cumming J.

Heard: March 8-9, 2005
Judgment: March 23, 2005
Docket: 00-CV-202080CP, 00-CV-200045CP, 00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP, 40610, 42267CP

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Evangelia Kriaris for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries Ltd.), Takeda Canada Vitamin and Food Inc.
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David W. Kent for BASF Aktiengesellschaft, BASF Corporation, BASF Canada Inc.
Andrew J. Roman for Akzo Nobel N.V., Akzo Nobel Chemicals B.V.
George D. Hunter for DCV Inc., Ducoa L.P.
James Doris for Bioproducts Inc.
Tycho Manson for Chinook Group Ltd.
F. Paul Morrison, J.P. Brown for Degussa Corporation, Degussa Canada Inc., Degussa-Huls A.G.
S.A. Dawson for Novus International Inc., Novus International (Canada) Inc.
Jennifer Badley for Reilly Industries Inc., Reilly Chemicals S.A.
S. Vlahakis for Nepera Inc., Roger Noack, David Purpi
Pauline W. Wong for Defendant, Mitsui & Co. Ltd.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
  V.2 Representative or class proceedings under class proceedings legislation
    V.2.b Certification
      V.2.b.i Plaintiff's class proceeding
        V.2.b.i.C Common issue or interest

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest
Multiple class actions were commenced in several provinces alleging global, multi-party price-fixing conspiracy relating to

sale of vitamins in Canada — Ultimately, five separate class actions were pursued in Ontario — Classes in actions were large and diverse group of consumers and purchasers — Certain defendants reached proposed settlement with certain plaintiffs — Plaintiffs brought motions for certification and approval of settlements — Motions granted — Prerequisites for certification were met — Plaintiffs produced litigation plan which set out workable method of resolving litigation — Plaintiff established common interest of all members of class — All members of class had interest in proving existence of conspiracy and in maximizing aggregate amount of class-wide damages — Settlements were fair and reasonable and in best interests of class members — Settlements were product of lengthy, adversarial negotiations which involved understandable compromise — Relatively small number of objections were indicative of objective reasonableness of settlements, especially considering substantial size of class.

Table of Authorities

Cases considered by *Cumming J.*:

Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co. of Canada (October 23, 2001), Winkler J. (Ont. S.C.J.) — referred to

Alfresh Beverages Canada Corp. v. Hoechst AG (2002), 2002 CarswellOnt 77, 16 C.P.C. (5th) 301 (Ont. S.C.J.) — referred to

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), [2001] 6 W.W.R. 628, 2001 ABCA 110, 2001 CarswellAlta 575, 4 C.P.C. (5th) 20, 281 A.R. 185, 248 W.A.C. 185, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13 (Alta. C.A.) — considered

Anderson v. Wilson (1999), 122 O.A.C. 69, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17 (Ont. C.A.) — referred to

Bendall v. McGhan Medical Corp. (1993), 16 C.P.C. (3d) 156, 14 O.R. (3d) 734, 106 D.L.R. (4th) 339, 1993 CarswellOnt 394 (Ont. Gen. Div.) — referred to

Bona Foods Ltd. v. Ajinomoto U.S.A. Inc. (2004), 2 C.P.C. (6th) 15, 2004 CarswellOnt 918 (Ont. S.C.J.) — referred to

Bona Foods Ltd. v. Pfizer Inc. (August 6, 2002), Doc. 38409 (London) (Ont. S.C.J.) — referred to

California v. ARC America Corp. (1989), 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (U.S. Cal.) — referred to

Caputo v. Imperial Tobacco Ltd. (2004), 2004 CarswellOnt 423, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350 (Ont. S.C.J.) — referred to

Carom v. Bre-X Minerals Ltd. (2000), 2000 CarswellOnt 3838, 51 O.R. (3d) 236, 1 C.P.C. (5th) 62, 138 O.A.C. 55, 11 B.L.R. (3d) 1, 196 D.L.R. (4th) 344 (Ont. C.A.) — considered

Catfish Antitrust Litigation, Re (1993), 826 F. Supp. 1019 (U.S. Miss.) — referred to

Chadha v. Bayer Inc. (1999), 1999 CarswellOnt 2080, 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.) — referred to

Chadha v. Bayer Inc. (2001), 2001 CarswellOnt 1697, 200 D.L.R. (4th) 309, 54 O.R. (3d) 520, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 8 C.P.C. (5th) 138 (Ont. Div. Ct.) — referred to

Chadha v. Bayer Inc. (2003), 2003 CarswellOnt 49, 223 D.L.R. (4th) 158, 168 O.A.C. 143, 63 O.R. (3d) 22, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40 (Ont. C.A.) — referred to

Chadha v. Bayer Inc. (2003), 191 O.A.C. 397 (note), 320 N.R. 399 (note), 65 O.R. (3d) xvii, 2003 CarswellOnt 2810, 2003 CarswellOnt 2811 (S.C.C.) — referred to

Cloud v. Canada (Attorney General) (2004), 2 C.P.C. (6th) 199, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 247 D.L.R.

(4th) 667, 192 O.A.C. 239, 2004 CarswellOnt 5026 (Ont. C.A.) — referred to

Cotton v. Hinton (1977), 559 F.2d 1326 (U.S. 5th Cir.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), [1998] I.L.R. I-3575, 1998 CarswellOnt 2758, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 3539, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Gariepy v. Shell Oil Co. (April 16, 2004), Doc. Toronto 30781/99 (Ont. S.C.) — referred to

Hanover Shoe Inc. v. United Shoe Machinery Corp. (1968), 392 U.S. 481, 88 S.Ct. 86, 20 L.Ed.2d 1231 (U.S. Pa.) — considered

Hollick v. Metropolitan Toronto (Municipality) (2001), *(*sub nom. *Hollick v. Toronto (City))* 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, *(*sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, *(*sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, *(*sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158 (S.C.C.) — considered

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — referred to

Illinois Brick Co. v. Illinois (1977), 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (U.S. Ill.) — considered

Killough v. Canadian Red Cross Society (2001), 2001 BCSC 1060, 2001 CarswellBC 1527, 91 B.C.L.R. (3d) 309 (B.C. S.C.) — referred to

M. (J.) v. Bradley (2004), *(*sub nom. *M. (J.) v. B. (W.))* 71 O.R. (3d) 171, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234, 187 O.A.C. 201, 2004 CarswellOnt 2243 (Ont. C.A.) — considered

McCarthy v. Canadian Red Cross Society (2001), 2001 CarswellOnt 2255, 8 C.P.C. (5th) 350, [2001] O.T.C. 470 (Ont. S.C.J.) — referred to

Millard v. North George Capital Management Ltd. (2000), 2000 CarswellOnt 1450, 47 C.P.C. (4th) 365 (Ont. S.C.J. [Commercial List]) — referred to

Minnema v. Archer Daniels Midland Co. (February 28, 2003), Doc. G23495-99CP (Ont. S.C.) — referred to

NASDAQ Market-Makers Antitrust Litigation, Re (1996), 169 F.R.D. 493 (U.S. S.D. N.Y.) — referred to

Nelson v. Bennett (1987), 662 F. Supp. 1324 (U.S. Dist. Ct. E.D. Cal.) — considered

Nucorp Energy Securities Litigation, Re (1987), 661 F. Supp. 1403 (U.S. S.D. Cal.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 1999 CarswellOnt 1851, 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — considered

Parsons v. McDonald's Restaurants of Canada Ltd. (2005), 2005 CarswellOnt 544 (Ont. C.A.) — considered

Price v. Panasonic Canada Inc. (2002), 2002 CarswellOnt 2087, 22 C.P.C. (5th) 379 (Ont. S.C.J.) — considered

Rumley v. British Columbia (2001), 2001 CarswellBC 1223, 2001 CarswellBC 1224 (S.C.C.) — considered

Sawatzky v. Société Chirurgicale Instrumentarium Inc. (1999), 1999 CarswellBC 1759, 71 B.C.L.R. (3d) 51, 37 C.P.C. (4th) 163 (B.C. S.C.) — referred to

Silicone Gel Breast Implant Products Liability Litigation, Re (September 1, 1994), Doc. CV 92-P-10000-S (U.S. N.D. Ala.) — considered

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225, 1988 CarswellOnt 121 (Ont. H.C.) — considered

Sugar Industry Antitrust Litigation, Re (1976), 73 F.R.D. 322 (U.S. E.D. Pa.) — referred to

Tesluk v. Boots Pharmaceutical PLC (2002), 2002 CarswellOnt 1266, 21 C.P.C. (5th) 196 (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), 94 Alta. L.R. (3d) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

Wilson v. Servier Canada Inc. (2000), 2000 CarswellOnt 3257, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233 (Ont. S.C.J.) — referred to

Wilson v. Servier Canada Inc. (2000), 143 O.A.C. 279, 2000 CarswellOnt 4399, 52 O.R. (3d) 20 (Ont. Div. Ct.) — referred to

Wilson v. Servier Canada Inc. (2001), 2001 CarswellOnt 3077, 2001 CarswellOnt 3078, 276 N.R. 197 (note), 154 O.A.C. 198 (note) (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — considered

s. 1 "common issues" — considered

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(d) — considered

s. 12 — referred to

s. 13 — referred to

s. 24 — considered

s. 26 — considered

s. 29(2) — referred to

s. 32 — pursuant to

s. 33 — pursuant to

Clayton Act, 15 U.S.C.
s. 15 — referred to

Competition Act, R.S.C. 1985, c. C-34
s. 36(1) — referred to

s. 45(1) — referred to

Federal Courts Act, R.S.C. 1985, c. F-7
s. 18.1 [en. 1990, c. 8, s. 5] — referred to

Interpretation Act, R.S.O. 1990, c. I.11
s. 10 — referred to

MOTIONS for certification and approval of settlements of class actions.

***Cumming J.*:**

The Motions

1 These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under sections 32 and 33 of the *Class Proceedings Act*, S.O. 1992, c. 6 ("*CPA*").

2 In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in paragraph 106 of these Reasons.)

3 The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information) online <http://www.vitaminsclassaction.com>.

4 There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc.("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

5 Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews "(Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau,

Fafard and Unterberg, Labelle, Lebeau.

6 As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

7 The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the settlement Agreement.

8 The plaintiffs assert that:

(a) the Defendants entered into conspiracies to fix prices with respect to the distribution and sale of Vitamins and related products in the period January 1, 1986 to February 28, 1999; and

(b) the worldwide vitamin industry was dominated by certain groupings of the Defendants who controlled a significant percentage of the world Vitamin market for many of the main types of vitamins.

9 Some of the Defendants pled guilty in the United States and Canada to price-fixing charges concerning Vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

10 Generally, Vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	**Uses**
Biotin (Vitamin B8, Vitamin H)	Human consumption— Animal and fish feed supplement
Bulk Vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human consumption— Food and beverage additive for human consumption— Cosmetics— Animal and fish feed supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption— Animal and fish feed supplement
Methionine	Human consumption— Animal and fish feed supplement
Niacin, Niacinamide (Vitamin B3)	Human consumption— Food and beverage additive for human consumption— Animal and fish feed supplement

11 There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

12 The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of Vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of Vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

13 Class Counsel submits this two-stage approach is novel in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. Federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: *Sherman Act*, 26 Stat. 209, 15 U.S.C. §1. Over 20 states have responded to this Federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

The Motions for Certification

14 The *CPA* is a procedural statute. Section 5 of the *CPA* sets out the test for certification. The word "*shall*" in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the *CPA* are met and if there is no other reason to refuse to make the order. *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.), at 744; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 13.

15 To certify an action as a class proceeding under s. 5, the plaintiff requires a *"*minimum evidentia[ry] basis for a certification order.*"* It is necessary that the plaintiff *"*show some basis in fact for each of the certification requirements," other than the requirement in s. 5(1)(a). The *"*adequacy of the record will vary in the circumstances of each case." *Hollick v. Metropolitan Toronto (Municipality)*, [2001] S.C.J. No. 67 (S.C.C.) at para. 25.

16 On thes certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and Vitamins involved, the motions can conveniently be discussed as a single motion.

17 The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)(a) of the *CPA*:

> (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
>
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
>
> (d) the novelty of the cause of action will not militate against the plaintiff;
>
> (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
>
> (f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information. *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 990-991; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 679; *Hollick*, *supra*, at para. 25; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.) at para. 41.

18 The plaintiffs allege the following causes of action:

> (a) the Defendants contravened s. 45(1) of Part VI of the *Competition Act*, R.S.C. 1985 c.C-34, giving rise to a right of damages under ss. 36(1) and 45(1);
>
> (b) the Defendants are liable for tortious conspiracy and intentional interference with economic interests; and
>
> (c) the Defendants are liable for punitive damages.

19 The plaintiffs submit that it is not "plain and obvious" and beyond doubt that they could not succeed in the causes of action pleaded.

20 Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be *"*defined...by reference to objective criteria.*"* A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification stage. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at para. 38.

21 A class definition must bear a rational relationship to the common issues. *Western Canadian Shopping Centres*, *supra*, at para. 38; *Hollick*, *supra*, at para. 17; *Cloud v. Canada (Attorney General)*, *supra*, at para. 45.

22 The proposed class definition for each of the Ontario Actions can be stated as follows:

> All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

23 The proposed class definitions embody all levels of purchasers, including those who purchased Vitamins in raw form and those who purchased a product of which Vitamins were a component part. As the court recognized in *Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (U.S. Ill. 1977) at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

24 The case of *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (U.S. Pa. 1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, *Hanover Shoe* involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the *Sherman Act*, *supra*, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

25 The above decision was affirmed in 1977 in *Illinois Brick*, *supra*, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers, causing them to suffer a loss. The court held that the passing — on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court's prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the *Clayton Act*, 38 Stat. 731, 15 U.S.C. §15: *Illinois Brick*.

26 The result of *Illinois Brick* is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

27 The decision of the U.S. Supreme Court in *Illinois Brick* was criticized in many quarters. The reasoning of its critics is largely contained within the dissent written by Mr. Justice Brennan at 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

> Today's decision flouts Congress' purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

28 Since the Supreme Court's decision in *Illinois Brick*, more than twenty states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the *Illinois Brick* decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court's decision in *Illinois Brick*. See *California v. ARC America Corp.*, 109 S.Ct. 1661 (U.S. Cal. 1989),

at 1665.

29 A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the province of Ontario. As stated by this Court in its decision dismissing the Defendants jurisdictional challenge:

> [i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort.

30 I continued on to say:

> [t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff 'national classes', is Ontario. *Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* [2002] O.J. No. 298 (S.C.J.) at paras. 100-101.

31 National classes have been certified by the Ontario court in many class actions. *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.) at 228, leave to appeal denied (2000), 52 O.R. (3d) 20 (Ont. Div. Ct.), leave to appeal to S.C.C. denied September 6, 2001 [2001 CarswellOnt 3077 (S.C.C.)]. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation." *Parsons v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (Ont. C.A.) at para. 15; *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (Ont. S.C.J.) at para. 2.

32 The plaintiffs propose the following common issue for each of the Ontario Actions:

> Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant Vitamins(s) in Canada in the relevant Purchase Period?

33 The definition of "common issues" in section 1 of the *CPA* "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high." The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim...is not required." This requirement has been described by the Court of Appeal "as a low bar." The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis." The common issues question should be approached purposively. *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.), at 248-249; *Cloud v. Canada (Attorney General)*, *supra*, at para. 52; *Western Canadian Shopping Centres*, *supra*, at para. 39; *Rumley v. British Columbia*, [2001] S.C.J. No. 39 (S.C.C.) at para. 29.

34 Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade. *Sugar Industry Antitrust Litigation, Re*, 73 F.R.D. 322 (U.S. E.D. Pa. 1976), at 335.

35 In the United States, it is widely accepted that:

> [An] allegation of price-fixing...will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992) at 18-15 to 18-21.

36 If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis. *Rumley*, *supra*, at para. 29.

37 "[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members." The only litigation alternatives to these class actions are a plethora of individual actions or no individual actions. These are not realistic alternatives to a class action. *Cloud v. Canada (Attorney General)*, *supra*, at para. 73.

38 One goal of the *CPA* is "litigation efficiency" or "judicial economy... to enable the court system to deal efficiently with a large number of claims [arising] from the same event." Another goal is to encourage access by victims to the court system. Thus, it is said, the *CPA* is "anchored in the principles of access to justice and judicial economy." The assessment of the s. 5(1)(d) requirement of the *CPA* "should be conducted through the lens of the three principles of advantages of class actions — judicial economy, access to justice, and behavioural modification." *Carom*, *supra*, at 238-239; *Hollick*, *supra*, at para. 27.

39 It is necessary "to assess the litigation as a whole" and "to adopt a practical cost-benefit approach to" the s. 5(1)(d) requirement. It is "essential to assess the importance of the common issues in relation to the claim as a whole." *Hollick*, *supra*, at para. 29; *Cloud v. Canada (Attorney General)*, *supra*, at para. 76.

40 These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions." Further, "individual actions would be less practical and less efficient than a class proceeding." Thus, certification would increase access to justice. *Hollick*, *supra*, at para. 31; *Rumley*, *supra*, at paras. 37-38.

41 A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in *Rumley* and in *Hollick*, namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures. *Rumley*, *supra*, at para. 35; *Hollick*, *supra*, at paras. 28-31.

42 Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices. *Catfish Antitrust Litigation, Re*, 826 F. Supp. 1019 (U.S. Miss. 1993), at 1034.

43 Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser, or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

44 The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages. *NASDAQ Market-Makers Antitrust Litigation, Re*, 169 F.R.D. 493 (U.S. S.D. N.Y. 1996), at 513.

45 The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

46 The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the Court's approval of the settlement.

47 In my view, and I so find, the prerequisite criteria required by the *CPA* for certification are met. Subject to the issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the motion records in respect of the Settling Defendants. (See paragraph 106 of these Reasons

for a summary.) I turn now to a consideration of the proposed settlements.

The Proposed Settlements

48 The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about $140 million, including interest, expenses and costs and would result in an anticipated recovery of about $100 million after the deduction of Settlement Credits.

49 Direct Purchasers will receive up to 12% of the value of their Vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid *cy-près* to carefully selected and well-recognized consumer and industry organizations. Each *cy-près* recipient has prepared a detailed proposal for the expenditure of its share of the settlement monies. Each recipient will be held accountable for the monies it receives through compliance with strict governing rules.

50 During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was $132,450,000 plus Pre-Deposit Interest. Since then:

> (a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (Akzo did not sell choline chloride in Canada);
>
> (b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (UCB did not sell choline chloride in Canada); and
>
> (c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for $32,728.80, based on 16.5% of its sales of $184,154.50, plus interest of $2,323.30 from March 1, 2003.

51 In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of $144,000,000 plus post-agreement interest, assuming that all other Defendants agreed to participate.

52 In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the Defendants reflecting a Settlement Amount of $148,500,000, being $144,000,000 plus capitalized interest of $4,500,000.

53 By February 2003, some of the Defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of $148,500,000 was reduced to $133,200,000.

54 In the fall of 2004 and January, 2005, there ware further adjustments to the Settlement Amount to bring it to $132,450,000.

55 The $132,450,000 includes some capitalized interest (in an amount less than $4,500,000) and is treated as damages.

56 The proposed settlements are based on a total of $140,676,928, as of the Deposit Date, calculated as follows:

Item	**Amount**
Aggregate damages per Amended Settlement Agreement (Settlement Amount $132,450,000 less expenses of $10,000,000)	$122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totaling	$532,728
Subtotal of aggregate damages	**$122,982,728**
Plus: expenses per Amended Settlement Agreement	$10,000,000
Subtotal including expenses	**$132,982,728**
Plus: Pre-Deposit Interest per Amended Settlement Agreement	$7,694,200
Total	**$140,676,928**

57 Sales of Vitamins in Canada which were subject to the alleged conspiracies totaled about $950,000,000. This amount includes about $43,000,000 of methionine sales by a Settling Defendant and estimated methionine sales of about $80,000,000 by the Defendants who have not settled. Therefore, the settlements are based upon Vitamins sales in Canada totaling about $870,000,000 ($950,000,000 minus $80,000,000).

58 Dr. Thomas Ross, the plaintiffs' expert, concludes in his affidavit that the "best 'point' estimate corresponds to overcharges on the order of 16%." He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only $749 million rather than $870 million, implying an aggregate damage number (overcharge) of $121 million."

59 Dr. Ross also states:

> In summary, I suggest that a range of $103 million to $138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately $121 million and the associated price overcharge is 16.2%. This percentage price overcharge is similar to that estimated by Beyer for the United States.

60 The settlements contemplate aggregate damages of $122,982,728 which compares favourably with Dr. Ross' "estimate of the damage arising" in the "range of $103 million to $138 million."

61 In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John Beyer opined that the weighted average overcharge based on his regression analysis (using U.S. data) was 13.5%. This estimate can be compared to Dr. Ross' regression analysis of a 16.2% overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18% to 20% of gross sales in an environment of treble damages and large jury verdicts.

Direct Purchasers

62 The aggregate damages of $122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

63 Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm's length, three Settling Defendants paid, in total, $24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of $200,500,000 of Vitamins from them. This equates to an average overcharge of 12% of sales.

64 Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

65 Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12% of the Purchase Price. The Settlement Credits particularized in the Agreement total $42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct Purchasers who purchased approximately $353,639,000 of Vitamins, calculated as:

$$\$42,436,670/(12\%) \times 100\%$$

66 By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5% of the Purchase Price to the Direct Purchasers with whom they settled.

67 After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately $98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	$122,450,000
Plus: Akzo Settlement Amount	250,000

Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
Subtotal of aggregate damages	**122,982,728**
Plus: expenses as per Amended Settlement Agreement	10,000,000
Subtotal of aggregate damages plus expenses	**132,982,728**
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
Subtotal of aggregate damages, expenses and Pre-Deposit Interest	**140,676,928**
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
Total payable to Administrator	**$98,240,258**

68 The monies paid to the Administrator will earn interest in the Administrator's hands before being paid out. The additional interest to be earned will total about $2,000,000. Thus, the total recovered through the settlement of the class actions is estimated to be in excess of $100,000,000 ($98,240,258 + $2,000,000).

69 Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart:

Fund	Allocation by Amended Settlement Agreement	Settlement Credits	Interest % allocation	Pre-Deposit Interest	Akzo, UCB and Reilly Settlements	Amount Allocated to Each Fund
Direct Purchaser	94,450,000	(42,436,670)	.578	4,447,247	250,000	56,710,577
Intermediate Purchaser	11,000,000 n/a		.122	938,693	141,364	12,080,057
Consumer	11,000,000 n/a		.122	938,693	141,364	12,080,057
Methionine	6,000,000 n/a		.067	515,511 n/a		6,515,511
Expense	10,000,000 n/a		.111	854,056 n/a		10,854,056
Total	**132,450,000**	**(42,436,670)**		**7,694,200**	**532,728**	**$98,240,258**

70 The recognition of Settlement Credits at 12% and the entitlement of each Direct Purchaser to receive up to 12% of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the Defendants during the course of settlement negotiations.

71 As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct Purchaser to be paid up to 12% of its Purchase Price.

72 Together, the Direct Purchaser Fund and the Methionine Fund are allocated $105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund: Amended Settlement Agreement	94,450,000
Methionine Fund: Amended Settlement Agreement	6,000,000
Subtotal	100,450,000
Pre-Deposit Interest on Direct Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser Fund	250,000
Total	**$105,662,758**

73 The allocation of $105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of $104,400,000, being 12% of the total Vitamin sales of $870,000,000. Class counsel submits that this allocation to the Direct Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12% of the Purchase Price and will motivate them to participate in the settlements rather than opt out.

74 Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

75 The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the Court.

76 However, if the requested $18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately $300,000 would be paid out of the Methionine Fund towards these costs.

77 The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12% of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

78 If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator's calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

79 There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

80 There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer. Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate *cy-près* distributions to these two groups of class members.

81 After the allocation to Direct Purchasers and to expenses, the balance of the settlement monies is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive $11,000,000 plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members.

Intermediate Purchasers

82 The Intermediate Purchaser Fund will be distributed *cy-près* to industry organizations for the benefit of Intermediate Purchasers.

83 Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers, and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70% percent of the fund to agricultural producers, 15% to grocer / wholesalers and 15% to drugstores / pharmacies.

84 The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by internet research and discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

(a) the organization's membership base;

(b) whether the organization was national in scope;

(c) the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and

(d) the organization's financial stability.

85 Proposed recipients have agreed to comply with the rules governing *cy-près* distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the Courts for the settlement funds they receive.

86 Each proposed recipient:

(a) prepared a detailed proposal which is before the Court;

(b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and

(c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

87 The Canadian Cervid Council was to receive 0.112% of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the Canadian Cervid Counsel will be distributed to the remaining participating organizations as provided in Schedule F.

88 The Canadian Goat Society is to receive 0.098% of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon Court approval, each of these two organizations will receive 50% of the funds earmarked for the Canadian Goat Society.

89 Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5% and 10.5% respectively of the available monies. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

90 Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70% of all retail drugstores and pharmacies in Canada, is to receive 15% of the available monies on behalf of drugstore/pharmacies.

91 Assuming a distribution of $11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	**Initial %**	**Adjusted %**	**Adjusted Allocation**
Agricultural Producers - 70%			
Canadian Pork Council	22.12	22.123	2,522,022
Canadian Cattlemen’s Association	18.795	18.799	2,143,086
Dairy Farmers of Canada	10.927	10.934	1,246,476
Chicken Farmers of Canada	7.469	7.476	852,264
Canadian Egg Marketing Agency	3.22	3.227	367,878
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.47	167,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association	0	0.056	6,384

Grocer Wholesalers - 15%			
Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798
Drugstores/Pharmacies - 15%			
Canadian Association of Chain Drugstores	15.0	15.007	1,710,798
Total	**100.0**	**100.0**	**11,400,000**

Consumers

92 The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to Vitamin Products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of Consumers of all ages.

93 The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30% of the initial monies in the Consumer Fund to research/advocacy groups for the benefit of all Consumers across Canada. The remaining 70% will be divided, based on population, between Quebec (16.5%) and the rest of Canada (53.5%) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

94 Proposed recipients were identified through internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

95 Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

96 Each potential recipient was evaluated against the following criteria:

(a) the organization's ability to deliver benefits in each province and territory;

(b) the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;

(c) whether the organization was non-denominational;

(d) whether the organization had a charitable or non-profit designation;

(e) the organization's financial stability and budget; and

(f) the organization's history of advocacy, service delivery, research, or education relevant to Vitamin Products.

97 Financial information was obtained from each potential recipient. The size of an organization's budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

98 Each proposed recipient prepared a detailed proposal which is before the Court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing *cy-près* distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to Consumers.

99 Assuming an initial distribution of $11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of

Consumers and the amount each is to receive:

Proposed Recipients	**%**	**Allocation**
Allocation to National Organizations - 30%		
Food Safety Network	29.0	991,800
Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
Allocation to all provinces and territories except Québec - 53.5%		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950
Allocation to Québec - 16.5%		
Centraide pour tout le Québec	46.0	865,260
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prévention à l'endettement des 40 associations de consommateurs du Québec	10.0	188,100
Projet Petits prêts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Québec)	9.0	169,290
Fondation Claude Masse	8.0	150,480
Option Consommateurs	8.0	150,480
Total		**$11,400,000**

100 The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund...shall be transferred to and become part of the Consumer Fund." Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100% and that substantial monies will trickle down to the Consumer Fund.

101 Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute monies which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

102 Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both Consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down monies to universities and colleges.

103 For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

104 The following chart lists the proposed recipients of the monies which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of $10,000,000 trickles down:

	%	**Allocation**
Northwestern Region - 30.3%		
University of British Columbia	45	1,363,500
University of Alberta	33	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000
Eastern Region - 7.6%		
Memorial University	50	380,000
Dalhousie University	50	380,000
Ontario - 38.4%		

University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
Québec - 23.7%		
Université Laval	27	639,900
McGill University	26	616,200
Faculté de médecine vétérinaire, Université of Montréal	27	639,900
Option Consommateurs [to a maximum of $1 million]	20	474,000
Total	**100**	**$ 10,000,000**

105 Option Consommateurs is to receive $1,142,280 of the initial Consumer *cy-près* distribution and 20%, to a maximum of $1,000,000, of the trickle down distribution. Option Consommateurs is not only a *cy-près* recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

The status of the Ontario class actions upon settlement approval

106 The following chart lists the outstanding class actions in Ontario and the status of each action if the Court approves the proposed settlements and they become effective.

Proceeding	**Settling Defendants**	**Non-Settling Defendants**
Ontario Biotin Action— *Glen Ford v. F.* Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd.,— Merck KGaA, Lonza AG,— Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.	none
Ontario Bulk Vitamins Action— *Glen Ford v. F.* Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd.,— Aventis Animal Nutrition— S.A., Eisai Co., Ltd., Takeda— Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.),— Merck KGaA, Daiichi Pharmaceutical Company, Ltd.	none
Ontario Choline Chloride	Chinook Group Limited	DCV, Inc.
Proceeding	**Settling Defendants**	**Non-Settling Defendants**
Action Fleming Feed Mill— *Ltd. v. BASF Atkiengesellschaft*	(incorrectly named Chinook Group, Ltd.)— BASF Aktiengesellschaft— Bioproducts, Incorporated (incorrectly named Bioproducts, Inc.)— Akzo Nobel Chemicals BV	DuCoa, L.P.
Supplemental Ontario Choline Chloride Action— *Fleming Feed Mill Ltd. v. UCB S.A.*	UCB S.A.— UCB Chemicals Corporation— UCB, Inc.	none
Ontario Niacin Action— *VitaPharm Canada Ltd. v. Degussa-H*üls AG	Degussa Canada Inc. Lonza AG— Nepera, Inc. (incorrectly named Nepera, Incorporated) Reilly Industries Inc.	none
Ontario Methionine Action— *Glen Ford v. Rh*ône-Poulenc S.A.	Aventis Animal Nutrition S.A.	Degussa-Hüls AG— Degussa Corporation— Degussa Canada Inc.— Novus International, Inc.
Supplemental Ontario Methionine Action— *Glen Ford v. Novus International (Canada) Inc.*	none	Novus International (Canada) Inc.— Nippon Soda Co. Ltd.— Mitsui & Co. Ltd.

107 If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action

and the Supplemental Ontario Methionine Action.

108 The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the Court's direction about whether or not to continue this action against these Defendants.

109 The following chart sets out an estimate of the timeline for the implementation of the settlement if the Courts in the three provinces give their approval:

Ontario approval hearing	March 8, 9, 2005
Decision — Ontario	By March 24, 2005
British Columbia and Quebec approval hearings	April 6 and 21, 2005
Ontario judgment final	By April 24, 2005
British Columbia and Quebec judgments final	By May 6, 2005
Implementation of Notice Program	By June 5, 2005
Opt-Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s.16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate *cy-près* and initial Consumer *cy-près* no earlier than	September 9, 2005
Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

The Law

110 A settlement of a class proceeding is not binding unless approved by the Court. To approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class. *CPA* s. 29(2); *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at 444, aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372 (S.C.C.).

111 The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 200 D.L.R. (4th) 667 (Alta. C.A.), at 677:

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

112 Similar sentiments have been expressed by Cronk. J.A., in *M. (J.) v. Bradley*, [2004] O.J. No. 2312 (Ont. C.A.) at para. 65:

> Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice...Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

113 There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval. *Manual for Complex Litigation*, Third §30.42 (1995). See *Cotton v. Hinton*, 559 F.2d 1326 (U.S. 5th Cir. 1977), at 1330; 578526 *Dabbs*, *supra*, at 440.

114 To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement

does not fall within a range of reasonable outcomes. 578526 *Dabbs*, *supra*, at 440.

115 In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> ...all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. *Dabbs*, *supra*, 440; Newberg, *supra*, at 11-104.

116 A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal. *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230.

117 In determining whether to approve a settlement, a court takes into account factors such as:

> (a) the likelihood of recovery or likelihood of success;
>
> (b) the amount and nature of discovery, evidence or investigation;
>
> (c) the proposed settlement terms and conditions;
>
> (d) the recommendation and experience of counsel;
>
> (e) the future expense and likely duration of litigation;
>
> (f) the recommendation of neutral parties, if any;
>
> (g) the number of objectors and nature of objections;
>
> (h) the presence of arms-length bargaining and the absence of collusion;
>
> (i) the information conveying to the court the dynamics of, and the positions taken by
>
> (j) the parties during the negotiations; and
>
> (k) the degree and nature of communications by counsel and the representative
>
> (l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 13; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 71-72.

118 These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. *Parsons*, *supra*, at para. 73.

119 When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

> (1) the Defendants should pay the total overcharge for Vitamins sold in Canada; and
>
> (2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian Vitamins marketplace would be measured by the total overcharge for Vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated.

120 The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the Court would not assess damages in the aggregate. Quite probably, the Defendants would have argued that the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), aff'g (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Ont. S.C.J.) (certification granted), leave to appeal to S.C.C. [2003 CarswellOnt 2810 (S.C.C.)] denied, ought as precedent to preclude certification in the actions at hand.

121 The plaintiffs also faced risks specific to some of the Defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain Bulk Vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant hurdle of having much less information to work with to prove overcharge rates for these Bulk Vitamins.

122 If the Defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

123 A court "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture." The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval. Newberg, *supra*, at 11-100 & 11-101; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) *supra* at para. 15.

124 While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), *supra* at paras. 15 and 24.

125 Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel's grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

> (a) interaction with U.S. counsel who had been litigating extensively against these Defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;
>
> (b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data, and industry data;
>
> (c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some Defendants challenging the jurisdiction of the Ontario Court;
>
> (d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;
>
> (e) the Agreed Statements of Fact that supported the guilty pleas; and

(f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

126 There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

127 The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), *supra* at para. 10; *Manual for Complex Litigation*, *supra*, at §30.42.

128 In reviewing the terms of a settlement, a court must be assured that the settlement secures an adequate advantage for the class in return for the compromise of litigation rights; Newberg, *supra*, at 11-46.

129 The proposed settlement under consideration contemplates aggregate damages of $122,982,728, or $132,982,728 including expenses and costs of $10,000,000, or a total of $140,676,928 with Pre-Deposit Interest. The $122,982,728 compares favourably with Dr. Ross' estimate of the actual damages being in the "range of $103 million to $138 million."

130 The settlement reasonably allocates $56,710,577 of the settlement monies to the Direct Purchaser Fund. Any unclaimed portion will flow down to the Consumer Fund to be predominately used by universities for the benefit of Intermediate Purchasers and Consumers. Class Counsel expect that substantial amounts will flow down because the take-up rate by Direct Purchasers will not be 100%.

131 The distribution to Intermediate Purchasers and Consumers is through two *cy-près* distribution plans, the Intermediate Purchaser Fund Distribution Protocol and the Consumer Fund Distribution Protocol to recognized industry and consumer organizations and universities. Class Counsel identified the recipient organizations through diligent research and consultation. All recipient organizations will be accountable for settlement monies received by them.

132 Section 24 of the *CPA* permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement monies by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In other words, the *CPA* permits *cy-près* distributions of the type contemplated in Schedules F and G of the Agreement.

133 *Cy-près* distributions of the type outlined in Schedules F and G have been accepted by the Ontario Court. In *Hoechst*, *supra*, at paras. 15-16, a price-fixing case involving food additives, this Court held:

> There are significant problems in identifying possible claimants below the manufacturer level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a cy-près distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The *CPA* provides flexibility for this approach: see ss. 24 and 26.
>
> Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

134 This reasoning was adopted by the Court in *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.). The Court approved a settlement which distributed all of the settlement benefits *cy-près* to various consumer groups for the indirect benefit of class members. The Court held:

> [w]here in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-près distribution to recognized organizations or institutions which will benefit class

members.

135 Class Counsel are seeking an order barring any future claim for contribution or indemnity against the Settling Defendants (and UCB in the additional, trailer settlement achieved with it). Once it became clear in the course of negotiations some Defendants would not participate in a global settlement, a bar order was critical in the negotiation of the Agreement. Class Counsel submits that the form of the bar order is fair and properly balances the competing interests of the classes, the Settling Defendants, UCB and the Non-Settling Defendants. No bar order is sought by Akzo or Reilly.

136 Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of *Nelson v. Bennett*, 662 F. Supp. 1324 (U.S. Dist. Ct. E.D. Cal. 1987), at 1335, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and of fairness and deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement."

137 In the case *Nucorp Energy Securities Litigation, Re*, 661 F. Supp. 1403 (U.S. S.D. Cal. 1987), at 1408, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, "as a practical matter, impossible*".* Any single defendant who refuses to settle, would force all other defendants to trial.

138 Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.), at 141, a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved. Winkler J. considered many American authorities in support of the proposed bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, sections 12 and 13 of the *CPA* provided a mechanism for supporting these principles:

> I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the *Class Proceedings Act* provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

139 Following the *Ontario New Home Warranty* decision, bar orders have been approved in the class actions context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. See *Millard v. North George Capital Management Ltd.*, [2000] O.J. No. 1535 (Ont. S.C.J. [Commercial List]); *Sawatzky v. Société Chirurgicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (B.C. S.C.); *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 1481 (B.C. S.C.); *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Ont. S.C.J.); and *Gariepy v. Shell Oil Co.* (April 16, 2004), Doc. Toronto 30781/99 (Ont. S.C.) at para. 16. Most recently, in a price-fixing case, the court approved a bar order. *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.*, [2004] O.J. No. 908 (Ont. S.C.J.).

140 In my view, the requested bar order is fair and reasonable.

141 The burden of proving that a settlement ought to be approved rests with the proponents, however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake. 578526 *Dabbs*, *supra*, at 440.

142 In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded

considerable weight, as stated in *Manual for Complex Litigation*, *supra*, at §30.42:

> [T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

143 In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved:

> As a practical matter, the overwhelming majority of proposed settlements are approved when the Court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. Newberg, *supra*, at 11-42.

144 Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

145 The proposed settlement achieves the legislative goals of the *CPA* and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

146 Class members will receive fair and reasonable benefits in return for the compromise of their litigation rights against the Settling Defendants, and Akzo, UCB and Reilly.

147 If there were to be a trial of the common issues, the litigation process to determine liability would be complicated and protracted, and no class member would be paid until the litigation process ended. The practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals. 578526 *Dabbs*, *supra* at 441.

148 The Court acknowledges a range of acceptable settlements, thereby recognizing, "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), *supra* at para. 12.

149 The settlements at hand were, in part, as a result of two mediations conducted by Winkler J. Also, the Children's Lawyer and the Public Trustee were aware of the ongoing negotiations and having been given notice of this approval hearing have indicated they do not wish to make submissions.

150 In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding, and accordingly do not have the rights of a party. *Dabbs*, *supra*, at 100.

151 Even in the presence of objectors, the settlement approval process is non-adversarial in nature:

> It is important that the Court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other. *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 1598, *supra* at para. 21.

152 An objector who suggests that Class Counsel ought to have structured the settlement differently essentially seeks to

substitute the personal judgment of such objector for the judgment of Class Counsel.

153 It is not within the jurisdiction of the Court to consider an objection based upon extra-legal concerns. The approval process does not include an assessment of the proposed settlement from a social or political context:

> The parties have chosen to settle the issue on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the class as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra legal and outside the ambit of the court's review of the settlement. *Parsons*, *supra*, at para. 77.

154 The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. Further, when a settlement is reached prior to the expiry of the opt out period, class members have a further element of control:

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class. *Parsons*, *supra*, at para. 79; *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 1598, *supra* at para. 11.

The Objections

155 As of February 15, 2005, the original deadline for written objections, Mr. William Dermody, the appointed friend of the Ontario Court in this settlement approval process, had received only three written objections in respect of the proposed settlement.

156 These were on behalf of two organizations, the International Society for Orthomolecular Medicine and the Health Action Network Society.

157 The third objection is by Dr. A. Hoffer, a retired psychiatrist and former Director of Psychiatric Research, Department of Public Health, for the province of Saskatchewan and a founder of the developing branch of medicine known as "orthomolecular medicine and psychiatry." His letter seeks consideration for patients who receive treatment of "optimum doses of vitamins for...forms of mental and physical illness." Dr. Hoffer could not appear so that he did not make an oral submission.

158 It is necessary and appropriate that only well-recognized entities be the recipients of the *cy-près* distributions. Such entities have an established record of providing not-for-profit services, with transparency in respect of their activities and accounting. They provide the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used. There are a multitude of charitable organizations in Canada who can use the limited monies available through the contemplated *cy-près* distribution. It is readily apparent that the organizations listed in Schedule G of the Agreement meet this criteria. It is also clear that there are other organizations who could arguably meet the criteria.

159 The process to determine recipients, and the reasons for the choices made, in respect of the listed organizations which are to receive the distributions in accordance with the Consumer Fund Distribution Protocol (Schedule G to the Agreement), including the proposals received from the successful intended recipients, are set forth in the Affidavit of Ms. Andrea DeKay dated February 16, 2005 (Vols. 3 and 4 of the Motion Record).

160 The first step in creating the Consumer Fund Distribution Protocol was to identify the primary objective, being the delivery of Vitamin related benefits to Canadian Consumers of all ages and across Canada. The second step was to identify

potential recipient organizations which would meet the primary objective.

161 Class Counsel took into consideration the extent to which a proposed organization could deliver benefits in each province and territory, could reach one or more of the target age groups, whether the organization was non-denominational, whether there was a registered charitable designation, the organization's financial stability and budget and the organization's history of advocacy, service delivery, research or education relevant to Vitamin Products. Consultation was also made with an expert in the non-profit sector as to the tentative list of possible recipients for review and comment.

162 The third step in the process was to develop a draft plan of distribution and the allocation of the limited resources. Ultimately, money was not allocated simply on a provincial or regional population basis but also on the basis of research/advocacy or service delivery. For example, 30% of the Fund is allocated to research/ advocacy focused organizations.

163 Finally, stringent guidelines were developed and reviewed by the accounting firm Deloitte & Touche LLP (the proposed Administrator) to ensure accountability. A binding commitment was obtained from each organization to use the monies solely for activities related to Vitamin Products, to maintain a separate account for the monies received, to provide reports, and to consent to an independent audit and to reimburse monies in the event a court should so order.

164 For example, The Food Safety Network is to receive 29%, The Centre for Research in Women's Health 10.5%, Breakfast for Learning 15% and Canadian Feed the Children 5%.

165 The distribution of any monies subsequently allocated to the Consumer Fund because of a less than 100% take-up in respect of the Direct Purchasers Fund (anticipated by Class Counsel) will go to listed universities.

166 Each objection was in respect of the list of proposed recipients of the Consumer Fund *cy-près* distribution. The objectors are persons or supporters of organizations or groups who wish to be recipients of the *cy-près* distribution.

167 A further objection was received by fax from the Consumer Health Organization of Canada March 4, 2005. A fifth objection was received by fax from Mr. Lars Soderstrom March 6, 2005.

168 The written submissions received were filed as part of the record of this proceeding. Each of the individual objectors who appeared at the hearing March 8, 2005 was allowed to make an oral submission and to file such further materials as desired.

169 Mr. Soderstrom's submission is unique in that he seems to argue against the merits of the proposed settlement on the basis that it does not result in payments directly to consumers. Mr. Borden has recently commenced an application on behalf of Mr. Soderstrom on the asserted basis that Mr. Stroderstrom's rights under the *Canadian Charter of Rights and Freedoms* are violated by the proposed settlement. The short answer to Mr. Soderstrom's objection is that he can, of course, opt out of the settlement and pursue his individual application, as he apparently intends to do. As I have stated above, in my view, a *cy-près* mechanism for the distribution of benefits through the recovery in respect of the damages to Consumers is the only viable, cost efficient and fair approach.

170 I turn now to the other four objections. Class Counsel properly objected to any organization or corporate entity which filed an objection being heard itself as an objector for the reason that it is not a class member. Hence, individuals, each being within the Consumer class in respect of the class actions at hand, made submissions, arguing that some parts of the monies available should go to certain organizations.

171 The only objector without an individual present who could speak in its interest was the International Society for Orthomolecular Medicine. Dr. Hoffer's letter objecting, discussed above, was also addressed to a like interest and concern as expressed by this organization. The responding affidavit of Ms. Andrea Dekay suggests that this organization represents a group of orthomolecular societies throughout the world, with its president being in the Netherlands.

172 Mr. Milt Bowling, Mr.Trueman Tuck, "a legal and political rights advocate", Dr. David Rowland and Mr. Paul Anderson, each made oral submissions. Mr. Tuck filed an extensive written submission.

173 Mr. Bowling argues for the inclusion of the Health Action Network Society ("HANS") as a recipient of funds. This organization is an educational, non-profit and charitable organization which has reportedly worked for some 22 years in educating consumers on the benefits of nutritional therapies, including the use of vitamins and minerals.

174 Mr. Anderson argued for the inclusion of the Consumer Health Organization of Canada in the list of recipients from the Consumer Fund.

175 Mr. Tuck proposes that funds from the settlement be given to the Live Longer Foundation. However, this entity was incorporated only in November, 2004. Mr. Tuck is also active on behalf of "Friends of Freedom," not a registered charity, which reportedly actively supports several court actions by alternative health organizations against Health Canada. This group also supports HANS. Mr. Tuck is an advocate on behalf of a number of organizations which promote food based medicines as a health measure. Mr. Tuck is a passionate advocate in favour of vitamins for health purposes. He states he is opposed to doctors and prescription drugs.

176 Ms. DeKay states in her responding affidavit of March 3, 2005, to the objections, after completing her research into the organizations favoured by the objectors, that Class Counsel "are satisfied that none of the organizations which objected to the settlement satisfy the criteria" determined by the process employed for the selection of recipient organizations, as outlined in her affidavit of February 16, 2005 (and discussed above). She concludes that she "would not have recommended that any of these organizations receive settlement monies from the Consumer Fund."

177 The Court concurs with the view of Class Counsel that the organizations favoured by the objections do not meet the selection criteria. This is not to imply any condemnation or criticism of these organizations. It is simply to say that none are sufficiently substantial to meet the extensive, demanding criteria for selection. As discussed above, the selection criteria is quite reasonable and responsible in all the circumstances. To repeat, there is a very limited supply of monies for distribution, with potentially many worthy claimant organizations. Not nearly all can be selected. The stringent criteria for selection is both appropriate and necessary for selection and maximizes the confidence of the broad, vitamin consuming public that the objectives of the settlement are being realized, and will be easily seen to be realized, by the proposed recipient organizations.

178 Given the substantial size of the class (millions in this case) and the relatively small number of objections, the Court must also take account of the relative paucity of objections and conclude that the vast majority of the class is supportive of the settlement. Finally, the selection put forward by Class Counsel is certainly reasonable, worthy and appropriate from every objective viewpoint.

179 "While approval of a proposed class settlement is not a matter to be determined by a plebiscite, the views of putative class members are certainly relevant and entitled to great weight": *Silicone Gel Breast Implant Products Liability Litigation, Re*, Doc. CV 92-P-10000-S (U.S. N.D. Ala. September 1, 1994) 1994 WL 578353 at 5.

Disposition

180 All of the negotiations in this case, including those with Lindel Hilling, Merck KGaA, Nepera, Inc., Lonza, Akzo, UCB and Reilly were at arms' length and adversarial in nature. Each clause of each settlement agreement was achieved through extensive, adversarial and protracted negotiations.

181 The drafting and negotiation of the Agreement was adversarial and hard fought over eighteen months. Reportedly, over 60 drafts of the agreements were circulated.

182 During the litigation process, before the announcement of the proposed settlement, Class Counsel did not attempt to directly communicate with or register individual class members because the large number (in the millions) made it impractical to do so. However, Class Counsel did maintain Vitamins websites and received numerous telephone and electronic contacts initiated by class members.

183 The proposed representative plaintiffs support and recommend approval of the settlement.

184 The inclusive model adopted by Class Counsel assesses aggregate damages for the entire marketplace, and provides benefits, directly and indirectly, to all purchasers in an efficient and manageable way.

185 Numerous price-fixing class actions have been commenced in Ontario. Two of these cases, *Chadha v. Bayer Inc.*, *supra* and *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (Ont. S.C.J.), were commenced on behalf of consumers only. In each of these consumer-only cases, the court refused to grant certification. Conversely, seven price-fixing class actions have been certified in Ontario in the context of negotiated settlements. In each of the settled cases, all purchasers of the price-fixed product, including Direct Purchasers, Intermediate Purchasers and Consumers, were included in the class. See *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co. of Canada*, [2001] O.J. No. 6028 (Ont. S.C.J.); *Hoechst*, *supra*; *Bona Foods Ltd. v. Pfizer Inc.*, [2002] O.J. No. 5553 (Ont. S.C.J.); *Newly Weds Foods Co. v. Pfizer Inc.* (7 April 2003) Toronto 39495; *Minnema v. Archer Daniels Midland Co.* (February 28, 2003), Doc. G23495-99CP (Ont. S.C.); *A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V.*. (22 December 2003) Toronto 02-CT-40300CP; *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.*, *supra*.

186 In approving the settlement in *Hoechst*, this Court recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing." *Hoechst*, *supra*, at para. 16.

187 The *CPA* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the 1982 Ontario Law Reform Commission's *Report on Class Actions* (vol. 1 (Toronto: Ministry of the Attorney General, 1982)), by the Attorney General's Advisory Committee on Class Action Reform and by the Supreme Court of Canada, are judicial efficiency, improved access to the courts and behaviour modification. *Interpretation Act*, R.S.O. 1990, c. I-11, s. 10; *Hollick*, *supra*, at para. 15; *Western Canadian Shopping Centres*, *supra*, at paras. 27-29.

188 The settlements are the product of lengthy, adversarial negotiations which understandably have involved compromise. Given the number of parties, the complexities of the issues and the litigation risks involved in proceeding to trial, in my view, and I so find, the settlements are fair and reasonable and in the best interests of the classes as a whole and should be approved.

189 For the reasons given, the overall settlement of the subject class actions is found to be fair and reasonable and in the best interests of all class members. Approval is given to the proposed settlement as set forth in the Agreement, subject to a determination and findings in respect of the regime set forth in s. 18.1 thereof, to be dealt with in separate Reasons for Decision, relating to the motion for approval of Class Counsel Fees.

190 Counsel can prepare the necessary implementing orders and judgments for my signature consistent with these Reasons for Decision and the separate Reasons for Decision relating to Class Counsel Fees.

Motions granted.

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2016 ONSC 5447
Ontario Superior Court of Justice

Lozanski v. Home Depot, Inc.

2016 CarswellOnt 13661, 2016 ONSC 5447, 272 A.C.W.S. (3d) 262

STEVEN LOZANSKI (Plaintiff) and THE HOME DEPOT, INC. and HOME DEPOT OF CANADA, INC. (Defendants)

Perell J.

Heard: August 22, 2016
Judgment: August 29, 2016
Docket: CV-14-512624-00CP

Counsel: Bryan C. McPhadden, C. Simoes, for Plaintiff
Dana Peebles, Katherine Booth, Kirsten Thompson, for Defendants

Subject: Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements
Headnote
Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Defendant companies' payment card system was hacked by criminal intruders, resulting in data breach — Defendants spent several million dollars to address privacy concerns of its customers — Plaintiff commenced one of several proposed class actions, which was later certified in Ontario as national class action for settlement purposes — Parties negotiated extensive settlement terms, including payment of honoraria to representative plaintiffs — Plaintiff brought motion for approval of settlement — Motion granted — Settlement and associated or ancillary requests were approved — Honoraria, which should only be awarded in exceptional cases, were not approved — Settlement was generously valued at $400,000 — It was highly unlikely that $250,000 settlement fund would be taken up for damage claims since there was little risk of actual damages, and settlement fund would be available to pay for notices and costs of administration — Additional $250,000 fund for identity theft insurance was given full value — Discontinuance that provided no benefits to class members would have been approved, therefore it was easy to conclude that proposed settlement agreement, which did confer benefits, should be approved as being fair, reasonable, and in best interests of class members.
Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Defendant companies' payment card system was hacked by criminal intruders, resulting in data breach — Defendants spent several million dollars to address privacy concerns of its customers — Plaintiff commenced one of several proposed

class actions, and it was later certified in Ontario as national class action for settlement purposes — Parties negotiated extensive settlement terms, and settlement was largely approved — Plaintiff brought motion for payment of class counsel's legal fees, disbursements, and HST totalling $406,800 — Motion granted in part — Settlement was generously valued at $400,000, and approved counsel fee was $120,000, all inclusive of disbursements and HST — Approved counsel fee was fair, reasonable, and generous — Awarding class counsel more than value of settlement would be error — Although defendants agreed to pay counsel fee subject to court approval and made no submissions to reduce amount they agreed to pay, they had good case that fee was too high for purposes of Class Proceedings Act, 1992 — Defendants had good argument that they ought not to have been subjected to class proceeding at all.

Table of Authorities

Cases considered by *Perell J.*:

Baxter v. Canada (Attorney General) (2006), 2006 CarswellOnt 7879, 83 O.R. (3d) 481, 40 C.P.C. (6th) 129 (Ont. S.C.J.) — referred to

Bellaire v. Daya (2007), 2007 CarswellOnt 7976, 49 C.P.C. (6th) 110 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 2010 ONSC 7147, 2010 CarswellOnt 9886, 9 C.P.C. (7th) 444 (Ont. S.C.J.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 2005 CarswellOnt 1095, 74 O.R. (3d) 758, 12 C.P.C. (6th) 252 (Ont. S.C.J.) — referred to

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 2007 C.E.B. & P.G.R. 8233 (headnote only), 40 C.P.C. (6th) 62 (Ont. S.C.J.) — referred to

Gagne v. Silcorp Ltd. (1998), 1998 CarswellOnt 4045, 113 O.A.C. 299, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 41 O.R. (3d) 417, 27 C.P.C. (4th) 114, 66 O.T.C. 400 (Ont. C.A.) — referred to

Kelman v. Goodyear Tire & Rubber Co. (2005), 2005 CarswellOnt 154, 5 C.P.C. (6th) 161, [2005] O.T.C. 36 (Ont. S.C.J.) — referred to

Lavier v. MyTravel Canada Holidays Inc. (2012), 2012 ONSC 1673, 2012 CarswellOnt 3687 (Ont. S.C.J.) — considered

Lavier v. MyTravel Canada Holidays Inc. (2013), 2013 ONCA 92, 2013 CarswellOnt 1580, 302 O.A.C. 194, 35 C.P.C. (7th) 240, 359 D.L.R. (4th) 713 (Ont. C.A.) — referred to

Markson v. MBNA Canada Bank (2012), 2012 ONSC 5891, 2012 CarswellOnt 17304, 42 C.P.C. (7th) 202 (Ont. S.C.J.) — referred to

McCarthy v. Canadian Red Cross Society (2007), 2007 CarswellOnt 3735 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (2000), 2000 CarswellOnt 2174, 49 O.R. (3d) 281, 46 C.P.C. (4th) 236 (Ont. S.C.J.) — referred to

Robinson v. Rochester Financial Ltd. (2012), 2012 ONSC 911, 2012 CarswellOnt 1368, [2012] 5 C.T.C. 24, 27 C.P.C. (7th) 351 (Ont. S.C.J.) — referred to

Smith Estate v. National Money Mart Co. (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.) — considered

Smith Estate v. National Money Mart Co. (2011), 2011 ONCA 233, 2011 CarswellOnt 1920, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223, 276 O.A.C. 237, 106 O.R. (3d) 37 (Ont. C.A.) — considered

Sparvier v. Canada (Attorney General) (2006), 2006 SKQB 533, 2006 CarswellSask 765, 35 C.P.C. (6th) 110, 290 Sask. R. 111 (Sask. Q.B.) — referred to

Sparvier v. Canada (Attorney General) (2007), 2007 SKCA 37, 2007 CarswellSask 148, 39 C.P.C. (6th) 133, [2007] 7 W.W.R. 682, 293 Sask. R. 54, 397 W.A.C. 54 (Sask. C.A.) — referred to

Tesluk v. Boots Pharmaceutical PLC (2002), 2002 CarswellOnt 1266, 21 C.P.C. (5th) 196, [2002] O.T.C. 233 (Ont. S.C.J.) — referred to

Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd. (2012), 2012 ONSC 6626, 2012 CarswellOnt 14602, 44 C.P.C. (7th) 361 (Ont. S.C.J.) — referred to

Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369, 10 O.T.C. 375, 1996 CarswellOnt 2970 (Ont. Gen. Div.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 29 — considered

MOTION by representative plaintiff in class action for approval of settlement and payment of class counsel's fee.

Perell J. **:**

A. INTRODUCTION

1 On June 6, 2016, pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, this action was certified in Ontario as a national class action for settlement purposes.

2 The Plaintiff, Steven Lozanski, brings a motion for, among other things: (a) approval of the settlement; (b) approval of the notice of the settlement and of its distribution plan; (c) payment of administration costs; (d) payment of several honoraria; and (e) payment of Class Counsel's fee of $406,800, all inclusive.

3 Class Counsel, a settlement-consortium of the Merchant Law Group and McPhadden Samac Tuovi LLP, submitted that the settlement was worth over $1 million in benefits to the Class Members and ought to be approved by the court. They also submitted that their counsel fee, which will be paid by the Defendants as part of the settlement, should be approved by the court.

4 For the reasons that follow, I shall approve the settlement and the associated or ancillary requests. I do not approve any honoraria. I would very generously value the settlement as having a value of $400,000, and I approve a counsel fee of $120,000, all inclusive of disbursements and HST.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. The Data Breach at Home Depot and its Response

5 The defendants are Home Depot, Inc. and Home Depot of Canada, Inc. Home Depot Inc. is the indirect parent of Home Depot of Canada (collectively "Home Depot"). Home Depot is a well known retailer of home improvement and construction products and services in Canada and in the United States.

6 Between April 11, 2014 and September 13, 2014, there was a data breach at Home Depot. Its payment card system was hacked by criminal intruders using custom-built malware to clandestinely breach Home Depot's computer system. The six-month period between April and September 2014 would define the Class Period for the class actions, discussed below.

7 On September 9, 2014, Home Depot provided notice to the Office of the Privacy Commissioner of Canada, the Office of the Information and Privacy Commissioner of Alberta, the Office of the Information and Privacy Commissioner of British Columbia, and the Commission d'accès à l'information du Québec that there had been a data breach. Subsequently, after an ongoing dialogue with Home Depot, none of the Privacy Commissioners found that Home Depot had violated Canada's privacy laws and each Office closed their files.

8 After discovering the data breach, on September 8 and 18, 2014, Home Depot issued a press release, and on September 16, 2014, Home Depot published notices of the data breach in *The Globe and Mail* (in English) and in *La Presse* (in French). On September 21, 2014, Home Depot sent over 500,000 emails directly to Canadian customers, in English and in French, to notify them that some customers' payment card information might have been compromised.

9 On November 6, 2014, Home Depot sent 58,605 emails directly to Canadian customers to advise that their email addresses may have been stolen in the Data Breach and issued a further press release regarding emails stolen in the Data Breach. Here, it may be noted that the theft of email addresses by itself does not by itself lead to identity theft financial harm.

10 In its press releases, Home Depot apologized to its customers, confirmed that it had eliminated the malware, and reassured the customers that they would not be responsible for fraudulent charges on their accounts. As further assurances, Home Depot offered its customers free credit monitoring and identify theft insurance. Its newspaper notices of September 16, 2014 stated, in part:

> To assist our customers who may have been affected by the breach, we are offering free identity protection service, including credit repair services, credit monitoring, and an identity theft insurance policy to any customer who used a payment card at a Home Depot store in 2014, from April on. Affected customers may receive 12 months of identity protection services beginning on September 8, 2014, at no cost to the customer. You may obtain information by calling 1-800-668-2266 or visiting www.HomeDepot.ca.

11 More precisely, under the offer made by Home Depot, Canadian customers were provided, at no charge, with: (1) Equifax credit monitoring; (2) Equifax identity theft insurance through an AIG policy (the identity theft insurance was not limited to the data breach); and (3) credit repair services — from AllClear ID, Inc. These latter services, called AllClear Secure, provided access to investigators who would determine if the customers had suffered fraud or identity theft and would assist them in recovering financial losses and restoring their identities to proper conditions.

12 To be more precise, pursuant to the offer made by Home Depot, any Canadian who said he or she had used a payment card at a Home Depot store in Canada between April and September 2014 received the Equifax Complete Premier Plan, at no charge. This plan included: (a) Lost Wallet Assist: One-stop assistance in cancelling and reissuing credit or debit cards, driver's licences, SIN cards, insurance cards, passports, and traveler's cheques; (b) WebDetect (Internet Scanning) to detect that personal information (e.g. SIN or credit card number) is being used on the Internet; (c) 24/7 credit monitoring with email notifications of key changes to credit profiles; (d) unlimited Equifax Credit Score and Report; and (e) up to $50,000 of identity theft insurance.

13 Between September 8, 2014 and September 19, 2015, Home Depot provided a total of 43,458 Canadian customers with one year of coverage under that Equifax Plan, beginning on the date of activation. I was advised that depending on bulk purchasing, the premium for identity theft insurance is between $50 and $100, and thus Home Depot spent several millions of dollars to address the privacy concerns of its customers. Subsequently, there were approximately 10 insurance claims made under the Equifax policies, none of them associated with the data breach at Home Depot.

2. The Commencement of Class Proceedings against Home Depot

14 Hard upon the announcement of the data breach at Home Depot, proposed class actions against it were commenced in the United States. These actions were eventually consolidated as *The Home Depot, Inc. Customer Data Security Breach Litigation*: Case No. 14-md-02583-TWT in Atlanta, Georgia before Judge Thrash. A counsel group of nine law firms was appointed to prosecute the class actions in the United States.

15 In Canada, after the announcement of the data breach, Merchant Law Group created a webpage soliciting sign-ups for claimants. Martin Knuth, a resident of Regina, Saskatchewan, signed up, and he was recruited by the firm to be a representative plaintiff in a class action launched there.

16 On September 17, 2016, Merchant Law Group commenced a class action in Saskatchewan on behalf of Mr. Knuth. Mr. Knuth had used his credit card in several transactions at a Home Depot store between April 11 and September 13, 2014.

17 The proposed class definition in Mr. Knuth's action was:

> All individuals in Canada, who suffered harm, inconveniences, economic losses, mental distress or other losses as a result of a privacy breach, who are and were at all material times owners of or otherwise beneficially entitled to deal with certain information of a confidential character, both personal and financial.

18 As it turned out, Mr. Knuth's class definition was over-inclusive, because not all credit or debit card purchasers were affected by the data breach at Home Depot. In actuality, the only affected purchasers were those that used their payment card by swiping its magnetic chip through the card reader at self-checkout terminals (a "SCO" terminal) that had been infected by the malware. Thus, later, the proposed class definition in Saskatchewan became:

> All persons in Canada, who, between April 11, 2014 and September 13, 2014, made a purchase at a Home Depot store using a credit card or debit card at a self-checkout terminal.

19 Purchasers with "chip" technology that "dipped" their cards at the reader and entered a PIN were not affected. It was later determined that Mr. Knuth and William Gilchrist, a deponent for Mr. Knuth's certification motion, had not been affected by the data breach because the manner in which they made payments was not vulnerable to the data breach. There were no SCOs in Québec Home Depot stores during the Class Period.

20 Home Depot estimated that 500,000 Canadian customers could have been affected by the data breach. Thus, Mr. Knuth's original class was over-inclusive by around two million Canadians.

21 Notwithstanding that it had commenced a national class action in Saskatchewan, on September 19, 2014, Merchant Law Group commenced a class action in Ontario. Andrew Sandrasangra was the proposed Representative Plaintiff.

22 Merchant Law Group also commenced proposed class actions in British Columbia; Rachel Mendel was the proposed Representative Plaintiff and in Newfoundland; Randy Clarke was the proposed Representative Plaintiff.

23 I foreshadow here to note that honoraria are sought for Mr. Sandrasangra, Ms. Mendel, and Mr. Clarke.

24 Merchant Law Group also commenced a proposed class action in Québec. Yves Theriault was the proposed Representative Plaintiff. This action was subsequently discontinued. No steps were ever taken in Merchant Law Group's British Columbia, Ontario, and Newfoundland proposed class actions.

25 Merchant Law Group was not the only Canadian law firm that responded to the situation at Home Depot. On September 22, 2014, McPhadden Samac Tuovi LLP issued a proposed class action on behalf of Mr. Lozanski.

26 Mr. Lozanski is a resident of Richmond, Ontario. He used his credit card in three transactions at a Home Depot store between April 11 and September 13, 2014. The proposed class definition in Mr. Lozanski's action was:

> All persons resident or situated in Canada (including their estates, executors, or personal representatives), who have communicated personal information and/or financial data and/or usage data to the defendants, which information was stolen or released to or obtained by unauthorized third parties in April or May 2014.

27 Like Mr. Knuth's proposed definition, Mr. Lozanski's class definition is over-inclusive. It was also later determined that like Mr. Knuth and Mr. Gilchrist, Mr. Lozanski was not personally affected by the data breach.

28 In their respective actions, Mr. Lozanski and Mr. Knuth alleged that the criminal breach of Home Depot's payment card system resulted in a compromise of Class Members' payment card information and caused financial and other losses to Class Members. It was further alleged that the breach of their payment card information represented a breach of Class Members' privacy rights and their contracts with Home Depot.

3. The Progress of the Class Actions

29 Thus, as of the fall of 2014, there were numerous class actions against Home Depot in the United States and six class actions in Canada. Of the five started by Merchant Law Group, it seems that a decision was made to move forward only with Mr. Knuth's action in Saskatchewan.

30 In Ontario, neither Merchant Law Group nor McPhadden Samac Tuovi LLP brought a carriage motion. From the fall of 2014, until relatively recently, there was very little activity in Ontario. McPhadden Samac Tuovi LLP and Merchant Law Group did not form a consortium in 2014, and it seems that McPhadden Samac Tuovi LLP was content to simply monitor the developments elsewhere and not push forward in Ontario.

31 Meanwhile in the Saskatchewan action, in the fall of 2015, Mr. Knuth delivered a certification motion record. The Record was comprised of: (a) his affidavit; (b) an affidavit from Brandon Ralfe, an Information Technology manager with Merchant Law Group; (c) an affidavit from Mr. Gilchrist; and (d) an affidavit from Professor Norman Archer, who was Mr. Knuth's expert witness.

32 Professor Archer's credentials are that he has a B.Sc. in Engineering Physics from the University of Alberta, a M.S. in Operations Research from New York University, and a PhD in Physics from McMaster University. He was a professor Emeritus at McMaster in the Information Systems Area of the DeGroote School of Business. He is the owner of the consulting firm EC Innovations, located in Hamilton, Ontario. Professor Archer has engaged in research, publication, and testimony relating to identify theft and fraud for 12 years.

33 In December 2015, in the Saskatchewan action, Home Depot delivered an affidavit from René Hamel, who is the Director of Telus' Security Solutions Department, which manages a team of digital forensic investigators. He trained with the RCMP and the FBI, and has worked in the forensic technology departments of the RCMP, KPMG, TD Bank, and other Canadian institutions.

34 A certification motion was scheduled for May 2016 and the parties proceeded to cross-examinations in the run up to the motion.

35 Although a certification motion is not a determination of the merits, the cross-examinations exposed considerable weaknesses in the merits of Mr. Knuth's proposed class action. In his affidavit for Mr. Knuth in the Saskatchewan action, Professor Archer deposed that the data breach was preventable, but during cross-examination, he admitted that he was just speculating and that data breaches are not unpreventable. For his part, Mr. Hamel, Home Depot's expert, testified that despite utmost diligence and efforts to prevent data breaches, companies remain vulnerable because hackers continually develop new malicious code "and the game of cat and mouse continues." He deposed that the occurrence of a data breach is not proof of a lack of care and of not having taken appropriate preventative measures. Home Depot was building a very strong case that it had done nothing wrong and there was mounting evidence that no Class Member had in fact been injured.

36 Following the completion of the cross-examinations, the parties to the Saskatchewan action filed several interlocutory motions that needed to be resolved before the certification motion could proceed. These motions were scheduled for April 28, 2016 and the May certification motion was accordingly adjourned.

4. Settlement Negotiations and Settlement Agreements

37 Meanwhile in the United States, the class actions were moving toward a settlement. In September 2015, the U.S. parties conducted a two-day mediation with an experienced mediator, Jonathan B. Marks of MarksADR, LLC. The mediation failed; however, the U.S. parties continued to negotiate in the following months with the ongoing assistance of Mr. Marks.

38 Eventually, in the United States, on March 7, 2016, a formal Settlement Agreement was signed and filed with the U.S. Court, and on March 8, 2016, Judge Thrash issued a Preliminary Approval Order.

39 On March 25, 2016, in the wake of the U.S. settlement, Home Depot offered to negotiate a resolution of all outstanding consumer class actions in Canada arising out of the data breach. Using the U.S. settlement as a template, Home Depot sent offers to settle to both Merchant Law Group and to McPhadden Samac Tuovi LLP. Home Depot wished a national settlement, subject to court approval in Ontario, using the settlement terms in the U.S. Agreement as a framework.

40 Home Depot wished to settle both class actions, and it stipulated that it would only address the matter of legal fees after the terms of settlement for the Class Members had been negotiated to an agreement.

41 It would appear that it was at this juncture that Merchant Law Group and McPhadden Samac Tuovi LLP agreed to form a consortium to settle the various class proceedings in Canada.

42 On April 25, 2016, the parties attended a mediation in Toronto with Ron Slaght acting as mediator. The mediation was successful, and Mr. Lozanski in the Ontario action and Mr. Knuth in the Saskatchewan action signed a Settlement Agreement with Home Depot.

43 Class Counsel recommends the settlement be approved by the court. Mr. Lozanski and Mr. Knuth consent to the settlement and to Class Counsel's fee request, discussed below.

44 After the settlement was reached, the court in Saskatchewan was advised that the settlement approval motions would proceed in the Ontario action. Practically speaking, the Saskatchewan action has been stayed for a national class action in Ontario. As noted above, in June 2016, I certified the action for settlement purposes.

5. The Terms of the Settlement Agreement

45 The major terms of the settlement between Home Depot and Messrs. Lozanski and Knuth are as follows:

- Home Depot denies any wrongdoing.

- The Class Members will release their claims against Home Depot.

- Home Depot agrees to create a non-reversionary Settlement Fund of $250,000 for the documented claims of Canadians whose payment card information and/or email address was compromised as a result of the data breach during the data breach period (Settlement Class Members).

    - o If the claims approved by the Administrator exceed the Settlement Fund, then the payments are to be distributed to Settlement Class Members on a *pro rata* basis.

- A Settlement Class Member with documented losses, which may include time spent remedying issues relating to the data breach, may apply for reimbursement up to $5,000.

    - o The time remedying issues claim is: (a) for up to five hours at $15 per hour; or (b) for a Settlement Class Member with reasonable documentation of substantiated losses for out-of-pocket losses or unreimbursed charges who cannot separately document their time remedying those losses or charges may self-certify for up to two hours at $15 per hour.

- The Settlement Administrator will evaluate claims submitted to determine whether: (a) the claimant is a Settlement Class Member; (b) the claim form is complete, accurate, and timely; (c) the claimant provided all information needed to evaluate the claim form; (d) the Settlement Class Member signed any applicable attestation as required; and (e) for documented claims, the information and documentation submitted, if true, could lead a reasonable person to believe that, more likely than not, the claimant has suffered a substantiated loss.

• The Settlement Administrator, in its discretion to be reasonably exercised, will determine the amount of substantiated losses for documented claims and/or self-certified time claims, up to a maximum of $5,000 per Settlement Class Member.

• Home Depot agrees to pay for free credit monitoring for Settlement Class Members to a cap of $250,000.

o If the cost to provide credit monitoring exceeds the capped fund of $250,000, then the service will be provided to claimants in the order in which their approved claim forms were received by the Administrator, until the funding is exhausted.

o Depending on whether bulk purchase prices are available, the per capita cost for credit monitoring is between $50 and $100. This means that on a first come first served basis, there will be free credit monitoring for between 2,500 to 5,000 Settlement Class Members.

• To receive benefits, a Settlement Class Member must file a claim form with the Administrator or before October 29, 2016, unless this Court orders otherwise.

• Home Depot agrees to pay a $4,000 honorarium to each of Mr. Lozanski and Mr. Knuth from the Settlement Fund.

• Home Depot agrees to pay a $1,000 honorarium to each of Mr. Sandrasangra, Ms. Mendel, and Mr. Clarke from the Settlement Fund.

• Home Depot agrees to pay for the notice of the fairness hearing and for the notice of the settlement to a value of $100,000.

o It is now anticipated that the costs of giving notice will be approximately $50,000.

• Home Depot agrees to pay for the costs of administration to a value of $100,000.

o Depending on the extent of the take up of the settlement, the costs of administration are anticipated to range between $25,000 to the cap of $100,000.

• If there is a surplus in the $250,000 Settlement Fund, it is to be applied to reimburse Home Depot for the costs of the notices and for the costs of administration.

• Home Depot will pay Mr. Lozanski and Mr. Knuth for their legal fees, costs, and disbursements up to the cumulative amount of $360,000 plus HST to be determined by the Ontario court after the determination of the settlement approval motion.

o The cumulative claim for legal fees, disbursements, and HST is $406,800.

6. The Value of the Settlement to Class Members

46 Professor Archer outlined three heads of damage to consumers from a payment card breach: (1) the risk of a fraudulent charge on one's credit card; (2) the risk of identity theft; and (3) the inconvenience of checking one's credit card statements. The so-called non-reversionary Settlement Fund of $250,000 is designed to provide compensation for these heads of damages.

47 Of the three heads of damage, practically speaking, there is little risk of fraudulent charges because of sophisticated safeguards developed by credit card companies. Moreover, when there are frauds, the losses are almost always absorbed by the credit card company or the retailer. The credit card companies are not Class Members.

48 In the immediate case, there is no evidence that a Class Member absorbed a fraudulent charge. Neither Merchant Law Group nor McPhadden Samac Tuovi LLP have been contacted by a putative Class Member who said that he or she suffered a financial loss attributable to the data breach.

49 There is also little risk that the data breach, including the disclosure of email addresses, increased the risk of identity theft, because the stolen data would have been inadequate to allow a criminal to fake another's identity.

50 Mr. Hamel's evidence was that for identity theft, the most important information to have is a government-issued identification number such as a driver's licence number, social insurance number or passport number and preferably all three. In the immediate case, the data stolen from Home Depot did not include this information.

51 As for inconvenience damages, in the immediate case, there are none, because credit card holders are already obliged to check their statements for fraudulent purchases.

52 Thus, in the immediate case, it is highly unlikely that the $250,000 fund will be taken up for damage claims and thus the so called non-reversionary Settlement Fund of $250,000 will be available to pay for the notices and to the administrator for its costs of administration. Given that the costs of the notice and administration are capped at $200,000 and probably will be less than that, there may have to be a cy-près or the money should be returned to Home Depot. For present purposes, I would value this component of the settlement at $150,000 comprised of the notice costs of $50,000 and the maximum administrator's cost of $100,000.

53 Unfortunately, as demonstrated by *Lavier v. MyTravel Canada Holidays Inc.*, 2012 ONSC 1673 (Ont. S.C.J.), rev'd 2013 ONCA 92 (Ont. C.A.), discussed below, the take up of benefits of settlements is often disappointing, and in the immediate case, there is a short claim period, so it remains to be determined whether the $250,000 fund for identity theft insurance will be taken up. If it were fully taken up, then at most 5,000 of the 500,000 Class Members would secure a benefit. For present purposes, I, nevertheless, value this component of the settlement at $250,000.

54 Thus by my generous reckoning, the value of the settlement to Settlement Class Members is approximately $400,000.

7. The Settlement Approval Process

55 On June 6, 2016, I certified Mr. Lozanski's action as a class action for settlement purposes. I scheduled August 22, 2016 for the fairness hearing.

56 There were no opt-outs and no objectors to the proposed settlement.

57 Somewhat untypically, I received factums and argument from both sides at the settlement approval hearing supporting the settlement. More typical is a defendant tacitly supporting the settlement and leaving it to the plaintiff to justify the settlement.

8. The Claim for Class Counsel Fees

58 Merchant Law Group requests approval of a counsel fee of $238,669.41 ($223,669.41 + $15,000) plus HST of $31,027.02 ($29,077.02, + $1,950) for a total of *$269,696.43*.

59 McPhadden Samac Tuovi LLP requests approval of a counsel fee of $121,330.59 ($120,437.37 + $893.22) plus HST of $15,772.98 ($15,656.86 + $116.12) for a total of *$137,103.57.*

60 The total counsel fee is *$406,800*. It appears that this sum is being divided with two-thirds to Merchant Law Group and one-third to McPhadden Samac Tuovi LLP.

61 I was provided with very little information about the nature of the retainer agreement between Mr. Knuth and Merchant Law Group apart from the fact that it was a contingency fee agreement.

62 Mr. Lozanski signed a "Class Action — Representative Plaintiff Contingency Fee Retainer Agreement" with McPhadden Samac Tuovi LLP. This agreement was disclosed to the court. The agreement defined the scope of the retainer, and provided terms of payment of fees by way of a contingency fee. The terms of payment stated:

> 7. The Client hereby acknowledges and agrees that this is a contingency fee agreement and that the Lawyer will be paid by way of a percentage of the recovery, subject to the terms and conditions set out below. . . . .
>
> 8. In this matter, legal fees will only be paid to the Lawyer in the event that the services are successful in obtaining a Judgment, Award or Settlement acceptable to the Client. The fees shall be paid by a lump sum payment, or payments out of the proceeds of such Judgment, Award or Settlement, or otherwise as the Lawyer and Client may agree or the Court may direct. The legal fee shall be a percentage of the total value of any Judgment, Award or Settlement, over and above any Award of court costs, or claim for reasonable disbursements by the Lawyer. Any and all costs awarded are to be to the Lawyer. The Client agrees that the above percentage will be calculated either as a contingency fee of 35% of the amounts recovered under any Judgment(s), Awards(s), or Settlement(s), (including damages and interest) or on the basis of a multiplier of 3 times the "Base Fee", whichever is higher. The "Base Fee" means the result of multiplying (i) the total number of hours worked by (ii) the hourly rates of the lawyers working on the file.
>
> . . . .
>
> In addition to any legal fee, the Lawyer shall be entitled to recover from any Settlement or Judgment all reasonable disbursements incurred along with interest which has accrued on such disbursements, and taxes. The Client acknowledges that it is not possible at this time to calculate what the Lawyer's exact fee will be; however, the Client acknowledges the following examples:
>
> > (a) If the claim results in a recovery of $10,000.00 for damages and interest and, $500.00 for disbursements, and $1,500.00 for costs for a total of $12,000.00, and if the lawyer actually incurred disbursements of $500.00, then the Lawyer's fee will be $3,500.00 ($10,000.00 x 35%) and the Lawyer would additionally be entitled to recover the disbursements of $500.00 and the costs of $1,500.00, such that the Lawyer would be paid a total of $5,500.00 ($3,500.00 + $500.00 +$1,500.00 = $5,500.00). The Client would receive $6,500.00 of the $12,000.00; or

. . . ..

63 As of the first week of August, Merchant Law Group had $353,395 in docketed time and $16,181.02 in disbursements. I was not provided with details of the dockets and I was not provided with the docket entries.

64 McPhadden Samac Tuovi LLP had docketed time of just over $35,000. I was not provided with details of the dockets, and I was not provided with the docket entries.

65 Since I was not provided with the dockets of either Merchant Law Group or McPhadden Samac Tuovi LLP, I do not know how much of the dockets of Merchant Law Group were attributable to the firms moribund actions in British Columbia, Ontario, Québec, and Newfoundland.

66 Since the consortium was only recently formed for the purposes of negotiating a settlement, it would appear that no litigation efficiencies were achieved by the formation of the consortium, which was a consortium just for settlement purposes.

67 As already noted above, under the settlement agreement, Home Depot agreed subject to court approval, to pay the counsel fee up to $360,000.

68 In the settlement agreement, there was no prohibition on Home Depot disputing the quantum as part of the fee approval process. At the hearing, although I invited comment, Home Depot's counsel made no submissions about whether a $406,800 fee should be approved.

C. DISCUSSION AND ANALYSIS

1. Settlement Approval

69 Section 29 of the *Class Proceedings Act, 1992* requires that discontinuances and settlements of class actions require court approval. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> **29.** (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> *Notice: dismissal, discontinuance, abandonment or settlement*
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

70 To approve a settlement of a class proceeding the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class members: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 68-73.

71 A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (Ont. S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*.

72 In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)*, *supra* at para. 10.

73 When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) number of objectors and nature of objections, if any; (h) the presence of good faith, arm's length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*; *Parsons v. Canadian Red Cross Society*, *supra* at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8; *Kelman v. Goodyear Tire & Rubber Co.*, [2005] O.J. No. 175 (Ont. S.C.J.) at paras. 12-13; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 117; *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.) at para. 10.

74 In the immediate case, given that: (a) Home Depot apparently did nothing wrong; (b) it responded in a responsible, prompt, generous, and exemplary fashion to the criminal acts perpetrated on it by the computer hackers; (c) Home Depot needed no behaviour management; (d) the Class Members' likelihood of success against Home Depot both on liability and on proof of any consequent damages was in the range of negligible to remote; and (e) the risk and expense of failure in the litigation were correspondingly substantial and proximate, I would have approved a discontinuance of Mr. Lozanski's proposed class action with or without costs and without any benefits achieved by the putative Class Members.

75 Since in the immediate case, I would have approved a discontinuance that would have provided no benefits to Class Members, it is quite easy to conclude that the proposed settlement agreement, which does confer benefits (albeit for a small portion of the Class), should be approved as being fair, reasonable, and in the best interests of the Class Members.

76 This conclusion that the settlement should be approved is supported by: (a) the amount and nature of discovery, evidence or investigation of the claims against Home Depot; (b) the recommendation and experience of counsel; (c) the absence of any objections; and (d) the presence of good faith arm's length bargaining and the absence of collusion.

77 For these reasons, I approve the settlement.

2. Honoraria

78 Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Ont. Gen. Div.) at para. 28.

79 However, the court should only rarely approve this award of compensation to the representative plaintiff: *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (Ont. S.C.J.); *Tesluk v. Boots Pharmaceutical PLC*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 (Ont. S.C.J.) at para. 71.

80 Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class: *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 (Ont. S.C.J.) at paras. 55-71; *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626 (Ont. S.C.J.).

81 Compensation to the representative plaintiff should not be routine and should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial: *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 (Ont. S.C.J.) at paras. 26-44.

82 In the immediate case, there is no justification for awarding honoraria to Mr. Lozanski, Mr. Knuth, Mr. Sandrasangra, Ms. Mendel, and Mr. Clarke from the settlement fund.

3. Fee Approval

83 Under the *Class Proceedings Act, 1992*, the court is charged with the responsibility of approving contingency fee agreements and in approving the counsel fee in any settlement of the class action.

84 In the immediate case, the court's fee approval task is complicated because in a roundabout way, the Ontario court is being asked to scrutinize the Counsel Fee for a Saskatchewan class action. In the immediate case, McPhadden Samac Tuovi LLP's involvement was largely prompted by Home Depot's insistence that the Ontario action be ramped up for settlement purposes rather than reaching an outcome in the much further advanced action in Saskatchewan.

85 While I think that McPhadden Samac Tuovi LLP has earned a share of the fee, because it participated in the settlement consortium and because the Ontario action has been resolved, nevertheless, having regard to the little it did to advance Mr. Lozanski's action, the firm's involvement in the settlement may be viewed as somewhat opportunistic. I will, however, accept this complication to the fee approval by focusing on the role and activities of Merchant Law Group and essentially ignore the redundancies of a late arriving settlement consortium.

86 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.) at para. 13; *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334 (Ont. S.C.J.) at paras. 19-20, varied 2011 2011 ONCA 233 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.) at para. 25.

87 Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fee must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Sask. Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (Sask. C.A.).

88 Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. C.A.); *Parsons v. Canadian Red Cross Society*, *supra*; *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at paras. 59-61.

89 Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith Estate v. National Money Mart Co.*, *supra*, at para. 24; *Fischer v. IG Investment Management Ltd.*, *supra*, at para. 28.

90 The benefits of the settlement to class members and the benefit of class actions to class counsel are interrelated matters. In *Lavier v. MyTravel Canada Holidays Inc.*, *supra*, the Court of Appeal ruled that I erred in awarding class counsel a fee that was disproportionate to the benefit and access to justice obtained by the class, which had only taken up a very small portion of the settlement funds, the balance of which reverted to the defendant.

91 In the *Lavier* case, MyTravel funded a settlement fund of $2.25 million for a class of approximately 4,000 members. After the take-up of the settlement, class counsel was entitled to apply for approval of an additional fee, and after class counsel's additional fee, if any, was paid, the residue in the fund was to be refunded to MyTravel. The settlement was

administered, and $333,306.79 was paid to the 352 class members who submitted eligible claims. The take-up rate was 8.85% of the class and 16.7% of the settlement fund. Class counsel was paid an initial fee of $600,000 and sought payment of the additional fee bringing its compensation to approximately $1.0 million, which was more than twice the value of the time recorded by class counsel and three times the amount of claims actually paid to class members.

92 The Court of Appeal held that while it was reasonable to award the initial fee, it was not reasonable to award any additional fee in light of the poor take-up. Justice MacPherson stated that I had correctly identified the factors to be applied on the fee approval, see above; however, my analysis minimized the significance of the actual recovery to the class and led me to award a fee that was grossly disproportionate to the results achieved and the risks undertaken.

93 In the immediate case, as explained above, being very generous, I would value the settlement in the immediate case to Class Members to be $400,000, and having regard to the various discretionary factors, noted above, in my opinion a fee of $120,000, all inclusive of disbursements and HST, is an appropriate and indeed generous counsel fee. To award Class Counsel more than the value of the settlement would be to repeat the error I made in the *Lavier* case.

94 During the course of the oral argument, I suggested to Class Counsel that the optics of approving a counsel fee of $406,000 for a settlement with a value of between $75,000 (if there was a small take-up) to $400,000 (if there was a fulsome take-up) were very bad. Class Counsel's response was that in September 2014, it was reasonable and commendable for Class Counsel to start a class action given the likelihood that Home Depot had some culpability in not safeguarding its customers' privacy and confidential information from criminal intruders and given the need to remedy the damage caused by the data breach.

95 Further, Class Counsel submitted that they diligently pursued the case to a very favourable outcome for the Class and, therefore, Class Counsel should be compensated for taking on the enormous litigation risks associated with class actions, including the risk of a fee contingent on success and the risk of exposure to ruinous adverse costs awards.

96 Class Counsel submitted that the class actions against Home Depot were reasonably commenced and diligently prosecuted and it was only through their role as champion for the Class Members that the goals of the class action regime of access to justice, behaviour modification, and judicial economy could be and were achieved in this case.

97 In my opinion, while Class Counsel's response provides the justification for approving the $120,000, all inclusive, counsel fee, it is does not justify paying $406,000 to Class Counsel while Class Members will receive a maximum and largely nominal $400,000 payment.

98 The truth be told, although Home Depot agreed to pay the Counsel Fee subject to court approval and made no submissions at the hearing to reduce the up to $360,000 it agreed to pay, it had a good case that the fee was too high for the purposes of the *Class Proceedings Act, 1992*.

99 Fee approval, like most other operative elements of the *Act*, is meant to be viewed through the lens of access to justice, behaviour modification, and judicial economy, and in this case, Home Depot had a good argument that it ought not to have been subject to a class proceeding at all.

100 The case for Home Depot being culpable was speculative at the outset and ultimately the case was proven to be very weak. The real villains in the piece were the computer hackers, who stole the data. After the data breach was discovered, there was no cover up, and Home Depot responded as a good corporate citizen to remedy the data breach. There is no reason to think that it needed or was deserving of behaviour modification. Home Depot's voluntarily-offered package of benefits to its customers is superior to the package of benefits achieved in the class actions.

101 Perhaps, it was the attempt to avoid a class action that explains why Home Depot was so generous in offering benefits, but it was sued nevertheless. By the time the actions against Home Depot came to be settled, there were no demonstrated or demonstrable losses by the Class Members and the Representative Plaintiffs were not even members

of the settlement class. Unless one wishes to play pretend, Home Depot was the successful party in resisting a pleaded claim of $500 million.

102 I appreciate that Class Counsel take on a considerable risk when they accept a retainer for a class action, and I appreciate that in the immediate case, there is no premium and indeed there is deficit in a counsel fee of $360,000. But it is not the court's function to make class actions risk free just because Class Counsel demonstrates that bringing a class action was not frivolous, vexatious, nor a palpable strike suit but rather was a reasonable response to a harm suffered by a group. In *Smith Estate v. National Money Mart Co.*, *supra*, at paras. 124-126, I had the following to say about the risk factor:

> 124. I accept that Class Counsel took on a high risk when they took on this class action, and I accept that taking on risk should be rewarded.
>
> 125. Recognizing risk as a factor relevant to determining the fairness and reasonableness of Class Counsel's fee provides an incentive to Class Counsel to encourage them to be a vehicle for access to justice for the class and behavior modification for society. That said, risk is only one factor connected to other factors, and it is a difficult factor from which to extrapolate a monetary award, because all litigation has risk, and every case raises the question of whether litigating would be worth the risk. In addition to being idiosyncratic, the evaluation of risk is also problematic because risk changes as social and legal conditions change. For instance, without speaking about the case at bar, there are many areas of mass wrongs where the risk of a proposed class proceeding not being certified is arguably less than it used to be in the early days of the legislation.
>
> 126. The acceptance of risk is not the paramount factor in the assessment of a reasonable fee or multiplier. In this regard, it is interesting to note that the Legislature did not enact a provision in the draft legislation approved by the Attorney General's Advisory Committee on Class Action Reform that provided that in fixing a multiplier, the court should only have regard to the risk incurred and the manner in which the solicitor conducted the proceedings. The acceptance of risk and the solicitor's performance are not privileged factors in the determination of a reasonable fee probably because the risk factor does not differentiate between a bad settlement and good one.

103 In some cases, and in my opinion, the immediate case is an example, it may have been reasonable to commence the class action but there comes a point when the litigation should be abandoned, discontinued, or settled pursuant to s. 29 of the *Class Proceedings Act, 1992*, and when the action is discontinued, abandoned, or settled, class counsel should not anticipate that every reasonably commenced class action will be remunerative and a profitable endeavor.

104 It is informative that the *Act* speaks of abandonment, even of a certified class action. Abandonment, which is not a normal incident of regular litigation, is at least envisioned for class proceedings, and it appears that the notion of abandonment was introduced as another mechanism to ameliorate the risk of class actions.

105 What might be champertous legal fees in other circumstances is permitted in a class action, but the court is charged with the responsibility of ensuring that the fees are consistent with the values and purposes of the class action regime, which is designed primarily as a means to access to justice for real clients, even recruited ones. And while class counsel should be compensated for taking on the risk of their client's case, in approving class counsel's fees the court should not approve the fee simply because a class counsel was prepared to take on the risk. In approving counsel fees, recognizing that class counsel are in some sense a partner in their client's litigation, the court walks the high adjudicative tightrope of neither encouraging nor discouraging class actions.

106 In this role of not discouraging, the courts must balance the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved and consider all of the other factors that are relevant to determining a fee, but the ultimate goal of fee approval is to arrive at a fee that is fair and reasonable in the circumstances of the particular case and not to send messages to heat or chill access to justice.

107 In the immediate case, in my opinion, $120,000, all inclusive, is a fair and reasonable counsel fee.

D. CONCLUSION

108 For the above reasons, I approve the settlement and the associated or ancillary requests. (I signed the Order at the hearing of the settlement approval motion.) I do not approve any honoraria. I approve a counsel fee of $120,000, all inclusive of disbursements and HST.

Motion granted.

2009 NSSC 331
Nova Scotia Supreme Court

Martin v. Roman Catholic Diocese of Antigonish

2009 CarswellNS 609, 2009 NSSC 331, 182 A.C.W.S. (3d) 267, 284 N.S.R. (2d) 76, 901 A.P.R. 76

Ronald Martin (Plaintiff) v. Raymond Lahey in his capacity as Bishop of the Roman Catholic Diocese of Antigonish and The Roman Catholic & Episcopal Corporation of Antigonish commonly known as the Roman Catholic Diocese of Antigonish (Defendants)

A. David MacAdam J.

Heard: September 10, 2009
Judgment: November 6, 2009
Docket: Hfx 297827

Counsel: John McKiggan, Russell Raikes for Plaintiff
Bruce MacIntosh, Ward Branch for Defendants

Subject: Churches and Religious Institutions; Civil Practice and Procedure

Related Abridgment Classifications

Religious institutions
VII Practice and procedure

Headnote

Religious institutions --- Practice and procedure

Priests allegedly committed numerous sexual assaults over almost 60 year period — Plaintiff brought action against Bishop and Diocese — Parties negotiated settlement agreement that established expedited claims process — Settlement set up fund of $12 million secured by debentures against Diocese property — Agreement gave defendants right to elect not to proceed with settlement if members of class opted out of class proceeding — Agreement gave plaintiff right to elect not to proceed with settlement if more than 70 class members identified themselves — Plaintiff brought application for order conditionally certifying action as class proceeding and approving settlement agreement — Application granted — Certification as class proceeding was conditional upon both sides proceeding with settlement agreement — Plaintiff established existence of cause of action — Identifiable class also existed — Settlement established common issues — Class proceeding and settlement were preferable procedures for "fair and efficient resolution" — Proposed representative plaintiff would fairly represent interests of class — Settlement agreement constituted fair and reasonable settlement that was in best interests of class.

Table of Authorities

Cases considered by *A. David MacAdam J.*:

Bendall v. McGhan Medical Corp. (1993), 1993 CarswellOnt 394, 16 C.P.C. (3d) 156, 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Ont. Gen. Div.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — considered

Carom v. Bre-X Minerals Ltd. (2000), 2000 CarswellOnt 3838, 138 O.A.C. 55, 1 C.P.C. (5th) 62, 11 B.L.R. (3d) 1, 196 D.L.R. (4th) 344, 51 O.R. (3d) 236 (Ont. C.A.) — considered

CSL Equity Investments Ltd. v. Valois (2007), 2007 CarswellOnt 2521, 60 C.C.P.B. 8 (Ont. S.C.J.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — considered

Gariepy v. Shell Oil Co. (2002), 2002 CarswellOnt 3472, 21 C.L.R. (3d) 98, 26 C.P.C. (5th) 358 (Ont. S.C.J.) — considered

Grimmer v. Carleton Road Industries Assn. (2009), 74 C.C.E.L. (3d) 141, 2009 NSSC 169, 2009 CarswellNS 296 (N.S. S.C.) — considered

Harrington v. Dow Corning Corp. (2000), 2000 CarswellBC 2183, 2000 BCCA 605, 144 B.C.A.C. 51, 236 W.A.C. 51, 193 D.L.R. (4th) 67, [2000] 11 W.W.R. 201, 82 B.C.L.R. (3d) 1, 47 C.P.C. (4th) 191, 2 C.C.L.T. (3d) 157 (B.C. C.A.) — considered

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — considered

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — followed

Kumar v. Mutual Life Assurance Co. of Canada (2003), 2003 CarswellOnt 1209, [2003] I.L.R. I-4181, 226 D.L.R. (4th) 112, 31 C.P.C. (5th) 205, 47 C.C.L.I. (3d) 43, 170 O.A.C. 165 (Ont. C.A.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Rumley v. British Columbia (2001), 2001 CarswellBC 1223, 2001 CarswellBC 1224 (S.C.C.) — considered

Rumley v. British Columbia (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — considered

Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379, 1998 CarswellOnt 5216 (Ont. Gen. Div.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, S.N.S. 2007, c. 28

Generally — referred to

s. 2(e) "common issues" — considered

s. 4 — referred to

s. 5 — referred to

s. 6 — considered

s. 7 — considered

s. 7(1) — considered

s. 7(1)(a) — considered

s. 7(1)(b) — considered

s. 7(1)(d) — considered

s. 7(1)(e) — considered

s. 7(2) — considered

s. 7(3) — considered

s. 10(d) — considered

s. 11(4) — referred to

s. 38(1)(a) — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

APPLICATION for order conditionally certifying action as class proceeding and approving settlement agreement.

***A. David MacAdam J.*:**

Introduction

1 The Plaintiffs seek an Order, on consent, (1) conditionally certifying an action as a class proceeding pursuant to sections 6 and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, and (2) approving a Settlement Agreement negotiated by the parties.

Background

2 The action involves a claim for damages arising from sexual assaults by priests of the Diocese of Antigonish. Mr. Martin is the proposed Representative Plaintiff for the class, which is defined as "all individuals who were sexually assaulted by a priest of the Diocese of Antigonish between 1950 and September 10, 2009, including the Estates of all such persons now deceased." The present action was commenced on June 24, 2008, after several years of investigation, litigation and negotiation respecting individual claims on account of sexual assaults allegedly committed by Father Hugh Vincent MacDonald. The parties to the class action have reached a settlement, for which they seek the approval of this Court.

3 The Plaintiff alleges that the Defendants - the current Bishop and the Diocese - are directly and vicariously liable for sexual assaults committed by priests of the Diocese. The Amended Statement of Claim includes claims for systemic negligence, infliction of mental distress, breach of trust, fraud, breach of non-delegable duty and breach of fiduciary duty. The Plaintiff alleges that as a result of the sexual assaults, he and other Class Members suffered serious, lasting and permanent physical, mental, psychological and economic injuries.

The Settlement Agreement

4 The parties submit that the proposed settlement provides significant benefits to class members. An expedited, confidential claims process has been established, through which individual class members may claim compensation on account of sexual assaults. The settlement establishes a Damages Fund of $12 million, secured by a floating debenture covering the real property of the Diocese. The Defendants will pay up to $400,000.00 for future psychological counselling for successful claimants. Expenses of the claim process will be paid by the Defendants. The Defendants will pay into a Taxable Costs Fund for costs awarded to individual claimants. The claims process is subject to ongoing supervision of this Court. The Settlement provides a release to the Defendants with respect to all claims by class members except those who opt out.

5 The Settlement Agreement is subject to two conditions. First, if there are any opt-outs, the Defendants will have the right to elect, within 70 business days of the conditional certification order, not to proceed with the settlement. Second,

if more than 70 Class Members identify themselves to Class Counsel, whom Class Counsel believe are *bona fide* Class Members, then Class Counsel may elect, within 70 business days of the conditional certification order, not to proceed with the settlement. If either condition is met, the party for whose benefit it was included must elect whether to waive it. If the conditions are not met, or if either party waives the conditions, the settlement and certification are final and binding. If the parties do not waive the conditions, the settlement and conditional certification are voided as if they had never occurred and the parties will revert to the litigation that existed before the settlement.

6 The claims process under the Settlement Agreement requires claimants to complete claim forms for delivery to defence counsel within six months of the Order approving the settlement, with a possible six-month extension in exigent circumstances with leave of this Court. There will be exchange of relevant documents between the Defendants and the claimants, who may be examined by defence counsel under oath for up to two hours. There is provision for calling witnesses and for joint medical/psychological examination. The parties agree to retain a joint economic expert to quantify claimants' economic losses.

7 If a claim cannot be settled by agreement, a retired judge of this Court will determine whether the claimant was sexually assaulted and, if so, determine the claimant's entitlement to damages, including general damages, economic loss and psychological counselling. Any such hearing is subject to the parties' obligation to meet and attempt to settle. Validation hearings will be inquisitorial, with questioning only by the judge and no cross-examination of the claimant. The judge will issue a written decision, which is subject to appeal to this Court. The parties have agreed to select six "test cases" to advance through the claims process in order to establish a range of damages. The judge will conduct a legal fee review after any hearing where compensation is awarded.

8 The Settlement Agreement contemplates that compensation will be paid on an interim with final distribution on application to the Court. It is possible that individual awards could be reduced on a *pro rata* basis, depending on the number of claimants and the amounts awarded. The Settlement Agreement provides that non-Catholic victims will receive awards at 75 per cent of what would be awarded to Catholic members on the basis that there is no vicarious liability for assaults against non-Catholics.

9 Among the benefits that the settlement process is said to offer are the waiver of some defences - such as limitation periods and denial of vicarious liability - by the Defendants; the relaxation of the standard of proof where there is a criminal conviction or where a criminal charge did not proceed due to the death of the accused; the privacy, confidentiality and speed of the process; the less adversarial nature of the process (as compared, presumably, with a court proceeding); and the encouragement the process offers for the settlement of claims.

10 The ongoing administration of the Settlement Agreement is subject to review by this Court. The Agreement also requires reporting to the Court at fixed intervals.

11 The proposed Settlement Agreement incorporates a Litigation Plan, which proposes the certification of a number of common issues, followed by the determination of individual issues, such as damages, by individual hearings before the agreed-upon retired judge, as directed by the Court.

Class Certification

12 The proposed Representative Plaintiff, Mr. Martin, has stated in his affidavits that he is aware of his obligations as a Representative Plaintiff, that he is prepared to fulfill those obligations on behalf of the Class and that he is unaware of any conflict of interest which would prevent him from acting as the Representative Plaintiff.

13 Mr. Martin filed an application for certification of this action as a class action under the *Class Proceedings Act* in December 2008. The Settlement Agreement was concluded on August 4, 2009. Under the Settlement Agreement (whose essential terms are set out above), the parties agree that the Plaintiffs will apply to this Court, on consent, for certification of the action as a Class Proceeding and approval of the Settlement Agreement. Certification is conditional upon the non-exercise of the parties' respective elections not to proceed and waiver provisions.

Issues

14 This application raises two issues: (1) Whether the action should be certified as a class proceeding pursuant to ss. 6 and 7 of the *Class Proceedings Act*, and (2) whether the settlement is fair, reasonable and in the best interests of the Class as a whole.

Law

15 The goals of class proceedings legislation are judicial economy, access to justice and deterrence or behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, [2000] S.C.J. No. 63 (S.C.C.), at paras. 27-29.

16 The *Class Proceedings Act* permits plaintiffs (s. 4) and defendants (s. 5) to apply for certification of a class proceeding. Section 6 provides for certification as a condition of a settlement, and recognizes the concept of a "settlement class:

> Where as a condition of settlement between a plaintiff and a defendant certification of a proceeding as a class proceeding is being sought in order that the settlement will bind the class members, the class members constitute a settlement class.

17 There is authority that the requirements for certification "need not ... be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed": *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Ont. S.C.J.), at para. 27.

18 Subsection 7(1) of the Act sets out the test for certification of a class proceeding. It provides:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

19 If these five conditions are met, the Court must certify the class proceeding. In determining, pursuant to s. 7(1)(d), that a class proceeding is the preferable procedure, ss. 7(2) sets out several considerations:

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

(f) any other matter the court considers relevant.

20 Subsection 7(3) confirms that approval of a settlement precedes certification of a class proceeding in an application under section 6:

(3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement.

21 A certification order may be amended (s. 11(4)). Moreover, the proceeding may be decertified (or the Court may make "any other order it considers appropriate") if the Court is of the view that the conditions of section 7 are not satisfied after the certification order is made.

22 Certification is not a decision on the merits of the claim. It is a procedural matter: *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.), at 743 . Rather than the merits, the certification stage "focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68, [2001] S.C.J. No. 67 (S.C.C.), at para. 16. The evidentiary base required for certification was discussed in *Taub v. Manufacturers Life Insurance Co.*, 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Ont. Gen. Div.)), a decision under the Ontario *Class Proceedings Act*, at para. 4:

In my view, s. 5 of the CPA requires the representative plaintiff to provide a certain minimum evidential basis for a certification order. The CPA clearly does not contemplate a detailed assessment of the merits of the claim of the representative plaintiff or of the claims of the members of the proposed class. That is clear from s. 5(5). However, it is my view that in order to certify the proceedings, the judge must be satisfied of certain basic facts required by s. 5 of the CPA as the basis for a certification order. The matter comes before the court on motion. I fail to see why the moving party should be relieved of the normal burden of providing the court with a factual record sufficient to ground the relief sought. While the point raised here has not been the subject of judicial determination, other courts have spoken of the need for an evidential basis for the certification motion: see eg *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314, esp. at 318-19. At a minimum, the court must be satisfied that there is a class of more that one person and that the issues raised by the members of the class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. In most class proceedings, these factual matters may well be obvious and require little evidence. Most class proceeding arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself. Obvious examples are claims arising from mass disasters such as subway or air crashes or claims based on allegations

> of harm from wide-spread pollution. I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess of the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied.

23 There is, then a necessity for a minimal evidentiary base before a class proceeding is certified.

24 Co-counsel for the defendant, Ward Branch, has written a text titled *Class Actions in Canada* (Canada Law Book, looseleaf, updated July 2009). Although this book was not referenced by either party on the application, I note that Mr. Branch observed, at paras. 4.1530-1540:

> 4.1530 While it is not proper to determine the merits of the case on the certification application, this principle should not artificially limit the court's examination of the factors necessary for a reasoned determination of whether a plaintiff has met the burden. As the court stated in *Castano v. American TobaccoCo.* [84 F.3d 734 (5th Cir. 1996)]: Going beyond the pleadings is necessary, as a court must understand the claims, defences, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.
>
> 4.1540 Evidence that touches on the merits of the case need not be excluded from the supporting affidavits so long as it touches on relevant factors to certification. Indeed the court must have a good sense of all of the issues that will be raised in order to foresee the future conduct of the litigation. Without a complete presentation, the court will be unable to assess manageability or preferability. However, in *Andersen v. St. Jude*, [[2003] O.J. No. 4314] the court noted that excessive amounts of evidence could be the basis for an adverse cost order. Furthermore, the court held that it was inappropriate to ask the court at the certification stage to choose between conflicting expert opinions with respect to the correct resolution of those issues. Evidence of the existence of parallel class proceedings in other jurisdictions may be admitted, as it is some evidence that other persons have a similar problem.

The Factors under s. 7(1)

Cause of action

25 There is authority to the effect that the test for determining whether "the pleadings disclose or the notice of application discloses a cause of action" as required by s. 7(1)(a) is whether the pleading would survive a motion to strike for failure to disclose a cause of action: *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) at para. 36. The test, as described in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, 1990 CarswellBC 216 (S.C.C.), is "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" (para. 36).

26 Mr. Branch, after noting (at para. 4.60) that the test is "very similar to those provisions in the rules of court in Ontario and B.C. permitting the dismissal of a proceeding that does not disclose a cause of action," goes on to state, at paras. 4.60 and 4.70:

> ... A similar test is applied, the only difference being that the onus to show a cause of action falls upon the party bringing the class action, as opposed to the party challenging the proceeding.
>
> 4.70 The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in *Edwards v. Law Societyof Upper Canada* [[1995] O.J. No. 2900 (S.C.)]:
>
> > There is a very low threshold to prove the existence of a cause of action ... the court should err on the side of protecting people who have a right of access to the courts.

27 Mr. Branch goes on to observe, at paras. 4.80, 4.105 and 4.107:

> 4.80 QA Hint: Make the para nest here Courts in B.C. have also adopted a low threshold for this requirement. The Statement of Claim is read as generously as possible, and as it might reasonably be amended, to accommodate inadequacies due solely to drafting deficiencies.
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> . . . . .
>
> 4.105 In Saskatchewan, the Court of Appeal has rejected the "plain and obvious" test for determining the cause of action requirement. Instead, plaintiffs in that province must prove an "authentic or genuine cause of action". According to this standard, plaintiffs must satisfy the court that there exists a plausible basis in principle and presumed fact for supposing that the defendants could be held liable. In *Bartolome v. Mr. Payday Easy Loans Inc.*, [2007 BCSC 132] the British Columbia Supreme Court questioned whether this formulation of the test produces any practical differences in results. The court refused to adopt the Saskatchewan version of [the] test, noting that this supposed reformulation was, in essence, the "plain and obvious" test.
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> 4.107 In Manitoba, the courts also have adopted a low threshold for this requirement, but so far the Manitoba Court of Appeal has declined to decide whether the applicable test is that adopted in Saskatchewan or the "plain and obvious" test.

28 To similar effect, in *Grimmer v. Carleton Road Industries Assn.*, 2009 NSSC 169 (N.S. S.C.), the Nova Scotia Supreme Court applied the "plain and obvious" test in an application to strike pleadings (paras. 14-19).

29 Also noted by Mr. Branch is the decision of the Ontario Superior Court of Justice in *CSL Equity Investments Ltd. v. Valois*, 60 C.C.P.B. 8, 2007 CarswellOnt 2521 (Ont. S.C.J.), at para. 5, to the effect that where an application is made in the context of a settlement, and the certification is by consent, the five criteria for certification will be "less rigorously applied than in the context of litigation."

30 As was observed in *Bartolome*, *supra*, it is therefore unnecessary to decide whether the formulation of the test by the Saskatchewan Court of Appeal is effectively any different than the "plain and obvious" test.

31 The Plaintiff submits that the Amended Statement of Claim discloses causes of action in negligence, breach of fiduciary duty, breach of non-delegable duty, battery and intentional infliction of mental suffering. The only requirement is to establish that there is a cause of action. I am satisfied that in these circumstances the Plaintiff has satisfied the first of these criteria. I note that a finding that "a cause of action" exists does not have the effect of dismissing causes of action upon which no specific finding is made. The statute only requires that a single cause of action be made out on the pleadings.

Identifiable class

32 Paragraph 7(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by a representative party." In *Bywater v. Toronto Transit Commission*, 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. Gen. Div.)), the Court said, at para. 10:

> The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

33 In *Dutton*, the Supreme Court of Canada said, at para. 38:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation.

> The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria....

34 In *Hollick*, the Supreme Court of Canada provided additional comments on the concept of an "identifiable class," at para. 17:

> ... The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b) [of the Ontario *Class Proceedings Act*]....

35 Certification cannot be denied by reason only that "the number of class members or the identity of each class member is not ascertained or may not be ascertainable": *Class Proceedings Act*, s. 10(d). In this case, the Applicant submits that the evidence discloses that there are a substantial number of individuals who were victims of sexual assault by priests of the Diocese; for example, there are criminal convictions against three priests. Further, the Applicant submits that the class definition will permit a person to identify whether they fit into the class. The Plaintiff has, therefore, also satisfied the second criteria.

Common issues

36 The Act defines "common issues" at s. 2(e), as follows:

> (e) "common issues" means
>
> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts....

37 In *Carom v. Bre-X Minerals Ltd.*, 196 D.L.R. (4th) 344, 2000 CarswellOnt 3838 (Ont. C.A.), the Ontario Court of Appeal made the following comments about an identical definition in the Ontario legislation, at paras. 40-41:

> The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives of the CPA, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.
>
> Second, the courts have also been wary of setting the bar too high on the common issues factor. In many cases, the Ontario courts have stated explicitly that certification should be ordered if the resolution of the common issues would advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of particular legal claims in the action, is not required. In *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C. C.A.), Cumming J.A. said, at p. 18:
>
> > When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

38 Thus, the common issues need not determine liability, but only "move the litigation forward." The Applicant submits that the settlement "effectively resolves many of the common issues which the Plaintiffs sought to certify...." These include the existence of a duty of care, a fiduciary duty and a non-delegable duty, and whether the Defendants are directly or vicariously liable for sexual assaults by priests in the Diocese.

39 The Settlement Agreement requires individual claimants to testify about the assaults that are said to constitute breaches of the alleged duties, leading to the damages they are alleging. As such, the Applicant says, the Settlement disposes of common issues, and thus eliminates the need for litigation that would arise if the action were certified and proceeded on a contested basis.

40 In *Class Actions in Canada*, Mr. Branch states, at para. 4.670:

> 4.670 A single common issue is sufficient to satisfy this requirement. The common issues need not advance each of the causes of action raised in the pleading, so long as they relate to one of the causes of action.... It is not necessary that everyone in the class shares the *same* interest in the resolution of an asserted common issue, only that each member has *an* interest in the resolution of the common issue.
>
> [Emphasis in original.]

41 Clearly, in view of the settlement of a number of issues, the Plaintiff has established this criterion.

Preferable procedure for a fair and efficient resolution

42 Paragraph 7(1)(d) requires the court to be satisfied that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute." According to the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69 (S.C.C.), [2001] S.C.J. No. 39 (S.C.C.), at para. 35:

> The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (*Hollick*, at para. 28).

43 The *Class Proceedings Act* provides, at s. 7(2):

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

44 The Applicant submits that approval of the Settlement Agreement and the certification of the class would provide the preferable procedure, for several reasons:

(a) The settlement resolves or eliminates issues which might otherwise have to proceed to trial on a contested basis;

(b) It significantly advances the timetable for the determination of individual issues;

(c) It eliminates the risk of a contested certification hearing;

(d) It provides members of the Class with a confidential process in which very personal and painful claims may be asserted;

(e) It provides a more expeditious and less adversarial method for the validation of claims and quantification of damages;

(f) If the action were not certified and individuals were required to pursue individual actions, such actions would be more expensive, more adversarial, and more time consuming;

(g) This confidential process is more likely to encourage victims of these sexual assaults to come forward for compensation;

(h) The majority of class members who have retained counsel to date have engaged class counsel and support a class proceeding;

(i) The issues which are resolved by this settlement are material and do advance this litigation;

(j) The claims process in the Settlement Agreement is a reasonable one and is subject to ongoing supervision.

45 The Applicant further submits that the certification of the class proceeding would meet the objectives of judicial economy and access to justice, for the following reasons:

(a) The settlement avoids a contested certification motion and resulting appeals;

(b) The settlement avoids a common issues trial which would only take place after extensive examinations for discovery and production of documents. That trial would likely last 6-10 weeks;

(c) The Defendants bear the expense of the claims process which relieves the Court of the burden of determining individual issues following the common issues trial;

(d) If the action is not certified, the Court faces the prospect of dozens of individual actions

(e) The Diocese does not have unlimited resources. By proceeding in this manner, it avoids a race between class members to obtain judgment in advance of the Diocese declaring bankruptcy;

(f) The settlement process dispenses with some defences that would be advanced by the Diocese in a common issues trial or individual actions;

(g) The claims process is designed to be less time consuming and less costly;

(h) The claims process has confidentiality safeguards that more likely to safeguard the privacy of the individual claimants than the regular court system; for example, the hearings are private and are not conducted in a public forum such as a court house;

(i) These safeguards for confidentiality make it more likely that those who were sexually assaulted will come forward;

(j) But for a class proceeding, many victims would not be psychologically or financially able to bear the rigours of ordinary litigation.

46 The Applicant also submits that the fact of the settlement and the resulting publicity will hopefully serve as a deterrent to other organizations and entities, so as to prevent such abuses from occurring in the future.

47 Citing *Harrington v. Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 (B.C. C.A.), at para. 23, Mr. Branch observes, at para. 4.670, that "if the impact of the resolution of the single common issue is limited, the court may find that the class action is not the preferable procedure to resolve the dispute (which is the next element of the test)."

48 In this case, the settlement resolves the common issues, and for the reasons outlined by the plaintiffs' counsel, the "preferable procedure for a fair and efficient resolution."

Representative party

49 The court is next required to be satisfied, pursuant to s. 7(1)(e) that there is a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

50 The Supreme Court of Canada said in *Dutton*, at para. 41:

[T]he class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class....

51 The proposed Representative Plaintiff, Mr. Martin, submits that he was sexually abused as a child by Father Hugh Vincent MacDonald, as was his brother, who subsequently committed suicide. He says he has "steadfastly advanced his desire to see justice for those who were victimized by priests of the Diocese of Antigonish. He has retained experienced and capable counsel to act on his behalf and that of the class. He has familiarized himself with his obligations as the Representative Plaintiff and has kept himself fully informed and involved through the negotiations which led to the settlement in fulfillment of his role as Representative Plaintiff." As such, Mr. Martin submits he will "fairly and adequately represent the interests of the class."

52 The proposed Representative Plaintiff is the Plaintiff in this proceeding and has been involved throughout the proceedings to date. Detailed plans for advancing the class proceeding have been produced on this application, including provisions for notifying class members of the existence of this proceeding, and for the holding of hearings in respect to claims that are contested, either as to liability or quantum, for the securing of the assets of the defendant pending determination of entitlement and providing for opting out by any class member wishing to do so.

53 The settlement stipulates limits on the total financial responsibility of the defendant and on the quantum of damages that any class member may be awarded. As such, by not opting out, each class member agrees to these limitations.

54 The Representative Plaintiff - including any plaintiff who was a class member - would have an interest in ensuring that the total claims do not exceed the agreed settlement, so as to avoid any pro-rating of his determined recovery. This "potential conflict" would arise in the case of any of the class members, and, in view of the obvious desirability of having a class member or members as the Representative Plaintiff or Plaintiffs, is not the type of conflict intended by the Legislature to disentitle Mr. Martin from acting as the Representative Plaintiff.

55 As to the other requirements of s. 7(1)(e), Mr. Martin says the Settlement Agreement accomplishes that which was intended to be achieved by way of certification and a common issues trial. A notice plan has been prepared and submitted to the Court, providing for reasonable steps to bring the fact of the Settlement Agreement to the attention of any members of the class. In the circumstances Mr. Martin is a Representative Plaintiff who satisfies the criteria of ss. 7(1)(e) of the Act.

Conclusion on the certification application

56 The proposed Representative Plaintiff submits that the requirements for certification have been met and that the action should be conditionally certified as a class proceeding pursuant to ss. 6-7 of the *Class Proceedings Act*, in accordance with the Settlement Agreement. The conditions under s. 7(1) of the Act having been met, subject to the right of the Defendants and class counsel not to proceed with the settlement and certification, the application for certification is granted.

Approval of the Settlement Agreement

57 Pursuant to s. 38(1)(a) of the *Class Proceedings Act*, a class proceeding "may be settled or discontinued only with the approval of the court." P.A. Cumming J. summarized several principles relevant to settlement approval in *Ford v. F. Hoffmann-La Roche Ltd.*, 74 O.R. (3d) 758, [2005] O.J. No. 1118 (Ont. S.C.J.), at paras. 113-118 (some citations omitted):

> There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval....
>
> To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes....
>
> In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":
>
> > ... all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. [*Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992), at 11-104.]
>
> A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal. *Sparling v.Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.).

In determining whether to approve a settlement, a court takes into account factors such as:

> (a) the likelihood of recovery or likelihood of success;
>
> (b) the amount and nature of discovery, evidence or investigation;
>
> (c) the proposed settlement terms and conditions;
>
> (d) the recommendation and experience of counsel;
>
> (e) the future expense and likely duration of litigation;
>
> (f) the recommendation of neutral parties, if any;
>
> (g) the number of objectors and nature of objections;
>
> (h) the presence of arms-length bargaining and the absence of collusion;
>
> (i) the information conveying to the court the dynamics of, and the positions taken by
>
> (j) the parties during the negotiations; and
>
> (k) the degree and nature of communications by counsel and the representative
>
> (l) plaintiff with class members during the litigation.
>
> *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598at para.13 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.).

These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. *Parsons*, *supra*, at para. 73.

58 The Plaintiff has made comments on several of the factors referred to in *Vitapharm*, *Dabbs v. Sun Life Assurance Co. of Canada* [1998 CarswellOnt 2758 (Ont. Gen. Div.)] and *Parsons v. Canadian Red Cross Society* [1999 CarswellOnt 2932 (Ont. S.C.J.)].

Liklihood of recovery or success

59 The Plaintiff submits that the Settlement Agreement will eliminate the risk that would be associated with a common issues trial and a contested certification hearing, due to the Defendants' waiver of certain defences, the moderation of the adversarial process, the creation of safeguards for confidentiality and reducing the degree of proof required in some cases. The Plaintiff says the process will be expedited by these measures, and adds that consistency and transparency in the process will be observed by using common experts and a retired judge, as well as by maintaining ongoing obligations to report to class counsel and the Court. The result of the Settlement Agreement not being approved would be a contested certification hearing and, if that is successful, a common issues trial, carrying "substantial risks for both sides," the Plaintiff submits.

Recommendation and experience of counsel

60 The Applicant submits that the Plaintiffs are represented by counsel who have some 45 years litigation experience, including in class actions as well as sexual abuse claims, such as the Residential School Settlement. The Applicant says the evidence before the Court discloses six months of negotiations, including nine days of negotiations in person in the first half of 2009. A judicial settlement conference was conducted on June 30, 2009. The Settlement Agreement was finalized on August 4, 2009. In the Applicant's submission, "[c]ounsel have expended considerable time and effort in the negotiation of this settlement, which negotiations were at arms-length. This settlement is the result of hard bargaining on both sides."

Litigation risks and expenses

61 The Applicant submits that, as Representative Plaintiff, he has placed himself at risk of a substantial adverse costs award, both with respect to certification and as a result of a contested trial of the common issues. He adds that the Defendants' resources "are such that protracted litigation could very well bankrupt the diocese."

Negotiations and participation of the Representative Plaintiff

62 The Representative Plaintiff has been directly involved in the negotiations leading to the Settlement Agreement, including attendance at the judicial settlement conference, and was in regular consultation with class counsel. He and counsel were in communication with members of the class before the action was commenced, and informed the class members of the action and of the progress of the negotiations. He says the indications are that class members support the Settlement Agreement, and indicates that new claimants have come forward as a result of the Phase 1 notice program.

Conclusion

63 As previously noted, I am satisfied on the basis of the submissions and evidence that the action meets the criteria for certification pursuant to ss. 6 and 7 of the *Class Proceedings Act*. I am satisfied that the Settlement Agreement constitutes a fair and reasonable settlement that is in the best interests of the Class as a whole and that it provides significant benefits to class members and meets the "range of reasonableness" test. As such, the action is conditionally certified as a class proceeding and the Settlement Agreement is approved. Also approved is the Phase 2 notice and notice plan for notification of potential class members of the certification and settlement, including their right to opt out.

Application granted.

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2005 CarswellOnt 2503
Ontario Superior Court of Justice

Nunes v. Air Transat A.T. Inc.

2005 CarswellOnt 2503, [2005] O.J. No. 2527, 140 A.C.W.S. (3d) 25, 20 C.P.C. (6th) 93

Josephine Nunes and Jorge Nunes (Plaintiffs) and Air Transat A.T. Inc., Airbus S.A.S., Airbus of North America Inc., Rolls-Royce PLC and Rolls-Royce Canada Limited and Airbus GIE (Defendants)

Cullity J.

Heard: May 30, 2005
Judgment: June 20, 2005
Docket: 01-CV-217295 CP

Counsel: J.J. Camp Q.C., Glenn Grenier, Allan Dick for Plaintiffs
B. Timothy Trembley for Defendant, Air Transat A.T. Inc.
D. Bruce Garrow for Defendants, Rolls -Royce PLC, Rolls -Royce Canada Limited
John Callaghan for Defendants, Airbus of North America Inc., Airbus GIE

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.e Miscellaneous
Headnote
Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
In 2001, airplane operated, assembled or developed by defendants ran out of fuel and was forced to make emergency landing, allegedly resulting in personal injury to certain named and class plaintiffs — Plaintiffs brought action for damages for personal injury, and action was certified as class proceeding — Parties reached settlement agreement and named plaintiffs brought motion for approval of settlement agreement — Motion granted — Settlements of class proceedings should be approved where settlement is fair and reasonable to class — Strong presumption of fairness exists where, as in present case, agreement is crafted by counsel for all parties — Where settlement as proposed, in its totality, falls within reasonable range of outcomes for class, then settlement negotiated by counsel should be approved — While it appeared that caps on loss of income may have been less than that possibly achievable at trial, it could not be said that

caps were grossly unfair or outside of acceptable range — Having regard inter alia to risks of lengthy litigation, settlement as proposed was within range of reasonable outcomes for parties and settlement agreement was properly approved.
Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
In 2001, airplane operated, assembled or developed by defendants ran out of fuel and was forced to make emergency landing, allegedly resulting in personal injury to certain named and class plaintiffs — Plaintiffs brought action for damages for personal injury, and action was certified as class proceeding — Parties reached settlement agreement and named plaintiffs brought motion for approval of settlement agreement — One C, member of class, objected inter alia to element of agreement which entitled class counsel to payment of all costs off top of settlement — Matter of costs was properly adjourned for comprehensive hearing — Motion was otherwise granted and settlement agreement approved.
Table of Authorities
Cases considered by *Cullity J.*:
Dabbs v. Sun Life Assurance Co. of Canada (1998), [1998] I.L.R. I-3575, 1998 CarswellOnt 2758, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — followed
Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 3539, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — referred to
Ford v. F. Hoffmann-La Roche Ltd. (2005), 2005 CarswellOnt 1095 (Ont. S.C.J.) — followed
Fraser v. Falconbridge Ltd. (2002), 2002 CarswellOnt 2357, 33 C.C.P.B. 60, 24 C.P.C. (5th) 396 (Ont. S.C.J.) — followed
Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — followed
Statutes considered:
Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 29(2) — pursuant to
Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to
Negligence Act, R.S.O. 1990, c. N.1
s. 1 — referred to
Treaties considered:
Warsaw Convention on International Carriage by Air, 1929, C.T.S. 1941/15; 137 L.N.T.S. 11
Article 17 — considered

MOTION by plaintiffs for approval of proposed settlement of class proceeding and of fees and disbursements of class counsel.

***Cullity J.*:**

1 The plaintiffs moved for the court's approval of a settlement of this action pursuant to section 29 (2) of the *Class Proceedings Act 1992* S.O. 1992, c.6 ("CPA"). There was also a motion for approval of the fees and disbursements of class counsel.

2 The proceedings involve claims against the defendants for damages suffered by passengers on Air Transat Flight 236 (" Flight 236") when, in August 2001, the aircraft, an Airbus A330, ran out of fuel, lost power in each of its engines and made an emergency landing in the Azores Islands. The defendant, Air Transat A.T. Inc., ("Air Transat") was the operator of the aircraft. Airbus S.A.S. and Airbus North America Inc., (together "Airbus") and Rolls-Royce plc and Rolls-Royce Canada Limited (together "Rolls-Royce") were sued as responsible for the manufacture of the aircraft, and that of its engines, respectively. Claims were also made on behalf of family members of the passengers.

The Settlement

3 The proceedings were certified by order of this court on July 4, 2003. The time for opting out has expired and it has now been determined that, of the 291 passengers on board Flight 236, 115 have either opted out or entered into individual settlements with Air Transat — leaving 176 class members who would share in the benefits to be provided under the terms of the proposed settlement. These benefits can be summarised as follows:

> 1. A fund of $7,650,000, plus accrued interest, is to be paid to an administrator in exchange for a release of all claims of class members arising from the events of Flight 236.
>
> 2. The administrator is to invest the fund in income-earning accounts and, after payment of class counsel fees and disbursements and expenses of administration, the fund is to be distributed among class members subject to monetary limits for particular kinds of damages and, otherwise, in accordance with a claims procedure contained in the settlement agreement.
>
> 3. The monetary limits on different heads of damages claimed by any member are:
>
> > (a) damages for non-pecuniary loss arising from post-traumatic stress disorder or similar psychological injury would not exceed $80,000 unless accompanied by evidence of other significant permanent personal injury — in which case the maximum amount of non-pecuniary damages would not exceed $100,000;
> >
> > (b) damages for past and future loss of income would not exceed $50,000;
> >
> > (c) damages for out-of-pocket expenses would not exceed $5000; and
> >
> > (d) damages in respect of future-care expenses would not exceed $5000.
>
> 4. Family member claimants would be limited to their rights of recovery under the *Family Law Act* (Ontario) and the claims asserted by all such members that are derivative of the claims of a particular passenger would not exceed $5000.

4 The settlement provides for class members to make claims, initially, to class counsel who are to provide the claimants with what counsel consider to be a fair and reasonable assessment of the value. Members then would have the option of accepting the assessment or of requesting a review by an arbitrator to be appointed by the court. In the latter event, the arbitrator would determine the value of the claim. Distributions would be made accordingly.

5 The claims process and the powers and procedures to be followed by class counsel, the administrator, a management committee of counsel — that is to work with the administrator and to make the initial assessment of claims for loss of income — and the arbitrator are set out in some detail in the settlement agreement and in a schedule to it. Caps would be placed on the fees payable to the administrator and to members of the management committee, and on an hourly rate to be charged by the arbitrator. Class counsel would not charge fees for their services in assessing the value of claims in addition to the lump-sum amount that the court is asked to approve in connection with their services to date, and the capped amounts that may be charged by members of the management committee.

The Law

6 The role of the court, and the standards to be applied, in determining whether a settlement should be approved has been discussed in several decisions of this court including *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at page 444, affirmed (1998), 41 O.R. (3d) 97 (Ont. C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.), at paras 77 - 80; *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (Ont. S.C.J.), at paras 13 - 14; and *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (Ont. S.C.J.), at paras 110 - 118.

7 In *Ford*, Cumming J. distilled the following principles from the earlier authorities:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.

(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;

(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;

(h) in determining whether to approve a settlement, the court takes into account factors such as:

(i) the likelihood of recovery or likelihood of success;

(ii) the amount and nature of discovery, evidence or investigation;

(iii) the proposed settlement terms and conditions;

(iv) the recommendations and experience of counsel;

(v) the future expense and likely duration of litigation;

(vi) the recommendation of neutral parties, if any;

(vii) the number of objectors and nature of objections;

(viii) the presence of arm's-length bargaining and the absence of collusion;

(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

8 I believe the following statements of Winkler J. in *Parsons* and in *Fraser* are particularly apposite to the settlement under consideration in this case:

It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready

> recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. (*Parsons*, at paragraph 79)
>
> Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay. The court must approve or reject the settlement in its entirety. It cannot substitute or alter it.... The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally." (*Fraser*, at para 13)

9 I note, however, that, unlike the position in the above cases, other than *Fraser*, class members who do not approve of the settlement have no right to opt out of the proceedings as the time in which this could be done has expired and, unlike what I think I was the position in *Parsons*, such a right is not conferred, or contemplated, by the settlement agreement. As notice of the terms of the settlement and of the approval hearing, and the right to object, that I considered to be reasonable and adequate was given to class members, and only two of them have informed the court that they have objections to the settlement, the potential significance of the inability to opt out at this stage might be considered to be limited to these objectors.

Discussion

10 Subject to the specific points made by, or on behalf of, the two objectors, I am satisfied that the factors set out above militate heavily in favour of the settlement. The proceedings were contentiously adversarial from the outset and the litigation risks for the plaintiffs were significant. Article 17 of the Warsaw Convention limits the liability of Air Transat to damages for bodily injury. Class counsel conducted a meticulous investigation and review of the likely claims of class members and concluded that virtually all of them will claim to have suffered post-traumatic stress disorder or other forms of mental or emotional harm. Although I found that, for the purposes of certification, the question whether such harm is to be considered to be bodily injury should be included in the common issues to be tried, counsel's research into the interpretation of Article 17 in this jurisdiction, and internationally, convinced them that there was a highly significant risk that the plaintiffs would not be successful on this issue at trial. After a lengthy examination of the evidence relating to the causes of the events on Flight 236, they concluded also that the case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects for establishing liability against it but made it inevitable that the litigation would be protracted and expensive. I see no reason to question the competence, diligence or judgment of class counsel on the assessment of litigation risks or, indeed, in the manner in which the proceedings were conducted and the settlement negotiated at arm's-length between the parties.

11 When negotiating the terms of the settlement, class counsel had obtained completed questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist in Vancouver and a physician in Portugal. This information, and medical reports that were provided by class members, were independently reviewed by each of the firms acting as co-counsel for the purpose of arriving at an estimate of the total value of the claims of class members. All the information was then provided to counsel for Air Transat to enable them to make their own assessment and, after the negotiations that ensued, the settlement amount of $7,650,000 was arrived at. In class counsel's submission, this amount, less counsels' fees, expenses and administration costs should be considered to be fair and reasonable — as well as substantial — compensation for the claims of class members. In their estimate — made on the basis of their assessment of the claims of class members that have already been completed — it should provide each class member with a recovery of at least 70 per cent of the amount likely to be assessed as the value of such member's claim. This is, of course, only an estimate and, to some extent, it is based on assumptions — about, for example, the amounts that will be claimed for loss of income and the number of claims that will be referred to the arbitrator — that might, or might not, turn out to be unduly optimistic.

12 I am satisfied that the caps proposed to be placed on the recovery of particular heads of damages have been carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. It appears likely that the claims for mental and emotional harm will be made by virtually all of the class members and will be far more common than claims for significant physical injuries or loss of income. The cap of $80,000 for psychological harm ($100,000 if

accompanied by significant permanent other injury) was chosen after a review of recent awards in this jurisdiction and elsewhere for post-traumatic stress disorder and similar illnesses.

13 I should note at this point that, although the terms of the proposed settlement might be construed as limiting claims for physical injuries to those that are accompanied by claims for psychological harm, I understand the intention to be that claims for physical injuries alone — if there are any — are to be compensated subject to a cap of $100,000.

14 The most problematic of the monetary limits placed on the recovery of particular types of damages is that relating to loss of income. In conducting their preliminary assessment of the value of the claims of class members, class counsel had less information about the potential loss of income than they had relating to the other heads of damages. However, to the extent that they were able to judge, there would be few claims for loss of income relative to those for psychological harm and only one passenger had provided documentation in support of an income loss in excess of the cap of $50,000. That member, I presume was Mr Manuel Ribeiro, one of the two members of the class who objected to the settlement. At the hearing, counsel indicated that their attention had been drawn to one other such potential claim that, on the basis of the information available to them, they considered to be of doubtful weight.

15 Through his counsel, Mr Ribeiro successfully requested an adjournment of the original hearing date appointed for the motion for approval. At the continuation of the hearing, he was represented by Mr Brian Brock Q.C. who, while disclaiming an intention to object to the settlement agreement in principle, requested that class counsel should be required to revisit it to address a number of issues that he raised in his written and oral submissions. In general terms, these issues relate to (a) whether class counsel gave sufficient significance to the fact that neither Airbus nor Rolls-Royce could claim the protection of Article 17 of the Warsaw Convention and the possibility that, as joint tortfeasors with Air Transat, damages that could not be recovered from it might be recoverable in full from either of them under section 1 of the *Negligence Act* R.S.O. 1990, c. 1 (as amended) even if only a very small degree of relative fault was apportioned to them; (b) whether the caps placed on non-pecuniary and pecuniary damages are fair and reasonable; and (c) whether the amount of legal fees requested by class counsel, and the manner in which they would be borne by class members, are fair and reasonable.

16 In an affidavit sworn for the purpose of the motion by Mr Joe Fiorante — a partner of one of the firms acting as class counsel — he indicated that the arguments mentioned by Mr Brock in connection with the first of the above issues had been considered by them and advanced in the negotiations for the settlement. I see no reason to reject this evidence or to conclude that the considerations to which Mr Brock referred are sufficient to remove the terms of the settlement from the "zone of reasonableness".

17 Mr Brock's submission that the caps were unfair was made in the context of his opinion that the value of Mr Ribeiro's claims for non-pecuniary damages for post-traumatic stress disorder and loss of income will exceed the limits of $80,000 and $50,000 that would be imposed under the settlement.

18 Class counsel's response to the submission with respect to non-pecuniary damages was that already mentioned — namely, that, from their review of damages awarded in recent cases, other than those involving sexual assaults, the $80,000 cap was at the high end of the range and, notwithstanding the evidence that, since the events of Flight 236, Mr Ribeiro has suffered, and will continue to suffer, psychological difficulties that will require psychiatric support and, probably, adjunct medication, they are not convinced that his claim would fall outside the likely range of damages. Based on their review of damages awards, I do not believe this conclusion is unreasonable although, as an experienced counsel in personal injury cases, Mr Brock's opinion that a higher award could be obtained merits respect. The fairness and reasonableness of the settlement — including the cap of $80,000 for non-pecuniary damages — must, however, be judged in relation to the class as a whole and is not to be determined in respect of the claims of each member considered separately. The comments of Winkler J. that I have quoted from *Parsons* and *Fraser* are in point. On the basis of the record before me, I believe I am justified in deferring to the opinion of class counsel that the cap of $80,000 on non-pecuniary damages would not operate unfairly in respect of Mr Ribeiro, let alone in respect of the class as a whole.

19 Mr Brock's criticism of the existence of the cap on the recovery for different heads of damages was not based exclusively on his opinion that his client's non-pecuniary damages would exceed $80,000. He made a similar objection with respect to the application of a $50,000 limit to Mr Ribeiro's claim for loss of income. In his submission, such a limit would operate with obvious unfairness to Mr Ribeiro in that his potential claim — calculated on the basis of a reduction in his income of $54,000 a year — would be approximately $670,000. Mr Brock informed me that his client was prepared to testify that, since Flight 236, he has lost his motivation to conduct his landscaping business of 25 years, the number of his employees and his customers has diminished and the business is now confined to grass cutting. In support of his estimate of Mr Ribeiro's loss of income, Mr Brock provided unaudited income statements of the corporation that operates the business for 1998, 2000, 2002 and 2004. These show that, between April 2001 and April 2004, the gross income of the corporation declined by approximately $48,600. During that period, operating expenses fell by approximately $49,156. Of this amount, approximately $32,000 represented a reduction in wages paid to employees. Two employees were laid off in the period after Flight 236. No personal income tax returns, or other information, were provided that would indicate the wages, or other amounts, received by Mr Ribeiro from the business in those years.

20 The income statements hardly support Mr Brock's estimate that his client had suffered an income loss of approximately $54,000 a year and, on the basis of the limited information provided, class counsel concluded that they were unable to determine whether Mr Ribeiro's total past and future income loss would exceed $50,000. I am in no better position. At the most, I can infer that Mr Ribeiro claims to have suffered a loss of income that will exceed the cap by a significant amount. The question is whether the existence of this claim is, in itself, sufficient to justify a decision to withhold approval of the settlement. In Mr Brock's submission it is, because it illustrates not merely that the cap is too low but, as well, the unfairness of placing any caps on heads of damages. As he stated in his brief or memorandum filed in the motion:

> If an individual plaintiff's claim falls within the cap it would appear that such person would make a full recovery. Those whose claims exceed the cap would recover only a proportionate share. No explanation is provided as to why those with serious claims should have their claims compromised in this way at the expense of those whose claims are not as serious.
>
> At a minimum one would expect that the recovery for each plaintiff would be on a pro-rata basis so that the percentage of recovery or loss of recovery would be equal.

21 Although I cannot amend the settlement, I do not think there is any doubt that I would have authority to refer this aspect of it back to the parties for their further consideration. After giving this matter careful thought, I am not disposed to do this.

22 As I have indicated, I do not intend to find that the total amount to be paid by Air Transat is less than that which would fall within a zone, or range, of reasonableness. The question that arises is how the net amount is to be distributed among class members if it is less than the total amount of their claims. The provision of caps is one method. Each of the possibilities suggested by Mr Brock is another. In preferring the first method as being in the best interests of the class as a whole, counsel considered:

> (a) the nature of the damages likely be claimed by the great majority of class members;
>
> (b) the likely value of such claims;
>
> (c) the possibility that the existence of one, or a few, very large claims for income losses would substantially deplete the amount available for distribution to the other class members; and
>
> (d) the need to simplify the claims process to avoid delays and to reduce expenses.

23 In my judgment each of these considerations was relevant, and properly considered by class counsel. The last of them underlines the necessity to consider the provisions of the settlement as a whole and not to place the focus on particular aspects of it in isolation. The objective of simplifying the claims process is relected in the caps placed on certain types of administrative expenses, the involvement of class counsel without further remuneration and the attempt to devise a process that members will find satisfactory without having recourse to arbitration. Each of these factors presupposes the existence of — and is designed to assist in effecting — an expeditious and economic method of allocating and distributing the net settlement funds among class members.

24 In my judgment, I would not be justified in finding that the existence, or the amounts, of the caps is so evidently unfair and unreasonable that approval of the settlement should be withheld. Nor do I believe that anything of value is likely to be gained by referring the matter back for further consideration by the parties. I am satisfied that the questions have been carefully considered by them. The qualifications and experience of class counsel were reviewed at some length in the carriage motion early in the proceedings. Nothing has occurred since then to dilute my confidence in the competence and diligence with which they would perform their responsibilities under the CPA. Their ability to identify each of the members of the class has enabled them to conduct an unusually thorough investigation and preliminary assessment of the claims of virtually all of them. Their decision that the imposition of the caps would be in the interests of the class as a whole is one which is entitled to be given considerable weight. I do not believe there is sufficient reason for impeding, or delaying, the implementation of the settlement by asking them to reconsider that decision.

25 The third of Mr Brock's objections concerns the amount of the fees of class counsel and the manner in which they would be borne by class members. The appropriate amount of the fees will be considered in an endorsement that will follow the release of these reasons after Mr Brock has had an opportunity to review the time dockets of class counsel. The extent to which approval is given to the payment of class counsel's fees before the final distribution — and any consequential changes to the terms of the claims process — will also be considered in the endorsement to follow.

26 The proposal that the fees, as then approved, should come off the top — rather than to be apportioned among class members in accordance with the value of the amounts ultimately distributed to each of them — is, I believe, appropriate in the circumstances of this case where a gross settlement amount would be paid up front by Air Transat and the further services of class counsel — other than those of the management committee — are to be provided for no further charge. Counsel have acted for the class as a whole and have negotiated a settlement on that basis. I see nothing unfair, or unreasonable, in awarding approved fees out of the settlement proceeds without regard to the proportions in which the proceeds will be shared by class members.

27 The other objection I received was made by Mr Giancarlo Cristiano in an attachment to an email message to class counsel. In the message Mr Cristiano thanked counsel for their diligence in dealing with the file and, subject to certain questions, concerns and objections to the terms of the settlement, he expressed his pleasure that it had been reached. In the attached letter he objected that the settlement contained no finding of liability for negligence on the part of Air Transat and no award of punitive damages. He also complained of the level of fees payable to class counsel and the administrator.

28 The first two of these objections misapprehend both the nature of the settlement as a compromise between the parties and the powers of the court. The settlement contains no admission of liability, negligence, on the part of Air Transat because it has not agreed to make any such admission. This, of course, is very common in a settlement of litigation and I have no jurisdiction to insert such a provision in the settlement. All I could do would be to refuse approval of the settlement unless it contained an admission of liability. Mr Cristiano did not ask me to do this and I would not consider such a decision to be in the best interests of class members. Similarly, and contrary to Mr Cristiano's impression, I have no power to amend the settlement so as to insert a claim for punitive damages.

29 I will consider Mr Cristiano's objection with respect to legal fees and expenses of administration in the endorsement that is to follow.

Disposition

30 Accordingly, pending the decision on the fees of class counsel, I will give provisional approval to the settlement as fair, reasonable and in the best interests of class members. This approval is subject to the terms of the endorsement that is to follow, any necessary adjustments to the times within which claims are to be made, any other acts to be performed and any other amendments counsel may consider to be required as a result of the delay in the release of these reasons. These changes, counsel's submissions with respect to the fees of independent counsel, a few drafting issues and the terms of any formal order can be considered following the release of the endorsement.

Order accordingly.

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: Adrian v. Canada (Minister of Health) | 2004 ABCA 149, 2004 CarswellAlta 550, 119 C.R.R. (2d) 200, 27 Alta. L.R. (4th) 274, [2004] 8 W.W.R. 707, 348 A.R. 91, 321 W.A.C. 91 | (Alta. C.A., Apr 15, 2004)

1999 CarswellOnt 2932
Ontario Superior Court of Justice

Parsons v. Canadian Red Cross Society

1999 CarswellOnt 2932, [1999] O.J. No. 3572, 103 O.T.C. 161, 40 C.P.C. (4th) 151, 91 A.C.W.S. (3d) 351

Dianna Lousie Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, Deceased and Elsie Kotyk, Personally, Plaintiffs and The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, Defendants

James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the Late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the Late Pierre Fournier, Plaintiffs and The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, Defendants

Winkler J.

Heard: August 19-21, 1999
Judgment: September 22, 1999
Docket: 98-CV-141369, 98-CV-146405

Counsel: *Harvey Strosberg, Q.C.*, *Heather Rumble Peterson* and *Patricia Speight*, for plaintiffs (98-CV-141369).
Bonnie A. Tough and *David Robins*, for plaintiffs (98-CV-146405).
Wendy Matheson and *Jane Bailey*, for Canadian Red Cross Society.
Michèle Smith and *R.F. Horak*, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., *Catherine Moore* and *J.C. Spencer*, for Attorney General of Canada.
Wilson McTavish, Q.C., *Linda Waxman* and *Marian Jacko*, for office of the children's lawyer.
Laurie Redden, for office of the public guardian and trustee.
Beth Symes, for friend of the court, Thalassemia Foundation of Canada.
William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for friend of the court, Hepatitis C Society of Canada.
Pierre R. Lavigne, for friend of the court, Dominique Honhon.
Bruce Lemer, for friend of the court, Anita Endean.
Elizabeth M. Stewart, for Provinces and Territories other than British Columbia and Quebec.
Janice E. Blackburn and *James P. Thomson*, for friend of the court, Canadian Hemophilia Society.

Subject: Public; Civil Practice and Procedure; Torts
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles

Headnote

Practice --- Disposition without trial — Settlement — General

Two class proceedings were commenced as result of contamination of Canadian blood supply with infectious viruses during 1980s — During class periods, sole supplier and distributor of whole blood and blood products in Canada was Canadian Red Cross Society — Viral infection at centre of proceedings was Hepatitis C — Claims of plaintiffs were based in negligence, breach of fiduciary duty and strict liability in tort — Motion was brought for court approval of comprehensive settlement package — Settlement agreement created plans to compensate persons infected with Hepatitis C, their secondarily infected spouses and children, and their other family members — Agreement was to be funded by payment by federal, provincial and territorial governments into trust fund — Motion granted — Settlement to be amended to apply entitlement provisions in hemophiliac plan to thalassemia sub-class, to provide sub-class with benefit of lesser burden of proof — To be approved, settlement must be fair, reasonable and in best interests of class as whole — That settlement is less than ideal for any particular class member is not bar to approval for class as whole — Provision in settlement for periodic subsequent claims should class member's condition worsen addressed concern with respect to uncertainty and unfairness of once-and-for-all settlement — Substantial risk that society would have no meaningful assets available to satisfy judgment if actions proceeded to trial — Real question existed as to liability of Crown defendants — Litigation would be lengthy, protracted and expensive — No suggestion of bad faith or collusion tainted settlement — There was adequate communication between class counsel and class members regarding settlement — Global settlement represented reasonable settlement when significant and real risks of litigation were taken into account — Settlement did not provide for fair and reasonable distribution among class members — Under agreement, opt-out claimants who were successful in individual litigation were to have any awards satisfied out of settlement fund — Provision raised risk of inequity as it gave opt-out claimants potential for preferential treatment in respect of access to fund — Opt-out provision to be deleted and replaced with provision that, in event of successful litigation by opt-out claimant, defendants were entitled to indemnification from fund only to extent that claimant would have been entitled to claim from fund had claimant remained in class — Remainder of distribution scheme was fair and reasonable — Fund was sufficient to provide benefits under settlement — Provision that mandated reversion of surplus of plans to defendants was not inappropriate if question of proper application of surplus is left up to administrator of fund — Proposed changes were not material — Settlement approved with required modifications.

Practice --- Parties — Representative or class actions — Procedural requirements

Two class proceedings were commenced as result of contamination of Canadian blood supply with infectious viruses during 1980s — During class periods, sole supplier and distributor of whole blood and blood products in Canada was Canadian Red Cross Society — Viral infection at centre of proceedings was Hepatitis C — Claims of plaintiffs were based in negligence, breach of fiduciary duty and strict liability in tort — Motion was brought for court approval of comprehensive settlement package — Settlement agreement created plans to compensate persons infected with Hepatitis C, their secondarily infected spouses and children and their other family members — Agreement was to be funded by payment by federal, provincial and territorial governments into trust fund — Motion granted — Settlement to be amended to apply entitlement provisions in hemophiliac plan to thalassemia sub-class, to provide sub-class with benefit of lesser burden of proof — To be approved, settlement must be fair, reasonable and in best interests of class as whole — That settlement is less than ideal for any particular class member is not bar to approval for class as whole — Provision in settlement for periodic subsequent claims should class member's condition worsen addressed concern with respect to uncertainty and unfairness of once-and-for-all settlement — Substantial risk that society would have no meaningful assets available to satisfy judgment if actions proceeded to trial — Real question existed as to liability of Crown defendants — Litigation would be lengthy, protracted and expensive — No suggestion of bad faith or collusion tainted settlement — There was adequate communication between class counsel and class members regarding settlement — Global settlement represented reasonable settlement when significant and real risks of litigation were taken into account — Settlement did not provide for fair and reasonable distribution among class members — Under agreement,

opt-out claimants who were successful in individual litigation were to have any awards satisfied out of settlement fund — Provision raised risk of inequity as it gave opt-out claimants potential for preferential treatment in respect of access to fund — Opt-out provision to be deleted and replaced with provision that, in event of successful litigation by opt-out claimant, defendants were entitled to indemnification from fund only to extent that claimant would have been entitled to claim from fund had claimant remained in class — Remainder of distribution scheme was fair and reasonable — Fund was sufficient to provide benefits under settlement — Provision that mandated reversion of surplus of plans to defendants was not inappropriate if question of proper application of surplus is left up to administrator of fund — Proposed changes were not material — Settlement approved with required modifications.

Table of Authorities

Cases considered by *Winkler J.*:

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182 (S.C.C.) — considered

Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) — applied

Dabbs v. Sun Life Assurance Co. of Canada, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.) — applied

Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565, 9 C.C.L.I. (3d) 253 (B.C. S.C.) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — considered

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) — applied

Sawatzky v. Société Chirurgicale Instrumentarium Inc. (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — considered

s. 5(2) — considered

s. 8(3) — considered

s. 26(4) — considered

s. 26(6) — considered

s. 29(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION for approval of settlement in two companion class proceedings.

***Winkler J.*:**

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action," brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, PricewaterhouseCoopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

> (a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;
>
> (b) an incubation period of 15 to 150 days;
>
> (c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
>
> (d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable

of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the *Medical Post* in February 1988, Dr. Alter was quoted as stating that:

> while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential.

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;

(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;

(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec. and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and

(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum

of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels." In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5,000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 — $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 — $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional

significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$65,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reimbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved defendants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the

approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily-infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p.3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

(a) the Hemophiliac cohort size is approximately 1645 persons

(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.

(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 co-infected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation.

Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate."

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income." Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income]...we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and out intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time.

There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the *CPA* and the power to amend the certification order is contained in s. 8(3) of the *Act*. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan *mutatis mutandis* to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the *CPA* provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the *CPA* dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in *Dabbs v. Sun Life Assurance Co. of Canada* (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) (*Dabbs No. 1*) at para. 9:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)], (*Dabbs No. 2*) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally, in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole," courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See *Dabbs No. 1* at para. 13, *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C. S.C.) at 571. See also Conte, *Newberg on Class Actions*, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical *seriatim* application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Morover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in *Dabbs No. 2* at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the

> potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario," a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion." On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the *Manual for Complex Litigation*, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties — even those with the best intentions — to give insufficient weight to the interests of at least some class members. *The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants*. (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

> (a) the adequacy of the total value of the settlement amount;
>
> (b) the extent of compensation provided through the settlement;
>
> (c) the sufficiency of the settlement Fund to provide the proposed compensation;
>
> (d) the reversion of any surplus;
>
> (e) the costs of administering the Plans; and
>
> (f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This

ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgement that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice ot opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection.

He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.
>
> HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.
>
> . . . . .
>
> Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of

> infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0.133 units per year.
>
> . . . . .
>
> Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may still be normal even though there is fibrosis since there may be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.
>
> A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.
>
> Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.
>
> Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> . . . . .
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety....
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of

> provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of

any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity, that this creates in the settlement uncertain, the far greater concern is the risk of inequity, that this creates in the settlement distribution. The *Manual for Complex Litigation* states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness..."

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the *CPA* provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.), adopted by this court in *Bisignano v. La Corporation Instrumentarium Inc.* (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class," the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be

satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not be an impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. *The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion*.

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $34,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear — e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example, the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at p. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.

Other key limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.), to support a conclusion that the Fund is sufficient. In *Nantais* , all of the class members were known and accordingly received actual notice of the settlement. Seventy-two per cent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the *Nantais* experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision *simpliciter* is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels *per se*. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural

at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefiting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the *CPA* which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members..." On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in *Dabbs No. 1* at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and *if such approvals are not granted without any material differences therein*, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally *de minimis*. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in *Dabbs No. 1* at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings.

Motion granted.

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2008 CarswellOnt 6590
Ontario Superior Court of Justice

Stewart v. General Motors of Canada Ltd.

2008 CarswellOnt 6590, [2008] O.J. No. 4426, 172 A.C.W.S. (3d) 572, 72 C.P.C. (6th) 361

Kenneth David Stewart and Darlene Simpson (Plaintiffs) and General Motors of Canada Limited and General Motors Corporation (Defendants)

Cullity J.

Heard: October 14, 2008
Judgment: November 4, 2008
Docket: 06-CV-310082 CP

Counsel: Kirk M. Baert, Jon Ptak for Respondents / Plaintiffs
Robert B. Bell, Michael C. Smith for Moving Parties / Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

Plaintiffs brought action for damages allegedly arising from design deficiencies in their vehicles, which were designed and manufactured by defendants — Plaintiffs moved for certification of action pursuant to Class Proceedings Act; in response, defendants filed affidavits of five experts whose opinions were directed at merits of proceedings — Certification order was granted for purpose of implementing settlement agreement ("settlement") that was executed by parties after motion was filed — Under settlement, defendants agreed to pay class members $400 for repair expenses incurred in first five years, $100 for sixth year and $50 for seventh year — In addition, class members who paid up to $1,500 for specified repairs could elect to receive 40 per cent of cost of repairs up to maximum of $400 — Class counsel recommended settlement after communicating with more than 4000 members of class — One hundred and six objections to settlement were received, of which class counsel determined only 50 were qualified members of class — Majority of objections were from individuals whose repairs cost more than $1,000 and who were dissatisfied with their compensation under settlement

— Plaintiffs moved for approval of settlement agreement — Motion granted — Settlement was fair and reasonable and in best interests of class as whole — Objections failed to recognize that settlement represented compromise, and that there would be risks, delays and expense in continuing with litigation — Settlement fell within zone of reasonableness, as neither success at certification stage nor at common issues trial would be assured, and litigation process could extend for years — Recommendation of class counsel was given particular weight given massive amount of research undertaken by them to rebut views of defendants' experts, which obliged them to focus unusual attention on merits of proceeding.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous

Plaintiffs brought action for damages allegedly arising from design deficiencies in their vehicles, which were designed and manufactured by defendants — Plaintiffs alleged that due to their poor design, intake manifold gaskets in their vehicles prematurely degraded, permitting coolant to leak, mix with oil and in some cases cause engine to overheat — Plaintiffs moved for certification of action pursuant to Class Proceedings Act — After motion was filed, settlement agreement ("settlement") was executed by parties — For purposes of settlement and certification, class was defined as consumers resident in Canada, other than Quebec, who had owned or leased qualifying vehicle and who had incurred expense from qualifying repair before specified date — Certification order granted for purpose of implementing settlement agreement — It was plain and obvious that material facts in pleadings, if proven, would establish plaintiffs' claims — Definition of class was not unnecessarily broad, its criteria were objective and it did not beg merits of plaintiffs' claims — Common issue was whether problems of vehicles that necessitated class members' expenditures on repairs were attributable to negligent design, manufacture and testing by defendants — Objectives of access to justice, judicial economy and behavioural modification would be achieved by certification — On contested motion, there would have been problems relating to significance to be attributed to individual issues of causation, and to manageability of proceeding — However, as consequence of settlement, these problems were now moot.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements

Plaintiffs brought action for damages allegedly arising from design deficiencies in their vehicles, which were designed and manufactured by defendants — Plaintiffs' action was certified pursuant to Class Proceedings Act; similar claims had been made in other Canadian class actions — Plaintiffs and defendants negotiated settlement agreement ("settlement"); parties in other cases had agreed to accept settlement if approved in this action — Under terms of settlement, there was no minimum amount that defendants were required to pay for benefit of class — Settlement provided for defendants to pay fees of class counsel in this proceeding, together with fees of plaintiffs' counsel in other class actions — Fees in amount of $2,520,000 plus $126,000 GST and disbursements of $170,999 were to be held in escrow, then paid out pursuant to terms of settlement — Plaintiffs moved for approval of fees of class counsel under settlement — Provisions of settlement relating to fees of class counsel in this proceeding only were approved — Approval was subject to order that $1,500,000 be held in escrow to be available for payment to class counsel; balance of negotiated fee was to be held in escrow until further order of court — Court could not properly approve fees of counsel in other proceedings where there was no evidence that they worked as team with class counsel, or that their work benefitted class in this action — Although this did not detract significantly from reasonableness of amount defendants agreed to pay, there was no assurance in present case that net recovery for class members would not be significantly less than amount of fees — Defendants had not agreed to contribute minimum amount under settlement and number of class members was uncertain — In these circumstances, it was appropriate to defer final agreement on fees until amounts recovered for benefit of class had been ascertained.

Table of Authorities

Cases considered by *Cullity J.*:

Directright Cartage Ltd. v. London Life Insurance Co. (2001), [2001] I.L.R. I-4013, 17 C.P.C. (5th) 185, 2001 CarswellOnt 3658, 34 C.C.L.I. (3d) 118 (Ont. S.C.J.) — referred to

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 1998 CarswellOnt 4045, 27 C.P.C. (4th) 114, 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253 (Ont. C.A.) — referred to

Gariepy v. Shell Oil Co. (2003), 2003 CarswellOnt 2466, 48 C.P.C. (5th) 340 (Ont. S.C.J.) — considered

Wilson v. Servier Canada Inc. (2005), 252 D.L.R. (4th) 742, 2005 CarswellOnt 1020, 9 C.P.C. (6th) 83 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 33(2) — referred to

Competition Act, R.S.C. 1985, c. C-34
s. 52 — referred to

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A
Generally — referred to

MOTION by plaintiffs for approval of settlement of action and for its certification pursuant to *Class Proceedings Act*, and for approval of fees of class counsel under settlement agreement.

***Cullity J.*:**

1 The plaintiffs moved for approval of the settlement of this action and for its certification pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). They also seek approval for their fees.

2 The proceeding is one of 17 in which similar claims have been made in Ontario and other Canadian jurisdictions. In this case the claims have been made in respect of a class that excludes residents of Quebec but is otherwise national in scope. Agreement has been reached with the parties in all cases to accept the settlement if it is approved in this action and in a proceeding in the Quebec Superior Court. I was informed that there are class actions in the United States in which broadly similar, but not identical, claims have been made.

The claims

3 The action concerns alleged design deficiencies in certain cars and trucks that were designed, manufactured, and marketed by the defendants. The plaintiffs allege that, due to poor design and manufacturing, the intake manifold gaskets ("IMG"s) in the vehicles prematurely degraded and did not properly maintain a seal to the engine. These deficiencies permitted coolant to leak, mix with the engine oil, and in some cases cause the engine to overheat with the possibility that it would seize completely and create a danger to the occupants of the vehicles.

4 The plaintiffs claimed damages for negligence, unfair practices pursuant to the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, schedule "A" and equivalent legislation in other provinces, breach of section 52 of the *Competition Act*, R.S.C.1985, c. C-34, and restitutionary remedies.

The plaintiffs

5 Kenneth David Stewart is a Baptist minister who owns two of the particular vehicles, each of which required repairs allegedly as a result of the poorly designed IMG's. Darlene Stuart is a claims examiner for Sun Life Financial. She previously owned one of the vehicles and paid for repairs allegedly required as a result of the design deficiencies in its IMG.

The defendants

6 General Motors Corporation, designs, tests, manufactures and directs the distribution of the vehicles. It also controls and directs the business of its Canadian subsidiary, General Motors of Canada Limited, in the design, manufacture,

marketing, sales, servicing and export of GM motor vehicles. The vehicles with which this litigation is concerned are distributed in Canada by General Motors of Canada Limited.

The class

7 For the purpose of the settlement and the certification of this proceeding, the class is defined as follows:

> All consumers resident in Canada, other than in the province of Quebec, who own or lease, or who have in the past owned or leased, a Qualifying Vehicle and who incurred an expanse from a Qualifying Repair before October 14, 2008.

8 For the purpose of the definition, a consumer is a person who purchases or leases a vehicle for personal, family, or household use, and not for commercial or business purposes.

9 The Qualifying Vehicles are listed in Annexes to the settlement agreement. Generally, they consist of Chevrolet, Pontiac, Buick and Oldsmobile vehicles whose model years were 1995 through 2003 (or 2004 in some vehicles) that had specified types of engines, were factory-equipped with a certain type of coolant and, in some vehicles, with nylon/silicone IMGs.

10 The evidence is that approximately 1,000,000 of the Qualifying Vehicles were sold in Canada and that, of these, approximately 116,000 were repaired under warranty. None of the experts was able to provide an estimate of the number of vehicles on which Qualifying Repairs were required and paid for by the owner or lessee.

11 Qualifying repairs are also defined in the agreement but are limited to those made within the earlier of seven years from the initial delivery date of the vehicle and 240,000 kilometres of use.

History of the litigation

12 The defendants vigorously contested both the claims and the plaintiff's contention that the requirements for certification under the CPA are satisfied. Prior to filing materials in response to the plaintiffs' motion for certification, the defendants moved for orders to strike the plaintiff's pleading; to compel a response to demands for particulars; to compel the plaintiffs' vehicles to be made available for inspection; to strike the affidavit of the plaintiffs' expert witness; to strike paragraphs from the affidavits of the plaintiffs; and to stay the action pending developments in one of the actions in the United States.

13 When these orders were refused, and leave to appeal was subsequently denied, the defendants delivered an extensive record in response to the plaintiffs' motion for certification. The record included the affidavits of five experts whose opinions were very heavily directed at the merits of the proceeding including the question whether the leaks of which the plaintiffs complained were attributable to deficiencies in the design of the IMGs. As evidence on this question was directly relevant to the commonality of issues that the plaintiff sought to have included in a certification order, it was, in the submission of defendants' counsel, admissible for that purpose.

14 Faced with the expert opinions of the defendants' deponents, the plaintiffs found it necessary to file further affidavits in reply to which the defendants responded with additional evidence. Ten days of cross-examinations of eleven deponents followed.

15 In November 2007, after the plaintiffs had applied for financial assistance from the Class Proceedings Fund, and the defendants had indicated that they would oppose the application, the defendants informed plaintiffs' counsel that they were prepared to enter into settlement negotiations in which they would provide an offer that would mirror the terms that would be offered to plaintiffs in the US litigation. The application for funding, and the certification motion set down for December 3-5 were then adjourned pending the negotiations. By that time virtually all of the plaintiffs' preparation for the motion had been completed.

The settlement

16 At the commencement of the negotiations, defendants' counsel stated that their clients wished to settle all the Canadian actions on substantially the same terms that would be available in a nation-wide US settlement.

17 The settlement negotiations were protracted and threatened to break down on a number of occasions. Hearings for a contested certification motion were rescheduled twice. After nine months of negotiations, a settlement agreement was executed in September 2008.

18 Under the terms of the proposed settlement, the defendants have agreed to pay to class members a maximum amount of $400 for repair expenses incurred within five years of the date the vehicle was acquired by its original purchaser or lessee; a maximum of $100 if they were incurred in the sixth year; and a maximum of $50 if incurred in the seventh year. In addition, class members who paid over $1,500 for repairs required by a coolant leak into a vehicle's internal engine components could elect to receive 40 per cent of the cost of the repairs up to a maximum of $400.

19 The total amount payable to class members would not be capped so that, irrespective of the number of claimants, all who could provide the required proof of their expenditures on the repairs would be compensated. Nor, however, is there any minimum total amount that the defendants would be required to provide for the purpose of the settlement.

20 The claims process that would be established under the settlement would be under the supervision of Crawford Class Action Services, with the active participation of the Customer Communication Service, a global organisation that has had extensive experience in receiving and handling claims against the defendants. Provision is made for rejected claims to be reviewed.

21 The process — including the application forms and acceptable proof of expenditures on repairs — was not part of the original offer of the defendants. It was negotiated between the parties in the light of class counsel's objective to have it as simple as possible without creating arbitrary impediments to recovery. The cost of administering the settlement is to be borne by the defendants.

22 Finally, on the question of settlement approval, the settlement agreement contains an obligation by the defendants to pay stipulated fees of class counsel. Although the provisions of paragraph 9.1 of the agreement appear to make all the other provisions conditional on the court's approval of the fees, counsel informed me that any such condition would be waived. Absent a waiver, I am satisfied that I could not properly approve the settlement.

Analysis

23 The standard to be applied in determining whether to approve the settlement is well settled. The question is whether it is fair and reasonable and in the best interests of the class as a whole — and not whether it meets the demands of any particular member. The standard is not one of perfection. To merit approval, a settlement need only fall within a "zone of reasonableness" so that a range of acceptable possibilities may exist. As a settlement invariably involves a compromise of the competing positions and interests of the parties, the fact that the class may receive significantly less than would be available if the plaintiffs were completely successful in the litigation will not necessarily require the court's approval to be withheld. The benefits to the class must be weighed against the risks, delays and expense of continuing litigation.

24 The views of class members who object to the settlement are to be considered but particular weight can be attributed to the recommendations of experienced class counsel where it is evident — as it is here — that the settlement negotiations were conducted in good faith and at arm's length without any suspicion of collusion, or any basis for a suspicion that class counsel were seeking to advance their own interests at the expense of the interests of the class.

25 Each of the plaintiffs has sworn an affidavit in which they express their belief that the settlement is fair and reasonable and in the interests of class members. In addition, class counsel have been in communication, at different

times, with more than 4000 members of the class. A number of those who have contacted counsel since the notice of the proposed settlement was given, have expressed satisfaction with its terms.

26 Approximately 106 objections were received. Of these, class counsel considers that 50 came from members of the class and that the other objectors were either not class members or provided insufficient evidence of their membership.

27 I have reviewed each of the objections. The great majority of them are from individuals whose repairs cost in excess of $1,000 and are dissatisfied — often strongly so — with the level of compensation they would receive under the settlement. Many of them — and of the other objectors- have indicated that they believe they should receive the full cost of their repairs, irrespective of the age of the vehicles.

28 A number of the objectors had complaints about the specifics of the compensation chart. Some expressed the view that mileage reflecting the use of vehicles would be a more appropriate consideration than the age of the vehicles at the time of the repairs. This is contrary to the evidence of an expert whose affidavits were delivered on behalf of the plaintiffs.

29 A notable feature of the objections is the almost entire absence of any recognition that a settlement is essentially a compromise and that there would be risks, great delays and considerable expense in continuing with the litigation. There was also, I think, a pervasive failure to understand that the court has no power to amend the terms of the settlement, so that its refusal to give approval would mean that the litigation would continue unless and until it became possible to reach further agreement.

30 A few of the objectors indicated that they would prefer to commence proceedings against the defendants for full compensation rather than to participate in the settlement. They will, of course, have an opportunity to do this by opting out of this proceeding if, and after, it is certified.

31 In my opinion, the settlement falls within the required zone of reasonableness. Neither success at the certification stage, or at a common issues trial, would be assured if the litigation continues. In particular, the defendants challenged — with evidence — the plaintiffs' contention that the engine leaks in question were caused by the design and structure of the IMGs rather than by any one or more of a variety of other possible causes that could be identified only by an inspection of each vehicle. Even if the plaintiffs were successful in obtaining certification, and a favourable judgment on the common issues, the existence of remaining individual issues of causation might well exclude an aggregate assessment and could easily make the task of pursuing these issues in a contested environment prohibitively expensive. The litigation process — with the virtual inevitability of appeals — might well extend for another three or four years, if not longer. In contrast, the claims process contained in the settlement agreement is relatively simple and the expense of administering the settlement — including the payment of the claims administrator's fees — is to be borne by the defendants.

32 The recommendation of class counsel in this case must be given particular weight because of the massive amount of research they were compelled to do in order to rebut the views of the experts and others whose affidavits were delivered by the defendants. As I have indicated, these obliged plaintiffs' counsel to focus unusual attention on the merits of the litigation both before, and for the purpose of, the certification motion. No assistance was received from counsel, or expert witnesses, in the litigation in the United States.

33 Only two of the objectors wished to have the list of qualifying vehicles expanded so as to include other vehicles — a different vehicle in each case. I am not equipped, and I do not intend, to second-guess counsel on that question, or on whether the compensation proposals are reasonable in the relative weight they attribute to normal depreciation of materials over different periods of time. One of the plaintiffs' expert witnesses deposed that the average cost for replacing an IMG would be $700 and, from sampling performed by plaintiffs' counsel, it was estimated that 60% of the repairs for this purpose would likely be required in the first five years.

34 As well as the recommendation of class counsel — on which I place considerable weight — the plaintiffs have delivered an affidavit of Mr Phil Edmondston, a consumer advocate and founder of the Automobile Protection Association. His biography states that he has worked on thousands of consumer claims against automobile

manufacturers. He expressed the view that the terms of the settlement are fair and reasonable given the nature of the claims and the myriad issues raised by the defendants. He was impressed by both the economic nature of the settlement and the "user friendly" structure of the claims process.

35 The notice to be given to the class members, and the manner of its dissemination, are in my judgment satisfactory and there will be an order approving the settlement.

Certification

36 On the basis of the plain and obvious test, as it has been applied for the purpose of section 5 (1) (a), material facts that, if proven, would establish the plaintiff's claims in negligence, and the statutory and restitutionary claims, have, in my opinion, been sufficiently pleaded.

37 Similarly, the class, as now defined, satisfies the requirements of section 5 (1) (b). It is not unnecessarily broad, its criteria are objective, and it does not beg the merits of the plaintiffs' claims.

38 The requirement in section 5 (1) (c) that there be common issues is also satisfied. The principal such issue is whether the problems of the vehicles that necessitated class members' expenditures on repairs were attributable to the negligent design, manufacture and testing of the vehicles by the defendants. Although this question would have been very much in dispute at trial, the plaintiffs did, in my opinion, establish the necessary minimum evidential basis for its existence as a common issue.

39 While the objectives of access to justice, judicial economy and behavioural modification would, in my opinion, be achieved by certification, there would, on a contested motion for certification, have been problems relating to the significance to be attributed to the individual issues of causation and, generally the manageability of the proceeding after a common issues trial. These problems may not have been insuperable but, as a consequence of the settlement, they have now become moot.

40 The plaintiffs are, in my opinion, well qualified to act as representatives of the class whether or not they would be able to establish their individual claims at trial. The requirement of a litigation plan is essentially satisfied by the settlement provisions.

41 In my judgment therefore, the requirements of certification under the CPA are satisfied for the purpose of implementing the settlement. There will be an order accordingly.

Fees of class counsel

42 Paragraphs 3.9 and 3.10 of the settlement agreement provide for the defendants to pay the fees of class counsel in this and the Quebec proceedings, together with the fees of the plaintiffs' counsel in the other Canadian class actions, in an amount of $2,520,000 plus $126,000 in GST and disbursements of $170,000. These amounts are to be paid to Koskie Minsky LLP in trust to be held in escrow in an interest-bearing account until December 16, 2008 unless the settlement agreement is rescinded, or terminated, before in accordance with certain conditions set out in the agreement.

43 In addition, the defendants are to pay fees and disbursements incurred from August 28, 2008 to December 15, 2008 up to a maximum of $131,250, inclusive of taxes.

44 The above amounts were negotiated after mediation by the Honourable Justice John Murray of this court. The mediation was conducted as such among the parties and His Honour was, quite properly, not asked whether the amounts ultimately agreed by them should be approved pursuant to the CPA.

45 For the purpose of the motion to approve the fees I have had two main concerns of which only the second affects the amount that should be approved.

46 The first concern is that I do not see on what basis I can, or should, properly approve fees of counsel in the other proceedings. There is no evidence that they worked as a team in the prosecution of this action, or that their work on the other cases benefited the class in this action or, indeed, the members of the putative classes in such cases. The only persons who would benefit would be the lawyers in those proceedings who would, in effect, be bought off. The suggestion that the court should approve payment to the other lawyers of part of the amount the defendants are to provide to settle the proceeding could only give further encouragement to the commencement of multiple class actions in the future.

47 At the same time, there is, I believe, validity in the submission of plaintiffs' counsel in this proceeding that, by reaching agreements with respect to the other actions, they have conferred a benefit on the class in this proceeding. The benefit consists of avoiding delay and expense that otherwise might well be incurred because of the unresolved problems with multiple multi-jurisdictional class actions in Canada — problems exemplified by the *Voutour* and *Tiboni* proceedings. This benefit, in my view, may legitimately be taken into account in determining the appropriate quantum of the fee to be awarded to counsel in this case without purporting to approve the fees of counsel in the other cases, and without being concerned with — or interfering with — any binding agreements that the parties have made with such counsel.

48 The factors to be considered in determining the amount of a reasonable fee were summarised by Cumming J. in *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (Ont. S.C.J.), at para 74 as follows:

> Factors to consider include the time expended by class counsel, the legal and factual complexity of the matters dealt with, the risk of success or failure assumed by class counsel in pursuing the litigation, the degree of skill and competence demonstrated by class counsel, the degree of responsibility assumed by class counsel, the results achieved, the benefits achieved for class members through a settlement, the importance of the matter to the class members, and the plaintiffs' expectation as to the quantum of fees to be paid.

49 Apart from the difficulty in evaluating the results achieved from the efforts of plaintiffs' counsel in this case, the considerations Cumming J. distilled from the authorities weigh quite heavily in favour of a substantial fee. In my opinion, the concerns I have expressed about approving the fees of the other lawyers do not detract significantly from the reasonableness of the total amount that the defendants agreed to pay. The amount of $2,520,000 represents a multiplier of approximately 2.6 times the docketed time of plaintiffs' counsel in the proceedings in Ontario and Quebec after the negotiated reduction of approximately 25 per cent is made in calculating an acceptable base fee. If the success achieved by the efforts of plaintiffs' counsel was to be determined without reference to the total amount that the defendants will actually have to pay — an amount that will depend on the number of claimants and the categorisation of their claims — and, if recognition is to be given to counsel's success in avoiding multi-jurisdictional disputes, a multiplier of 2.6 would, I believe, be on the low side.

50 I am, however, not satisfied that, in this case, I can appropriately disregard the possibility that, when all claims have been dealt with, the lawyers and not the class members may turn out to be by far the principal beneficiaries of the settlement. The defendants have not agreed to contribute a minimum amount for the benefit of the class members, and there is no assurance that the net recovery for them will not be significantly less than the amount of the fees. It is, of course, equally possible that the fees will represent an acceptable percentage of the gross recovery, in which the expenses of administration to be borne by the defendants must be included. On the evidence in the record, it would be sheer speculation on my part to draw one inference rather than the other.

51 The problem arises not just because, until the claims period has expired, it will be uncertain how many of the class members will make valid claims — and in which of the three categories those claims will fall. In this case, the parties have been unable to provide any estimate of the number of class members. It is projected that 900,000 of the specified vehicles may have been sold in Canada and not repaired under warranty. In their materials prepared for the purpose of a contested certification motion, plaintiffs' counsel suggested that there could be 400,000 class members — namely owners

and former owners of vehicles who paid for repairs within the class period. I am now told that none of the parties' experts is able to confirm this, or any other number, as a reasonable estimate.

52 It has been recognised in other cases, that, for the purpose of fee approval, it is legitimate to look at the actual recovery achieved for the benefit of the class. This is consistent with the requirement that the court should look at the degree of success as well as the degree of risk: *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 (Ont. C.A.), at para 15. Here there has been "success" as required to justify a contingent fee agreement pursuant to section 33 (2) of the CPA, but the degree of success is impossible to estimate on the basis of the agreement and the evidence presented by the parties.

53 In similar circumstances, it has been recognised that it may be appropriate to defer final agreement of fees until the amounts recovered for the benefit of the class have been ascertained. The question was addressed by Nordheimer J. in *Gariepy v. Shell Oil Co.* [2003 CarswellOnt 2466 (Ont. S.C.J.)], at paragraphs 16 and 18 of his reasons:

> Where I have some difficulty in this case is with the factors regarding the importance of the matter to the client and the results achieved. At this stage, there is no information available as to the number of members of the class who will actually decide to take up the settlement offered. Without that information, it is difficult to fully evaluate the results achieved. It is also difficult to evaluate whether the resolution of the claims was truly important to the class members. Put another way, if very few of the members of the class wind up taking advantage of the settlement, that might be some evidence that the results of the settlement were less favourable than they might otherwise appear and/or that the issue itself is not one of great importance to the members of the class. ...
>
> I accept that there would be an unfairness in requiring class counsel to await the completion of the settlement in order to obtain their remuneration if that required no payment being approved to class counsel. However, it seems to me that it is open to the court to approve a base level of remuneration at this stage and consider a request for additional remuneration once the take up rate in the settlement is known, if the take up rate would demonstrate that additional recompense is justified. For example, payment only of the value of the time spent together with the disbursements could be approved ... and the balance could be considered at a later stage. Indeed, it appears that just such an approach was negotiated, and approved, in *Directright Cartage Ltd v. London Life Insurance Co.*, [2001] O.J. No. 4073 (S.C.J.).

54 On the facts before him, Nordheimer J. held that it would not be appropriate to defer final approval of the fees even if a low percentage of class members decided to claim under the settlement. As in this case, the number of class members could not reasonably be estimated, but the learned judge was, it appears, prepared to consider the value of the settlement equal to the maximum amount of $30,500,000 that the defendants had offered to pay. I am not sure that I understand the significance that the learned judge placed on the amount of the cap — except, perhaps, to the extent that it provided some recognition by the parties that a high take-up rate might well be anticipated. I note, also, that in *Gariepy* it was mentioned that the claims process under the settlement might extend over a period of years. In contrast, the claims period in this case is to end on April 30, 2009 by which time the maximum take-up will be known and it should be possible to make a final decision on the fees that merit approval.

55 As Nordheimer J. mentioned in *Gariepy*, Cumming J. approved staggered payments of class counsel's fees in *Directright Cartage Ltd. v. London Life Insurance Co.* [2001 CarswellOnt 3658 (Ont. S.C.J.)]. Part of the fees were to be payable within 10 days of settlement approval, a part when the number of claimants was known, and the balance after the final payment had been made. The court's approval was required for the second and third payments. Again, in *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (Ont. S.C.J.) — where it was estimated that there were 160,000 class members, and where counsel requested fees of $13 million and additional fees up to $5 million if the maximum amount to be paid to class members by the defendants was not exhausted — Cumming J. approved an immediate payment of $10 million and deferred approval of the balance. He stated, at para 99:

> It is appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.

56 After indicating that, on the basis of the factors to be applied — other than that of total recovery — he would have approved a high multiplier, he commented, at para 91:

> But other significant factors must also be kept in mind given the idiosyncratic nature of this class action. Class counsel could not reasonably estimate the total number of class members actually injured by ingestion of the defendants' diet drugs. Even if it is determined ultimately it is only a relatively few of the total users who have been injured, their injuries are severe (including death in several instances) and these persons would not have achieved any redress at all but for the efforts of class counsel.

57 In this case the amounts payable to individual class members are relatively small and over 25,000 successful applications at an average payment of $100 will be required for the payments to even equal the fees requested. Even after giving significant weight to the other factors that are relevant to a fee determination — as I am satisfied I must in this case — there is such uncertainty on the question of the total recovery, that I am not prepared at this stage to approve the payment of $2,520,000 on December 16, 2008 as provided in para 3.9 of the settlement agreement. There will be an order that $1.5 million of the amount to be held in escrow pursuant to paragraph 3.9 may be paid to class counsel in this proceeding pursuant, and subject, to the terms of the paragraph. The balance — less any amount ordered by the Superior Court of Quebec to be paid to counsel in the Quebec proceeding — is to continue to be held in escrow until further order of the court. The provisions of the settlement agreement relating to the fees of class counsel in this proceeding are otherwise approved.

Motion granted.

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2011 ONSC 7118
Ontario Superior Court of Justice

Voutour v. Pfizer Canada Inc.

2011 CarswellOnt 14961, 2011 ONSC 7118, 213 A.C.W.S. (3d) 307, 38 C.P.C. (7th) 360

Jesse Voutour, Eiko Voutour, Portia Waheed and Pardo Antonio Perotta, Plaintiffs and Pfizer Canada Inc. and Pfizer Inc., Defendants

Perell J.

Heard: November 29, 2011
Judgment: November 30, 2011
Docket: 05-CV-287488CP

Counsel: B.C. McPhadden, J. Rochon, I. Erez, A. Thorsen, for Plaintiffs
G. Zakaib, E. Larose, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.ii Aggregate awards
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iii Agreements respecting fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Aggregate awards

Plaintiff patients in several provinces started actions against defendant drug manufacturer for alleged damages from use of manufacturer's anti-inflammatory drugs — Actions were joined as class action — Similar action had been previously commenced in United States — United States action was settled in 2008 — Settlement agreement was reached in 2011 in Canadian action — Agreement came about in part due to evidence from United States action and difficulty of proving common issues and individual damages — Settlement fund was to be established by manufacturers to pay insurers. legal fees, costs and various other expenses — Class members were to be paid after these expenses had been paid from fund — All class counsel and representative plaintiffs endorsed agreement — Four class members opposed settlement on basis that they would be excluded from compensation — Representative plaintiffs moved to have agreement and counsel fees approved — Motion granted — Settlement was fair and reasonable in all circumstances — Taking action to trial would be lengthy process and there would be risk of minimal or no recovery — This was true as claims against manufacturer were difficult to prove and manufacturer was experienced in similar litigation — Although overall settlement was fraction of amount sought in pleadings, it was more reasonably connected to expectations of patients — Patients who had suffered most serious harm would actually receive more compensation than patients in United States action — Class as whole would receive reasonable compensation, and objections of individual class members were not sufficient to override this — Counsel fees were reasonable given complexity of action and provided proper incentive to take on difficult litigation — Both counsel fee and settlement were approved.

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Table of Authorities

Cases considered by *Perell J.*:

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 1998 CarswellOnt 3539, [1999] I.L.R. I-3629, 41 O.R. (3d) 97 (Ont. C.A.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Endean v. Canadian Red Cross Society (2000), 45 C.P.C. (4th) 39, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 2000 BCSC 971, 2000 CarswellBC 1298 (B.C. S.C.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — referred to

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 1998 CarswellOnt 4045, 27 C.P.C. (4th) 114, 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253 (Ont. C.A.) — referred to

Kelman v. Goodyear Tire & Rubber Co. (2005), 5 C.P.C. (6th) 161, 2005 CarswellOnt 154 (Ont. S.C.J.) — referred to

Maxwell v. MLG Ventures Ltd. (1996), 1996 CarswellOnt 2831, 30 O.R. (3d) 304, 11 O.T.C. 292, 3 C.P.C. (4th) 360 (Ont. Gen. Div. [Commercial List]) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — referred to

Serwaczek v. Medical Engineering Corp. (1996), 13 O.T.C. 63, 1996 CarswellOnt 3182, 3 C.P.C. (4th) 386 (Ont. Gen. Div.) — referred to

Sparvier v. Canada (Attorney General) (2006), 2006 CarswellSask 765, 35 C.P.C. (6th) 110, 2006 SKQB 533, 290 Sask. R. 111 (Sask. Q.B.) — referred to

Sparvier v. Canada (Attorney General) (2007), 2007 CarswellSask 148, 2007 SKCA 37, 39 C.P.C. (6th) 133, 293 Sask. R. 54, 397 W.A.C. 54, [2007] 7 W.W.R. 682 (Sask. C.A.) — referred to

Tesluk v. Boots Pharmaceutical PLC (2002), 2002 CarswellOnt 1266, 21 C.P.C. (5th) 196 (Ont. S.C.J.) — referred to

Wamboldt v. Northstar Aerospace (Canada) Inc. (2009), 2009 CarswellOnt 3582, 72 C.P.C. (6th) 386 (Ont. S.C.J.) — referred to

Windisman v. Toronto College Park Ltd. (1996), 1996 CarswellOnt 2970, 10 O.T.C. 375, 3 C.P.C. (4th) 369 (Ont. Gen. Div.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 29(2) — considered

MOTION by plaintiff litigants for approval of settlement of class action and counsel fees.

***Perell J.*:**

A. Introduction

1 In a consolidated class action against Pfizer Canada Inc. and Pfizer Inc., the Plaintiffs, Jesse Voutour, Eiko Voutour, Portia Waheed, and Pardo Antonio Perrotta, bring a motion for: settlement approval, counsel fee approval, and incidental relief under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

2 The parties' Settlement Agreement seeks to resolve all Canadian litigation related to Bextra and Celebrex, which are drugs manufactured and distributed by the Defendants.

3 For the Reasons for Decision that follow and notwithstanding the objections of a few Class Members, including Timothy Moorley and Mrs. Rodriques-Trasvina, I approve the Settlement Agreement, approve the counsel fee, and grant the ancillary relief.

B. Factual Background

1. The Prologue to Claims against Pfizer Inc. and Pfizer Canada

4 Pfizer Inc. and Pfizer Canada Inc. manufactured and marketed the drugs Bextra and Celebrex, which are prescription, non-steroidal, anti-inflammatory drugs ("NSAIDs"), a class of drugs used for the treatment of inflammation and associated pain. They are known as selective COX-2 inhibitors.

5 On April 14, 1999, Celebrex was approved for the treatment of rheumatoid arthritis and osteoarthritis, and on May 28, 2002, it was approved for use in the treatment of familial adenomatous polyposis, a disease of the large intestine. On September 8, 2004, Celebrex was approved for the short term management of moderate to severe acute pain in adults.

6 On December 11, 2002, Bextra was approved for the treatment of acute and chronic adult rheumatoid arthritis and osteoarthritis and for pain relief related to primary dysmenorrhea.

7 On September 30, 2004, another pharmaceutical company's Cox-2 drug, Vioxx, was withdrawn from the worldwide market because of evidence of its cardiovascular risk, and on December 17, 2004, the U.S. National Cancer Institute announced the premature cessation of a trial of Celebrex due to an increased risk of cardiovascular events.

8 After the withdrawal of Vioxx and the cessation of the Celebrex studies, expert advisory panels were struck in both the U.S. and in Canada. On April 7, 2005, Health Canada asked Pfizer Canada to suspend sales of Bextra and to impose new restrictions on the use of Celebrex.

9 Health Canada's request was stated to be in response to "potentially life-threatening skin reactions" in the case of Bextra and an "increased risk of heart attack and stroke" in the case of Celebrex. It is to be noted that the reasons for the suspension of Bextra was not the same as the reason for imposing restrictions on the uses for Celebrex.

10 In April 2005, Health Canada also alerted the public and prescribing physicians to concerns about the cardiovascular safety of Celebrex and recommended its limited prescription. These concerns were incorporated into significant labelling changes for Celebrex and the concerns were also disclosed in a "Dear Doctor" letter in September, 2005 providing information about the drug's use.

11 In Canada, on December 16, 2005, Health Canada advised the public that Bextra would not return to the market.

12 Celebrex continues to be sold in the U.S., Canada, and elsewhere, although with the strongest form of black box warnings regarding its use.

13 Neither Health Canada nor the United States Food and Drug Administration have requested the withdrawal of Celebrex.

14 It is alleged that many users of Bextra and Celebrex suffered serious, medical problems as a consequence of their use of these drugs.

15 It is to be noted that given the state of scientific and medical knowledge, the Representative Plaintiffs confronted substantial problems proving the connection, if any, with the use of Bextra and Celebrex with any particular adverse medical condition, many of which could be explained be pre-existing conditions or other factors. Proof of causation would also be problematic because there was some evidence known to Class Counsel that suggested that any harmful effects from the drug would not occur if use of the drug stopped. These difficulties of connecting the drug use to various medical conditions are reflected in the Settlement Agreement and in the objections to it.

2. The United States Multi-District Litigation against Pfizer Inc.

16 In the United States, in multi-district litigation, Pfizer Inc. was sued for damages with respect to injuries allegedly suffered as a consequence of the use of Bextra and Celebrex.

17 In the United States litigation, the U.S. court made a finding that available scientific evidence did not support the conclusion that daily doses of 200 mg of Celebrex caused harm to patients. The court, however, was not prepared to make a similar finding with respect to daily doses of 400 mg of Celebrex. In any event, Pfizer Inc. and Pfizer Canada deny that Celebrex causes the harm as alleged by the Plaintiffs.

18 In the fall of 2008, Pfizer Inc. began settlement negotiations to settle the Bextra and Celebrex litigation in the United States.

19 A settlement was reached in the United States. Under that settlement, Pfizer Inc. reserved $745 million to settle all known personal injury cases, which were settled on an individual basis.

20 In the United States in excess of 7,000 individually filed claims were resolved. The average value of the settlements was $106,428 per claimant or $69,178 per claimant after the deduction of attorney's contingency fees.

3. The Canadian Class Actions against Pfizer Inc. and Pfizer Canada

21 Between 2004 and 2008, class actions with respect to Bextra and Celebrex were initiated across Canada; more particularly:

- In Québec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia, between October 12, 2004 and December 19, 2005, various plaintiffs commenced class actions against Pfizer Inc. and Pfizer Canada and others

with respect to Bextra or Celebrex. The Merchant Law Group was the lawyer of record in these various proposed class actions.

• In Ontario, on December 21, 2004, Portia Waheed commenced an action against Pfizer Inc. and Pfizer Canada Inc. with respect to Celebrex. The firm now known as McFadden, Samac, Touvi was the lawyer of record.

• In Ontario, on January 14, 2005, Pardo Antonio Perrotta commenced an action against Pfizer Inc. and Pfizer Canada with respect to Celebrex. The firm Rochon Genova LLP was the lawyer of record.

• In British Columbia, on January 24, 2005, Timothy Moorley commenced an action against Pfizer Inc. and Pfizer Canada. The firm of Poyner Baxter was the lawyer of record. That firm subsequently removed itself as lawyer of record, and Mr. Moorley is now a self-represented plaintiff and the proposed representative plaintiff in the British Columbia action. He has not taken steps to have his action certified, and in the case at bar, he is a Class Member and an objector to the settlement approval.

• In Alberta, on April 8, 2005, Eugene Laverty commenced an action against Pfizer Inc. and Pfizer Canada with respect to Bextra. The firm of McNally, Cuming Raymaker was the lawyer of record. There is agreement that this action will be discontinued on consent.

• In Ontario, on April 11, 2005, Jesse and Eiko Voutour commenced an action against Pfizer Inc. and Pfizer Canada with respect to Bextra. The firm now known as McFadden, Samac, Touvi was the lawyer of record.

• In Québec, on October 27, 2008, Union des Consommateurs, Diane Guay, and Micheline Labrie commenced an action against Pfizer Canada with respect to Celebrex. The law firm of Lauzon Bélanger Inc. was the lawyer of record.

22 McFadden, Samac, Touvi, Rochon Genova LLP, and the Merchant Law Firm agreed to co-operate and formed a consortium to prosecute various class actions, principally by advancing claims in Ontario and Québec. In October 2009, Lauzon Bélanger Inc. joined the consortium.

23 In the class actions of the consortium of law firms, the Plaintiffs allege that the Defendants were negligent in the manufacture and distribution of Bextra and Celebrex and that the proposed class members suffered damages. The Plaintiffs also advance a claim for waiver of tort and for punitive damages.

24 In the case at bar, the Plaintiffs allege that the drugs caused serious and life-threatening adverse reactions and that the Defendants knew or ought to have known of these risks and failed to warn Canadian consumers sufficiently or at all and failed to take appropriate steps related to the risks.

25 The Defendants vigorously deny that they committed any wrongdoing. They have not delivered statements of defence in the Ontario actions, and there have not been any examinations for discovery in the Ontario actions.

26 On August 25, 2011, the Ontario actions were consolidated and certified as a class action for settlement purposes.

27 It was a term of the Court's certification order that Collectiva Class Action Services Inc. ("Collectiva") be provisionally appointed Claims Administrator for opt-outs, coordination of the notice plan, and administration of objections. This appointment would continue as a matter of the incidental relief being requested on this settlement approval motion.

28 On August 30, 2011, the Québec action was authorized as a class proceeding for settlement purposes.

29 Pursuant to the Ontario Court's certification order of August 25, 2011, Deloitte and Touche LLP gave notice of the certification. As part of the notice program, it distributed 2,000 notices of certification for settlement approval. The notice program cost $394,906.75. Class Members were provided with the opportunity to complete claim forms.

30 The deadline for opting out was November 1, 2011. Fifteen persons opted out, but the Defendants elected not to exercise their tip-over rights under the Settlement Agreement. Subject to court approval, there is a binding settlement agreement. Should approval not be granted, the certification will be set aside and the proposed class action would resume with certification to be determined on a contested basis.

31 As at November 11, 2011, Collectiva had sent out 44 Claim Packages, received 32 Claim Packages, received 145 telephone inquiries, received 9 email inquiries, and noted that 369 people had signed up for updates regarding the Settlement Agreement via the settlement website.

32 As noted above, Deloitte delivered direct notices to 2,000 potential Class Members. For the purposes of this settlement approval motion, it should be noted that this group included anyone who had contacted Class Counsel relative to the two drugs in question for any reason, with the result that some of those notified were not Class Members.

33 It should also be noted that some of those notified did not suffer injuries during the class period. Others did not suffer Compensable Injuries as defined by the Settlement Agreement. Still others possibly had injuries caused by factors other than the two drugs that are the subject of the class action. Taking these factors into consideration, Class Counsel anticipates that there will be in the range of 90 compensable claims with an aggregate value of between $3.0 million and $4.0 million under the terms of the Settlement Agreement, which are discussed below.

4. The Settlement Negotiations

34 In November of 2008, settlement negotiations began in Canada. The negotiations included two sessions of a Court-supervised mediation in the summer and early fall of 2010. Justice Lacoursiere of the Québec Superior Court acted as judicial mediator. I know Justice Lacoursiere to be a talented and highly regarded jurist, and an experienced class action judge.

35 After prolonged negotiations, the parties reached an agreement in principle. It took another year for a formal agreement to be reached. The Canadian Bextra/Celebrex Settlement Agreement is dated August 23, 2011.

36 The Plaintiffs submit that a variety of factors associated with litigation risk were influential in the settlement negotiations and in structuring the scheme of the settlement. Class Counsel submits that while they were confident in the strength of the case against Pfizer Inc. and Pfizer Canada, significant liability risks were incorporated into the eligibility criteria and the compensation values under the Settlement Agreement. The litigation risk factors included:

- The evidence and the finding in the United States litigation indicated that causation of harm would be particularly difficult to prove for daily dosages of under 400mg.

- Bextra was withdrawn from the market on the basis of its association with adverse skin reactions, not cardiovascular risks.

- The withdrawal of Bextra from the market in April of 2005 and the announcements by Health Canada about cardiovascular risks associated with Celebrex reduced the Defendants' exposure to liability for a failure to warn and for injuries suffered after April 2005. The effective date for claims, however, was stretched to the end of 2005.

- The Defendants have vigorously contested liability, and among other things, they would rely on limitation period defences and the difficulties of proving causation. With respect to causation, there is the complication of commonly experienced co-morbidities that could be the explanation for the Class Members' injuries.

- Absent a settlement, the litigation would be protracted and difficult. There would be a contested certification hearing, an extensive discovery phase, and a lengthy common issues trial that would not be determinative in the sense that individual issue trials would still follow.

• Assuming success at a common issues trial, each Class Member would still need to prove that he or she consumed Bextra or Celebrex and consequentially suffered an injury and that that injury occurred before he or she ought to have been aware of the likelihood of risk.

• Each class member would also have to individually prove the quantum of damages.

5. The Settlement Agreement

37 The essential terms of the settlement agreement are as follows:

• Pfizer Inc. and Pfizer Canada pay $12 million to create a $12 million settlement fund. The settlement fund is to be used to pay:

• Compensation for Compensable Injuries and losses. (Compensable Injuries are defined, as described below, to particular types of injuries.)

• The claims of public health insurers.

• Class Counsels' fees, disbursements, and taxes, for which (as described below) $4 million is being sought plus disbursements of $212,068.87 plus applicable taxes.

• Costs for the notice plan, not to exceed $400,000. (As noted above, the actual cost was $394,906.75.)

• Costs for administering the settlement, not to exceed $250,000.

• Costs of the claims adjudicators.

• The distribution of payments to Class Members will not commence until after all claims have been determined or adjudicated.

• Class Members will submit claims packages to Collectiva within 180 days of the effective date of the settlement approval to be processed as follows:

• The Class Members will provide documentation to show use of the drug and a contemporaneous compensable injury. Notably, there is no causation analysis linking the use of the drug to the contemporaneous injury.

• Collectiva will contact Class Members about incomplete claims and then submit the complete claims to one of two Canadian physicians appointed by the Court (one of whom will be French-speaking), who will make a determination of eligibility within 30 days.

• Collectiva will advise the Class Member of the adjudicator's decision.

• Class Members will have 30 days to challenge and engage a process of documentary review by the Court, which review will be binding.

• Eligible class members receive compensation for Compensable Injuries, Income Loss Claims, Consumer Claims, and Derivative Claims, as follows:

• The payments for Compensable Injuries range from $5,000 to $100,000 depending on the Class Member providing documentary proof that he or she was prescribed Bextra and/or Celebrex and contemporaneously with the use of the drug, he or she suffered from one of a list of Compensable Injuries.

• To become entitled to recovery from the settlement funds, Class Members will, in most cases, need to present only documentary evidence in the form of pharmacy records evidencing the dispensing, purchase, or

prescription of Bextra and or Celebrex and medical records contemporaneous with the Class Member's use of Bextra and/or Celebrex that reflect the injury allegedly suffered from the use of the drug.

• Claims for fatal or non-fatal myocardial infractions or ischemic strokes are valued at $100,000 for use before January 1, 2006 of Bextra or for use before January 1, 2006 of 400 mg or greater daily doses of Celebrex.

• Claims for fatal or non-fatal myocardial infractions or for ischemic strokes are initially valued at $25,000 for use before January 1, 2006 of daily doses of Celebrex of less than 400 gm.

• Claims for severe cutaneous adverse reactions are valued at $50,000 for use of Bextra.

• Claims for other cardiac, renal, or vascular events are valued at $10,000 where there was drug use before January 1, 2006 of Bextra or use of 400 mg per day or more of Celebrex.

• As Derivative Claims, Family Class Members receive 10% of the value of the associated Class Member's Compensable Injury to a maximum of $10,000 for a single Class Member.

• The payments for loss of income are determined based on the difference between the Class Member's average net income in the three years before the Compensable Injury and the Class Member's average net income following the injury.

• The payment for the Consumer Claim of up to $300 as partial reimbursement for the cost of Bextra and/or Celebrex purchases is based upon submission of a Claim Package and the applicable product identification documentation.

• The net funds available to Class Members are notionally allocated: 70% for Compensable Injuries; 18% for Income Loss Claims; 7% for any additional notice costs and adjudication expenses; and 5% for Consumer Claims.

• If there are insufficient net funds for distribution to Class Members, then the amounts will be distributed *pro rata* within each notional allocation.

• If there is a surplus funds for distribution to Class Members, claims related to Celebrex at a daily dosage of less than 400 mg. will be increased *pro rata* up to their maximum value.

• Payment of $5,000 as an honorarium to the proposed representative plaintiffs in the Ontario and Québec actions.

• The costs associated with the Notice, all administration and adjudication costs, payments to public health insurers, as well as lawyers' fees and expenses are to be paid out of the fund.

• Any undistributed balance of the settlement fund is to be distributed *cy-près*. The funds will be divided between the Ontario and Québec actions based on the final compensation values for each jurisdiction. In Ontario, a cy-press will be made 45% to The Arthritis Society, 45% to Women's College Hospital Foundation and 5% to the Walrus Foundation.

6. Endorsement of the Settlement Agreement

38 All the Class Counsel involved in the class action endorse the Settlement Agreement, and they recommend that it be approved by the Court as fair, reasonable and in the best interests of the Class Members.

39 The Representative Plaintiffs believe that the Settlement Agreement is fair, reasonable and in the best interests of Class Members.

7. Opposition to the Settlement

40 Four Class Members filed written objections to the Settlement Agreement with Collectiva before the November 1, 2011 deadline to do so including an objection from Mr. Moorley. Two additional objections were filed after the deadline on November 16 and 17, 2011 that replicate Mr. Moorley's objection. The other objectors with timely objections were Serge Brochu, Gérard St-Germain, and Yanick Lavallée.

41 Mr. Jamie Trasvina attended the settlement approval hearing to make an objection on behalf of his mother who had used Bextra in 2004 and 2005 and suffered a heart attack and stroke in March 2006. It would seem that she will not be eligible for compensation under the proposed settlement.

42 With the exception of Mr. Brouchu, the objectors who objected before November 1, 2011 have chosen to remain as Class Members rather than opt out of the class action.

43 Serge Brochu and Gérard St-Germain object to the January 1, 2006 endpoint for the class period, which they suggest should be extended.

44 Mr. Lavallée's objects to the list of Compensable Injuries as being too narrow and as excluding his injuries.

45 The Trasvina objection was that the amount of compensation was insufficient and the exclusion of certain types of injuries; i.e. the restrictions on what was a Compensable Injury was unfair and unreasonable.

8. Mr. Mooreley's Objection

46 Mr. Mooreley's objection is the most detailed and extensive and includes an account of his life experience after using Celebrex. His story is distressing and sad. In 2003, Mr. Moorely was a semi-professional boxer and in excellent health. He was prescribed Celebrex to alleviate minor cramping in his feet. What followed after 2003 was the amputation of a part of his right foot, the discovery of a complete occlusion of his femoral artery, and the discovery of a hole in his heart, which Class Counsel suggested may be a pre-existing congenital condition.

47 Mr. Moorely says that he was negligently served by various doctors and hospitals and the misadventures included the alleged loss of his medical test records. He retained a British Columbia law firm to prosecute a class action, but his experience with the legal establishment appears to have been equally unfortunate, and he and his lawyers have parted company. They removed themselves from the record, and in his written objection, he is frank to say that he does not know the status of his action in British Columbia.

48 Mr. Moorely, who did not attend the settlement approval hearing, objects to the proposed settlement. He submits that the Defendants would not be successful at a trial. He characterizes the Defendants as notoriously negligent, as shown by Pfizer Inc. having been criminally prosecuted in the United States and having settled similar claims about dangerous drugs. He says that the Defendants have shown no remorse, and he submits that they should pay punitive damages for the harm they allegedly have caused.

49 Mr. Moorely submits that the settlement is deficient and will not achieve the aims of the tort system. He says that the amount of the settlement fund will be inadequate to pay the claims of Class Members. He notes that the claim as pleaded was for $1 billion plus punitive damages of $500 million.

9. Factual Background to Counsel Fee Application

50 The Representative Plaintiffs signed retainer agreements. The agreements all involve contingency fees, but the agreements differ.

51 The retainer with Portia Waheed provides for compensation on the basis of a percentage of 30% of the amounts recovered or on the basis of a 3 times multiplier, whichever is higher. The retainer with Pardo Antonio Perrotta provides for compensation on the basis of a percentage of 25% of the amounts recovered or on the basis of a 3 times multiplier,

whichever is higher. The retainers with Jesse and Eiko Voutour each provide for compensation on the basis of a percentage of the amounts recovered, namely, 25%.

52 To date, the consortium of Class Counsel have expended approximately 7,700 hours in prosecuting the class actions. A considerable amount of time was expended with respect to the variety of factors associated with litigation risks that are noted above.

53 In this last regard, I am satisfied that the decisions about litigation risk are informed and well-researched decisions notwithstanding that there has not been examinations for discovery in the class action.

54 The combined value of this unbilled time is $3,458,020.81 plus $307,221.92 in applicable taxes.

C. Settlement Approval

55 Under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

56 To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 68-73.

57 In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

58 When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at pp. 440 -44, aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372 (S.C.C.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8; *Kelman v. Goodyear Tire & Rubber Co.*, [2005] O.J. No. 175 (Ont. S.C.J.) at paras. 12-13; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 117; *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.) at para. 10.

59 A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (Ont. S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372 (S.C.C.).

60 In my opinion, having regard to the claims and defences in the litigation and the objections raised to the Settlement Agreement in the case at bar, the settlement proposed is fair and reasonable and should be approved.

61 The proposed settlement is within the range of reasonableness. Class Counsel, with their medical and science experts, have done considerable work and appear to have come to a fully-informed assessment of the likelihood of success and of the risks of failure in the litigation.

62 The Representative Plaintiffs confront Defendants that are a formidable foe and the litigation and the settlement negotiations, which had the benefit of an experienced class action judge, have been contentious and hard fought and the settlement agreement appears to reflect these difficult negotiations. There is nothing to suggest any collusion or that Class Counsel were less than resolute in seeking a settlement that they perceived as rational and fair and in the best interests of the Class Members.

63 The settlement has the benefits of settlements generally. It provides certainty of some recovery and it avoids the delays and uncertainties of pursuing a common issues trial to be followed by individual issues trials. For some Class Members, the settlement will achieve an immediate success that would have been at least delayed and might never have come, unless they had the resoluteness to prove causation at individual issues trials that would be several years away.

64 The allocation of damage awards for the Compensable Injuries, the definition of what are Compensable Injuries, and the temporal requirement connecting the drug to the injury are within the range of reasonableness and reflects the genuine difficulties the Class Members would confront if they were pressed by contested proceedings to prove a connection between particular ailments or conditions and the usage of the drugs.

65 Although as Mr. Moorely notes, it is a $12 million settlement of a $1.5 billion dollar claim as pleaded. The pleaded claim - as all too typically is the case - bears no rational relationship to the Defendants' genuine exposure to liability, and the pleaded claim does not account for the genuine risks of proving liability, including the difficulties of proving a breach of a duty of care and of proving causation of harm.

66 In the United States litigation, Pfizer Inc. settled claims on an individual basis, and the net return to an individual claimant was $69,178. In contrast, in the case at bar, eligible claimants will receive $5,000, $25,000, or $100,000 depending on the class member providing documentary proof that he or she was prescribed Bextra and/or Celebrex and contemporaneously with the prescription of the drug he or she suffered from one of a list of Compensable Injuries. Thus, under the Canadian settlement, it appears that the most serious claims would receive compensation comparable to that achieved in the United States. Using the United States litigation as some measure of what is fair and reasonable, the contrast suggests that the Canadian settlement is reasonable and fair. The proposed settlement has the advantage that for the Compensable Injuries, causation of harm is not a factor.

67 Based on Class Counsel's estimates, the settlement fund should be adequate to pay the eligible claimants without any reduction.

68 I appreciate that the proposed settlement does not provide compensation for all injuries that occurred to users of Bextra and Celebrex. However, the identification of compensable injuries is rational and reflects the considerable litigation risks that other types of injury could not be proven to have a link to Bextra or Celebrex usage. Similarly, the effective date of injuries occurring before the end of 2005 is rational and reflective of a genuine and serious litigation risk.

69 For the above reasons, I approve the settlement in accordance with the *Class Proceedings Act, 1992* and I grant the ancillary relief requested in the notice of motion.

D. Fee Approval

70 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Ont. Gen. Div. [Commercial List]); *Windisman v. Toronto College Park*

Ltd., [1996] O.J. No. 2897 (Ont. Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Ont. Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.).

71 Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Sask. Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (Sask. C.A.).

72 Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.); *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at paras. 59-61.

73 Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by Class Counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by Class Counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement: *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (B.C. S.C.); *Wamboldt v. Northstar Aerospace (Canada) Inc.*, [2009] O.J. No. 2583 (Ont. S.C.J.) at para. 33.

74 In my opinion, in the case at bar, the fees requested by the consortium of law firms are fair and reasonable. Put shortly, Class Counsel have earned their fees including what amounts to a quite modest premium above their hours and hourly rates for what was difficult and high-risk products liability litigation against a formidable foe that has not admitted liability.

E. Conclusion

75 For the above Reasons, I approve the Settlement Agreement, approve the counsel fee, and grant the ancillary relief. The formal order may be settled at a case conference.

Motion granted.

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Most Negative Treatment: Check subsequent history and related treatments.

1996 CarswellNfld 76
Newfoundland Court of Appeal

Briffett v. Gander & District Hospital Board

1996 CarswellNfld 76, [1996] N.J. No. 34, 137 Nfld. & P.E.I.R. 271, 29 C.C.L.T. (2d) 251, 428 A.P.R. 271, 61 A.C.W.S. (3d) 506

Dr. Phyllis Johnson (first appellant) and Dr. Myra Cooper (second appellant) and Glen Briffett (respondent)

Mahoney, Marshall and Steele JJ.A.

Heard: October 24, 1994
Judgment: February 19, 1996
Docket: 199/93, 223/92

Counsel: *Peter Browne*, for appellants.
Wayne Dymond, for respondent.

Subject: Torts; Public; Civil Practice and Procedure

Related Abridgment Classifications

Health law
IV Regional matters
IV.1 Hospitals
IV.1.c Liability of hospital
IV.1.c.i Negligence of hospital

Health law
V Malpractice
V.2 Negligence
V.2.a Types of malpractice
V.2.a.ii Failure to diagnose

Health law
V Malpractice
V.2 Negligence
V.2.c Standard of care

Health law
V Malpractice
V.2 Negligence
V.2.d Causation

Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.B Future loss of earning capacity

Remedies
I Damages
I.14 Valuation of damages
I.14.b Mitigation
I.14.b.viii Return to or pursuit of employment

Remedies
I Damages
I.14 Valuation of damages
I.14.i Deductions and collateral benefits
I.14.i.vi Statutory or government benefits

Headnote

Health law --- Physicians and surgeons — Malpractice — Standard of care — Locality

Health law — Physicians and surgeons — Malpractice — Standard of care — Locality — Plaintiff going to hospital after awakening with chest pains — Doctor misreading plaintiff's electrocardiogram as normal but keeping plaintiff in hospital for observation and further testing — Second doctor not examining plaintiff and not performing further testing as ordered by first doctor — Plaintiff being discharged — Plaintiff later being diagnosed as having had heart attack — Plaintiff bringing action in negligence against hospital doctors — Cardiologists testifying that defendants did not meet standard of care of average doctor — Defendants arguing that cardiologists not qualified to set standard of care for general practitioners — Cardiologists qualified as general practitioners before specializing — Cardiologists being qualified to testify as to standard of care for general practitioners in hospital emergency room.

Health law --- Physicians and surgeons — Malpractice — Causation

Health law — Physicians and surgeons — Malpractice — Causation — Plaintiff having pre-existing heart condition — Plaintiff going to hospital after experiencing chest pains — Plaintiff being misdiagnosed and improperly treated by defendant doctors — Plaintiff suffering heart attack — Experts testifying that heart attacks can be avoided when properly diagnosed and treated — Evidence supporting finding that plaintiff's heart attack could have been avoided — Evidence supporting finding that defendants' negligence caused damage to plaintiff's heart resulting from heart attack — Pre-existing possibility of heart attack not reducing defendants' liability for damages.

Damages --- Valuation of damages — Duty to mitigate

Damages — Valuation of damages — Duty to mitigate — Plaintiff being misdiagnosed and improperly treated by doctors — Plaintiff suffering heart attack as result — Plaintiff being unable to return to work as millwright but possibly able to perform sedentary work — Plaintiff's ability to generate future income highly speculative — Damages award not having to account for possibility of mitigation.

Damages --- Damages in tort — Personal injury — Prospective pecuniary loss — Effect of pre-existing condition

Damages — Damages in tort — Personal injury — Prospective pecuniary loss — Effect of pre-existing condition — Plaintiff with pre-existing heart condition being misdiagnosed and improperly treated by defendant doctors — Plaintiff establishing defendants materially caused his damage — Plaintiff's pre-existing condition not operating to reduce damages for loss of future income.

Damages --- Damages in tort — Personal injury — Collateral benefits — Statutory and government benefits

Damages — Damages in tort — Personal injury — Collateral benefits — Statutory and government benefits — Plaintiff establishing defendants liable in negligence for damages including loss of future income — Plaintiff's damages award not being reduced by Canada Pension Plan disability benefits received — Plaintiff's damages award including unemployment insurance benefits as future income — Premium-based programs constituting delayed remuneration for purpose of calculating damages awards — Canada Pension Plan, R.S.C. 1985, c. C-8.

The plaintiff, GB, went to the Gander hospital in April of 1987 after awakening with chest pains. Upon arrival, he was examined by Dr. J, one of the defendants. GB told Dr. J that he had been experiencing chest pains for a month and that his family doctor had prescribed heartburn medication for them. Dr. J reviewed GB's patient file and ordered that he be given an electrocardiogram. Dr. J read GB's electrocardiagram as normal and diagnosed GB as having inflammation of the joints in his chest. She prescribed an anti-inflammatory but directed GB to be kept in an observation room for a few hours, after which she ordered that more tests be done by the doctor on duty. GB remained in the observation room for two hours, after which the other defendant, Dr. C, ordered that GB be discharged without giving him the additional tests. GB returned home, where he stayed in bed for three and a half days, having shortness of breath and chest pain and being unable to walk without support. One month later, GB visited another doctor, who read the electrocardiogram taken at the hospital as abnormal and diagnosed GB as having had a heart attack, probably after leaving the hospital when he was home in bed. From April 1987 onward, GB did not work and was under medical surveillance.

GB brought an action against Dr. J and Dr. C, who were found liable in negligence. GB was awarded $441,000 for non-pecuniary damages, out-of-pocket expenses, and loss of income and future income. Dr. J and Dr. C appealed the finding of liability and the assessment of damages. They argued that the finding of negligence was not supported by the evidence and was based on an incorrect standard of care, and that even if there had been negligence, causation had not been proven. Dr. J and Dr. C argued that the damages assessed for lost income were not supported by the evidence, failed to consider the inevitability of GB's condition and his potential to mitigate, and improperly included unemployment insurance benefits while failing to discount GB's CCP disability benefits. GB cross-appealed on the assessment of damages.

Held:

The appeal and the cross-appeal were dismissed.

Both parties called medical experts to testify with respect to the issue of negligence. The record showed that both parties' experts agreed that Dr. J had misread GB's electrocardiogram, that Dr. J and Dr. C did not follow the correct procedures in respect of a patient with GB's symptoms and medical history, and that counsel for Dr. J and Dr. C conceded that GB had not received proper care. There was ample evidence on which to base the finding that Dr. J and Dr. C had been negligent. The legal standard of care required of doctors is that they exercise skill, knowledge and judgment consistent with the average of their group of physicians. The cardiologists who gave evidence on the standard of care to be expected of the defendants were qualified as general practioners before specializing, and were therefore qualified to testify as to the standard of care expected of the average general practitioner in a hospital emergency room.

The record showed that the medical experts called by the parties disagreed as to whether GB had suffered a heart attack before or after leaving the hospital, and thus as to whether a proper diagnosis at the hospital could have prevented the heart attack. However, the parties' experts did agree that if a person on the verge of a heart attack entered a hospital and was treated properly, there was a good chance of avoiding the heart attack. Therefore, there was sufficient evidence to conclude that the defendants' negligence caused GB's damages.

Once a plaintiff establishes that a defendant's negligence caused the plaintiff's damage, the plaintiff's pre-existing condition, which may have led to that damage in any case, does not operate to reduce the quantum of damages. As Dr. J and Dr. C materially contributed to GB's heart attack and his resultant total disability, GB's pre-existing heart condition was not relevant to the assessment of damages awarded against Dr. J and Dr. C.

Collateral benefits received by a plaintiff from a program into which the plaintiff paid premiums were delayed remuneration for the purposes of calculating damages for loss of future income. Thus, GB's Canada Pension Plan disability benefits should not be deducted from, and his unemployment insurance benefits should be included in, the damages awarded for loss of future income.

While actuarial calculations are the most reliable for determining future income, the global approach to damages may be used where the actuarial evidence is insufficient or unreliable or leads to an unfair result. Because of the lack of reliable past income assumptions, the trial judge correctly adopted the global approach with respect to GB's future income. The quantum awarded for loss of future income was supported by the evidence, considered all applicable principles, and was neither too low nor too high.

Substantial inability to perform all the duties of one's position is equivalent to total disability. The expert evidence ranged

from the opinion that GB could perform sedentary work in future to the opinion that he could not work at all, but all the experts agreed that he could no longer perform the work he had done in the past. The evidence supported the finding that he was totally disabled and and his future ability to earn income was doubtful. Therefore, the damages assessment did not have to account for possible mitigation of damages in future.

While GB's heart attack dramatically altered his lifestyle, there was no finding that the attack had severly reduced his appreciation of life. There was no basis to hold that the award of $40,000 for non-pecuniary damages was inordinately low.

Table of Authorities

Cases considered:

Alexander Enterprises Ltd. v. Dobbin (1987), 63 Nfld. & P.E.I.R., 194 A.P.R. 1 (Nfld. C.A.) — *considered*

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577, 19 N.R. 50, 8 A.R. 182, 83 D.L.R. (3d) 452 — *considered*

Bloudoff v. Dolezel (March 30, 1992), Doc. 25045/87 (Ont. Gen. Div.) [additional reasons at (July 9, 1992), Doc. 25045/87 (Ont. Gen. Div.), further additional reasons at (September 4, 1992), Doc. 25045/87 (Ont. Gen. Div.), affirmed (April 24, 1996), Doc. CA C12457 (Ont. C.A.)] — *considered*

Bradburn v. Great Western Railway Co. (1874), L.R. 10 Exch. 1 (U.K.), [1874-80] All E.R. Rep. 195 (U.K. Exch.) — *considered*

Cotic v. Gray (1981), 33 O.R. (2d) 356, 17 C.C.L.T. 138, 124 D.L.R. (3d) 641, 2 O.A.C. 191 (C.A.) — *applied*

Cunningham v. Wheeler, [1994] 4 W.W.R. 153, 88 B.C.L.R. (2d) 273, 20 C.C.L.T. (2d) 1, 2 C.C.P.B. 217, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1, 23 C.C.L.I. (2d) 205, *(*sub nom. *Cooper v. Miller (No. 1))* 164 N.R. 81, 41 B.C.A.C. 1, 66 W.A.C. 1 — *considered*

Dulieu v. White & Sons, [1901] 2 K.B. 669 (U.K.) — *considered*

Gill v. Canadian Pacific Railway, [1973] S.C.R. 654, [1973] 4 W.W.R. 593, 37 D.L.R. (3d) 229 — *applied*

Hotson v. East Berkshire Area Health Authority, [1987] 2 All E.R. 909, [1987] A.C. 750 (U.K. H.L.) — *applied*

Kolonel v. Kenny (1992), 98 Nfld. & P.E.I.R. 1, 311 A.P.R. 1 (Nfld. T.D.) — *considered*

Laferrière c. Lawson (1991), 6 C.C.L.T. (2d) 119, 123 N.R. 325, 38 Q.A.C. 161, [1991] R.R.A. 320 (headnote only), [1991] 1 S.C.R. 541, (sub nom. Laferrière v. Lawson) 78 D.L.R. (4th) 609 — *applied*

Lapointe c. Hôpital Le Gardeur (1992), 10 C.C.L.T. (2d) 101, [1992] 1 S.C.R. 351, 9 C.P.C. (3d) 78, *(*sub nom. *Lapointe v. Hôpital Le Gardeur)* 90 D.L.R. (4th) 27, *(*sub nom. *Lapointe v. Chevrette)* 133 N.R. 116, 45 Q.A.C. 262 — *applied*

Laurentide Motels Ltd. c. Beauport (Ville) (1989), 45 M.P.L.R. 1, 94 N.R. 1, [1989] 1 S.C.R. 705, 23 Q.A.C. 1 — *considered*

Lindal v. Lindal, [1982] 1 W.W.R. 433, 19 C.C.L.T. 1, 34 B.C.L.R. 273, 129 D.L.R. (3d) 263, 39 N.R. 361, [1981] 2 S.C.R. 629 — *applied*

M. (K.) v. M. (H.) (1991), [1992] 3 S.C.R. — *considered*

Nance v. British Columbia Electric Railway, [1951] 2 W.W.R. (N.S.) 665, [1951] 3 D.L.R. 705 (P.C.) — *applied*

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., [1961] 1 All E.R. 404, [1961] A.C. 388 (New South

Wales P.C.) — *considered*

Parry v. Cleaver (1969), [1970] A.C. 1, [1969] 1 All E.R. 555 (U.K. H.L.) — *considered*

Polemis v. Furness Withy & Co., [1921] 3 K.B. 560, [1921] All E.R. Rep. 40 (U.K. C.A.) — *considered*

Ratych v. Bloomer (1990), 30 C.C.E.L. 161, 3 C.C.L.T. (2d) 1, 69 D.L.R. (4th) 25, [1990] 1 S.C.R. 940, 107 N.R. 335, 73 O.R. (2d) 448 (note), 39 O.A.C. 103, [1990] R.R.A. 651 (headnote only) *(*sub nom. *Bloomer v. Ratych)* [1990] R.R.A. 651 (headnote only) — *distinguished*

Snell v. Farrell (1990), 110 N.R. 200, [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, *(*sub nom. *Farrel c. Snell)* [1990] R.R.A. 660 (headnote only) — *applied*

Stein v. "Kathy K" (The) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 — *considered*

Sucharov v. Paul Revere Life Insurance Co. (1983), 3 C.C.L.I. 114, [1984] I.L.R. 1-1732, 5 D.L.R. (4th) 199, 50 N.R. 144, 26 Man. R. (2d) 161, [1983] 2 S.C.R. 541 — *applied*

Taylor v. Hogan (1994), 119 Nfld. & P.E.I.R. 37, 370 A.P.R. 37 (Nfld. C.A.) — *applied*

Teno v. Arnold, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 19 N.R. 1, 83 D.L.R. (3d) 609 — *considered*

Thornton v. Prince George Board of Education, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 19 N.R. 552, 83 D.L.R. (3d) 480 — *considered*

Wilson v. Swanson, [1956] S.C.R. 804, 5 D.L.R. (2d) 113 — *applied*

Wilton v. Genik (June 26, 1995), Doc. 31363/88 (Ont. Gen. Div.) — *considered*

Statutes considered:

Canada Pension Plan, R.S.C. 1985, c. C-8

s. 8*considered*

s. 9*considered*

s. 44*considered*

Unemployment Insurance Act, S.C. 1970-71-72, c. 48 [R.S.C. 1985, c. U-1]

s. 51 [R.S.C. 1985, c. U-1, s. 37]*considered*

s. 53 [R.S.C. 1985, c. U-1, s. 39]*considered*

APPEAL from finding of liability in negligence and from assessment of damages reported at (1992), 103 Nfld. & P.E.I.R. 271, 306 A.P.R. 271 (Nfld. T.D.); CROSS-APPEAL from assessment of damages.

Judgment of the court delivered by *Marshall, J.A.*:

1 This appeal is taken by Drs. Phyllis Johnson and Myra Cooper against a finding of liability in negligence for damages by a Trial Division judge in respect of their diagnoses and treatment of Mr. Glen Briffett whilst he was a patient at the James Paton Memorial Hospital in Gander. They are also appealing the subsequent assessment of damages, totalling $441,000.00, for non-pecuniary damages, "out-of-pocket" expenses and loss of earnings and earning capacity. Mr. Briffett is also

contesting the assessment by way of counter-appeal in which he complains that the amounts awarded in respect of his income and non-pecuniary losses were not adequate to fairly compensate him for these damages.

The hospital visit and treatment

2 Early in the morning of April 9, 1987, Mr. Briffett was driven to the Gander hospital from his residence in Glovertown, some 65 to 75 kilometres away, where he had awakened with chest pains. He was attended at 5:10 a.m., some fifteen minutes after his arrival, by Dr. Johnson who proceeded to determine the history of her patient's complaint and examined him.

3 With the aid of the clinical record obtained from his original chart, Dr. Johnson acknowledged, over five years later in her testimony at the trial, that Mr. Briffett had described himself to her as having experienced a one and one-half month period of severe, almost constant, chest pains "like really bad heartburn" which made his chest sore "from one armpit to another". The same record also confirmed to Dr. Johnson she had been told by Mr. Briffett that he had contacted Dr. Graham Worrall, a family physician practising in his home town, about those complaints during this period of his discomfort. In fact, he apprised her that he had paid Dr. Worrall a visit during the previous day and received a prescription for "cimetidine". The evidence revealed that this medication was prescribed as a result of the local doctor's diagnosis "of having heartburn caused by stomach acid rather than heart pain or chest wall pain".

4 Dr. Johnson's notation upon an x-ray requisition confirmed her awareness that Mr. Briffett had a type of "hyperlipoproteinemia" which, in lay terms, signifies a presence of fatty substance in the blood stream tending to impede free circulation. The same notation also confirmed that she had been made aware that her patient's chest pain increased with activity.

5 The judge concluded from the evidence that Dr. Johnson had gained "a rather thorough personal and family history" from Mr. Briffett's patient files and from her own inquiries of him. This was noted by the judge to include knowledge that this thirty-three year old patient whom she was examining was a smoker, had a high cholesterol level and had been prescribed medication for some intestinal complaint on the previous day by the medical practitioner in Glovertown.

6 In fact, when she saw him, Dr. Johnson requested a nurse to give "Mylanta" to Mr. Briffett. She explained she did this "because that's the drug that would have helped if indeed it was heartburn that was causing the problem". From the vantage point of the foregoing background information, Dr. Johnson then proceeded to examine Mr. Briffett. This included a physical examination of his person and a reading of the results of an electrocardiogram which had been taken after his arrival at the hospital by nursing personnel.

7 Mr. Briffett showed no signs of palpitations, tachycardia, fever or chills. His pulse and blood pressure were normal. The sounding of his chest was clear. Dr. Johnson read the E.K.G. as being normal. In short, her examination of Mr. Briffett signalled nothing untoward to her with the exception of chest tenderness which was located at the junction of her patient's ribs and breast bone.

8 Dr. Johnson's appraisal of the foregoing information led her to a working diagnosis of "costochonditis", i.e., inflammation of the joints between Mr. Briffett's ribs and serum, or breast bone. This resulted in her prescribing "entrophen", a coated aspirin, as an anti-inflammatory medication. As her diagnosis was not definitive, she directed that her patient be kept in the observation room of the hospital's emergency department until 8 a.m. when she ordered that he was to have a chest x-ray and blood testing and to be seen by the casualty medical officer who was scheduled to have relieved her by that time. The evidence establishes that Dr. Johnson's assessment of Mr. Briffett terminated at 5:35 a.m. and there was no indication of her seeing him afterwards.

9 Mr. Briffett testified that he remained "curled up on the bed" from that time until approximately 7:45 a.m. During this period of two hours or so he claimed to be experiencing pain which he described as "a hard pain for probably a couple of minutes and then (it would) simmer away to just a burning pain for how long I'm not quite sure". However, he did not call for any of the nurses because he was waiting for the drugs to have effect. While he was apparently unaware of any of the hospital personnel looking in on him during that period, the trial judge accepted the evidence of the nursing staff on duty at the time that he would have been observed by them on occasions during his sojourn in the observation room. In fact, this finding receives corroboration from Mr. Briffett's testimony which indicates that the notation by the nursing staff that the

patient was again experiencing pain resulted from his complaint to a nurse who visited him between 7 and 8 o'clock inquiring as to "how I was feeling".

10 Shortly after registering this complaint, the blood work was done and the x-ray was taken, in fulfilment of Dr. Johnson's instructions. After returning from the x-ray department, he was seen by Dr. Cooper, the incoming casualty officer relieving Dr. Johnson. In contrast with Dr. Johnson, Dr. Cooper did not testify at trial. The trial judge relied upon the uncontradicted evidence of Mr. Briffett as to what transpired when Dr. Cooper arrived at his bed side.

11 Mr. Briffett stated that when he returned to his bed from the x-ray department shortly after 8 o'clock, Dr. Cooper entered his room, introduced herself and inquired how he was feeling. He replied that he was still experiencing intermittently hard chest pains followed by a burning sensation which were more or less constant. He recounted that Dr. Cooper responded that she was going to go along with Dr. Johnson's diagnosis of "costochranditis". When he asked her to explain, he states that she described it as an inflammation of the chest cavity.

12 Mr. Briffett indicated that he disputed that diagnosis by stating that he thought "it's my heart or lungs". He recounted that she then responded by suggesting it might be arthritic pain. The following represents the record of the ensuing conversation between them according to Mr. Briffett's uncontradicted version of it:

> ... I said, no, it's definitely not, arthritis is not so painful as this and with that she didn't like my comment for some reason or another. She said you mean to think that arthritis pain is not hard too. I said I don't know, but I said this is not arthritis. And with that she left.

13 Mr. Briffett then describes Dr. Cooper as going into a room or office nearby. Two or three minutes later he was visited by a nurse who advised him that Dr. Cooper had advised that he must get out of bed as it was needed for another patient. Mr. Briffett did as he was told and got out of bed, dressed and was proceeding to leave via the hospital corridor when Dr. Cooper called him back and gave him a prescription for entrophen. He then proceeded to the lobby where he called his wife and left the premises after her arrival an hour or so later.

14 It should be noted that Dr. Cooper's sole involvement with Mr. Briffett was apparently the foregoing interaction with him, which he described as lasting approximately five to ten minutes. Mr. Briffett stated that Dr. Cooper conducted no physical examination of him. Neither was further blood drawn from him for testing nor an additional E.K.G. requested.

Events subsequent to the hospital visit

15 After filling the enthropen prescription at a pharmacy in Gander, Mr. and Mrs. Briffett returned home to Glovertown. From there a Dr. Robbins was contacted because of continuing pain which Mr. Briffett was undergoing. Following a visit to Dr. Robbin's clinic and a recounting of his recent medical consultations relative to his condition, the doctor prescribed demerol and advised his patient to go back to the hospital in Gander if that medication did not ease the pain.

16 Mr. Briffett filled that prescription and returned home. He recounted that during that evening of April 9, 1987, "the pain stuck in and stayed" for three and a half days during which time he stayed in bed taking the demerol. During this period he testified to having shortness of breath and tenderness around his chest as well as having to support himself on furniture and the walls whilst navigating bathroom visits. When the persistent pain subsided on April 12th he sought and obtained, on the recommendation of third parties, an appointment for approximately one month hence with Dr. Forward who carried on a general practice in Gander. Dr. Forward referred Mr. Briffett to Dr. Jeff Hiscock, an internist at the James Paton Memorial Hospital.

17 The ensuing medical assessment was not, however, Dr. Hiscock's first professional involvement with Mr. Briffett's health problems. Hospital procedure required E.K.G.'s to be read by an internist. As a result, the electrocardiogram taken after Mr. Briffett's arrival at the James Paton Memorial Hospital on April 9, 1987, and which Dr. Johnson had interpreted at that time as normal, had been routinely sent to Dr. Hiscock's department in that institution for the specialist's interpretation. In his report dated April 13, 1987, the internist notes that the E.K.G. showed signs of possible myocardial "ischemia", which describes heart disease from insufficient blood supply to coronary muscle. The result was such that Dr. Hiscock requested a

"further report" in view of the "patient's age".

18 That recommendation was not acted upon. It was normal practice for a copy of such a report to be remitted to the physician who had attended the patient concerned. However, Dr. Johnson testified that she had no recollection of receiving it. Nevertheless, in retrospect on the witness stand she openly conceded that, she did not then share the opinion which she had formed on April 9, 1987, that the E.K.G. was "absolutely normal".

19 Instead, now recognizing the E.K.G. showed the irregularity identified by Dr. Hiscock, she acknowledged that the tracing did show indicia of abnormality. With admirable and forthcoming candor she explained her change of opinion by volunteering to the court: "(r)ight now I have six years of experience in the Emergency Department reading E.K.G.'s and at that time I had six month's experience". Later in her testimony she also acknowledged that she "would probably have repeated the E.K.G. in the morning", had she realized the one taken on Mr. Briffett's arrival at the hospital was abnormal.

20 When he saw Mr. Briffett at Dr. Forward's request, Dr. Hiscock was, of course, privy to that E.K.G., as well as a previous one that had been remitted to him by Dr. Worrall and which had been taken on March 25, 1987, during an earlier visit by Mr. Briffett to his family practitioner's office in Glovertown. In his consultation report back to Dr. Forward dated May 26, 1987, both of these E.K.G.s were mentioned and the internist observed that the second one, which Dr. Johnson originally assessed as normal, contained detrimental changes from the tracing in the first electrocardiogram. On the basis of this observation, together with his physical examination of Mr. Briffett and of his family history of heart disease, Dr. Hiscock concluded that "(p)otentially, this gentlemen may have angina". He advised Dr. Forward that he was advancing the date that Dr. Forward had obtained for a stress test of Mr. Briffett, noting that should it not be "unequivocally normal", their patient would require coronary angiography, i.e., a test to show in detail the extent of any heart disease.

21 The need for angiography must have become immediately apparent because on the same day, Dr. Hiscock wrote to Dr. Eric Stone, an associate professor of cardiology at Memorial University, who maintained a private consulting practice in St. John's, requesting the test be performed as soon as possible. In his letter to Dr. Stone, Dr. Hiscock mentioned the earlier E.K.G.s and the changes in the one taken on April 9th. He also sent along the results of Mr. Briffett's stress test, which had been taken that day, and observed that it showed evidence of new damage. He observed that at a point in the test Mr. Briffett experienced the onset of pain which progressed and was associated with shortness of breath. Dr. Hiscock also advised Dr. Stone that he had provided Mr. Briffett with medication and nitroglycerin and nitropaste. As a result of his assessment, he had advised Mr. Briffett "to stop working entirely".

22 As a result, Mr. Briffett was admitted on July 6th, 1987, to the Health Science Centre in St. John's as a patient of Dr. Stone. From the angiography and other investigative measures undertaken under his direction, Dr. Stone concluded that Mr. Briffett had had a heart attack and was a poor candidate for either surgery or angioplasty.

23 As to the coronary seizure, while Dr. Stone stated in his testimony that an electrocardiogram that was given to Mr. Briffett on his admission to the Health Science Centre afforded fairly obvious evidence that he had suffered the attack, the cardiologist was equally explicit in asserting that his patient's E.K.G. that had been earlier obtained at the James Paton Memorial Hospital on April 9th did not show the heart attack which was evident subsequently in July when he was seen in St. John's. Consequently, in his ensuing testimony. Dr. Stone is recorded as asserting:

> ... my interpretation of the events was that he had gone to hospital in Gander with pre infarction angina in other words he was leading into a heart attack, had settled down, had gone home and by his account of much more severe pain after he had gone home, actually had the heart attack then and subsequently wound up with Jeff Hiscock and myself and so on.

24 Under cross-examination the specialist elaborated by acknowledging that the precise time of the attack could not be pin-pointed and by evoking the possibility of it having started before or during his stay in the emergency department in the hospital in Gander on April 9th. He expressed this view in the following words:

> ... nobody can say with absolute certainly when this man had his heart attack. All you can say is that he was set up for it and in the process of it or heading toward it from the time he got out of bed and was finished up four days later, that is what you can say about it.

25 With respect to Mr. Briffett's restricted prospects for surgical intervention, in discharging his patient with a diagnosis of "ischemic heart disease", Dr. Stone noted in his report that his patient was a very poor candidate for either surgery or angioplasty "because of the diffuse multivessel coronary disease". Although Mr. Briffett might be reconsidered for these procedures if he should become totally disabled by angina despite maximal drug therapy, Dr. Stone's discharge report cautions that the results of either of these measures "would likely be much less than optimal".

26 Mr. Briffett has not worked at his chosen occupations of millwright and fox farmer since developing his heart condition in the spring and summer of 1987 and has been under medical surveillance. Attributing his situation to medical malpractice, Mr. Briffett launched the action grounded in negligence that is the subject of this appeal against Drs. Johnson and Cooper as well as Drs. Worrall and Hiscock and the Gander and District Medical Board. The claim against Dr. Hiscock was withdrawn prior to trial. Those against Dr. Worrall and the Board were dismissed in the trial judge's decision wherein he found Drs. Johnson and Cooper negligent in their diagnoses and treatment of Mr. Briffett. These physicians are now appealing this decision.

The finding of liability

27 After reviewing Dr. Johnson's performance in the emergency department of the James Paton Memorial Hospital on April 9, 1987, the trial judge concluded that the standard of care provided that morning by her to Mr. Briffett "fell short on the balance of probabilities" of that required of a reasonably competent physician with her training. The findings upon which this conclusion was based, and which had been derived from expert medical testimony adduced at the trial, had shortly before been summed up by the trial judge as follows:

> ... the appropriate and the acceptable course of conduct for Dr. Johnson on the morning in question was to have taken repeat E.K.G.s; to have placed the plaintiff on an intravenous line and to have done several CPKs. Considering the history of the patient and his family this, I believe, was the minimal standard of patient care.

28 To these oversights, the trial judge added the failure to admit Mr. Briffett to the hospital's coronary care unit which he found to be another "prudent course of action" which Dr. Johnson failed to follow. Having so identified her negligence, the judge turned to Dr. Cooper's treatment of Mr. Briffett.

29 With respect to Dr. Cooper, the trial judge said:

> It appears rather obvious that the standard of patient care given by Dr. Cooper to the plaintiff falls far short of that expected of a normally prudent competent physician. There was obviously a duty on Dr. Cooper to at least reassess the plaintiff as requested by Dr. Johnson. While there is little evidence to go on, it seems rather clear that the doctor's involvement with the plaintiff could hardly be referred to as a medical re-assessment. It was perfunctory, almost to the point of being curt ....

30 Just before making these observations the judge had characterized Dr. Cooper's attendance upon Mr. Briffett as "very casual", "painfully brief" and not "too cordial" which resulted in him being requested to move out of the bed for another patient. Having observed the superficial and terse nature of Dr. Cooper's interaction with Mr. Briffett, the trial judge continued in the foregoing passage to comment:

> ... It does not appear that he was ever given another examination; there is no evidence of any additional blood work being done; there is no evidence of an additional E.K.G. being done; he was not admitted to the CCU; he was not even allowed to remain where he was to rest. He had already told Dr. Cooper that he was suffering from hard pains. I draw little comfort from the fact that Dr. Cooper belatedly gave the plaintiff a prescription for Entrophen. This is almost tantamount to telling a patient at the other end of a telephone line to "take two aspirins and call me in the morning".

31 In addressing the actions of both doctors, the trial judge voiced the view that "this is a classic case of someone slipping

between the cracks in the system".

32 Having attributed negligence to Drs. Johnson and Cooper, the judge turned to the issue of causation raised in their counsel's assertion that the failure of his clients to take further steps would not have prevented the heart attack or minimized any of the physical damage visited upon Mr. Briffett. The judge commences by observing that the law does not require causation to be determined by scientific precision but on the basis of probabilities taking into account all of the evidence. He then proceeds to discuss the expert evidence bearing on this aspect of the matter, noting that both cardiologists, respectively testifying at the instigation of the doctors and the patient, agreed that the prudent course on April 9th, 1987, would have been to have admitted Mr. Briffett to the coronary care unit. After comparing the similarities and differences in the specialists' evidence, he concluded that Mr. Briffett:

> ... should have been placed in the CCU and all of the medical techniques and treatments should have been utilized .... I believe that the treatment received by the plaintiff, or the lack of it, resulted in significant damage to the plaintiff's heart necessitating cardiac catheterization and coronary angiography.

33 The challenges of Drs. Johnson and Cooper to this finding of liability will now be addressed before moving on to their appeal against the level of damages subsequently assessed.

Failure to support findings

34 Counsel for the appellant physicians argues that the trial judge erred by failing to adequately support the findings upon which his conclusions attributing liability were based. He points out that the primary thrust of the litigation turned on evidence of two cardiologists, namely: Dr. Stone and Dr. Calvin MacCallum, testifying at the behest of Mr. Briffett and the appellant physicians respectively. Like Dr. Stone, Dr. MacCallum is an associate professor of medicine at Memorial University and practising his specialty in St. John's, mainly at the Health Science Center.

35 In fact, the challenges advanced by counsel to the imposition of liability upon Drs. Johnson and Cooper center primarily upon the judge's reception of the cardiologists' evidence. Counsel lays particular emphasis upon two aspects of the judge's appraisal of their testimony. Firstly, he takes issue with the judge's acceptance of Dr. Stone's theory as to the timing of Mr. Briffett's heart attack, claiming it to be contrary to "overwhelming evidence" presented at trial. Secondly, counsel lays stress upon alleged misapprehension of the established facts by the judge as to what measures Drs. Johnson and Cooper could have taken to prevent the coronary damage, even if Mr. Briffett had been admitted to the coronary care unit that morning. These contentions relate to the principal ground upon which the finding of liability is contested in this appeal, i.e. causation, and will mainly be discussed in that context.

36 However, the claim that the trial judge failed to indicate or adequately support his findings has also been advanced as a general complaint respecting his decision. To support his premise that a judge at first instance is obliged to do so, counsel enlists the following commentary from the judgment of L'Heureux-Dubé, J. In *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705 at p. 799:

> If it happens that the trial judge neglects to indicate his findings in this respect or does not adequately support them, then it may be that an appellate court has to form its own conclusions.

37 These words cannot be construed as an open mandate justifying the substitution of appellate findings for those made at first instance merely because of the absence of explicit linkage of specific elements of the proof to the conclusions drawn in a trial proceeding. The restrictions upon an appeal tribunal forming its own views as to the credibility of witnesses and the factual underpinnings upon which the legal issues are to be addressed are well established. *Laurentide* does not purport to expand these parameters. It is obvious from the context of the passage in which they were uttered that the foregoing comments contemplate that the asserted appellate power to "form its own conclusions" is circumscribed by judicial deference historically accorded to the trial judge's unique advantage in making factual findings. This deference to the tribunal of first instance extends, not only to ordinary witnesses, but also to experts such as the two cardiologists who testified in this matter (see *Lapointe c. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 per L'Heureux-Dubé, J. at p. 358).

38 Stemming out of this recognition of a trial judge's unique position comes the oft cited concomitant rule that his or her factual findings may not be reversed on appeal unless it can be established that there was "some palpable and overriding error" which affected his or her assessment of the facts. (*Stein v. "Kathy K" (The)* (1975), 62 D.L.R. (3d) 1 (S.C.C.) per Ritchie, J. at p. 5). This means where the alleged error, as in the case at bar, is one of failure to adequately support findings, the omission must be shown to be palpable and overriding in order for the appellate court to draw its own conclusions as to the facts.

39 Moreover, in addressing such alleged errors of omission, it is also important to bear in mind that a trial judge does not have to mention explicitly each element of proof in his or her judgment, but is deemed, in the absence of demonstration to the contrary, to have appreciated the evidence adduced at trial. This being the case, it is not enough for the appellant merely to show that relevant elements of the evidence were not referred to in the impugned judgment. It must also be shown that the record does not contain evidence which could support the challenged findings. This means that the ultimate question is not so much whether the recorded decision omitted mention of evidence which might be enlisted as militating against the findings expressed in the judgment, but rather whether there was such a dearth of evidence to support them that the omission could only be viewed as a manifest and palpable error.

40 Considered against this background of legal principles, counsel's claim that the judge failed in the case at bar to adequately support his findings must be rejected. In fact, the impugned judgment represents a full and careful analysis and treatment of the evidence, including the sometimes divergent medical opinions. Even if certain elements of proof could be shown to be absent from the trial judge's reasoning, an examination of the transcript shows that there was quite sufficient evidence that could be reasonably accepted by a trier of fact as countervailing contrary fact and opinion and upon which he could base his findings. In such circumstances judicial deference comes into play and the law is clear: - with the record of the trial proceedings affording support for the presiding judge's findings, no palpable or overriding error exists which would authorize this Court forming its own conclusions on the facts.

41 Further reference will be made to the specific areas where counsel claims the trial judge exhibited an imperfect appreciation of the evidence as this decision now turns to address the appellant physicians' complaints that the judge erred in attributing fault and causation to their actions. However, those issues should be treated on the footing that, as a general proposition, their counsel's claim that the judge failed to indicate or adequately support his findings is unsustainable.

The question of fault

42 In his attack upon the judge's findings that his clients' conduct was negligent, counsel for the appellant physicians maintains that two errors were committed. Firstly, he claims there was a misapprehension of Dr. Stone's evidence which led the trial judge to hold that Drs. Johnson and Cooper could reasonably have prevented Mr. Briffett's heart attack. Inasmuch as this effectively amounts to asserting that the significant damage to Mr. Briffett's person did not result from the actions of these physicians attending him in the hospital's emergency department on the morning in question, this allegation will be considered in discussing the issue of causation. The second objection to the attribution of fault centers upon the standard of care from which the trial judge found the attending physicians to have fallen short.

43 Counsel takes no issue with the general legal standard which the judge defines as applying in medical malpractice actions. He acknowledges that the judge correctly identified that the legal standard of care required of doctors is that they exercise towards their patients the skill, knowledge and judgment of the average of their group of physicians. This concession was apt and is in concert with the general test set down by the Supreme Court of Canada in the frequently referenced case of *Wilson v. Swanson* (1956) S.C.R. 804 per Rand, J. At p 811.

44 Counsel's complaint lies not with the judge's appreciation of the standard exacted by the law but in his application of it. Thus, counsel maintains that the judge incorrectly inferred that his clients did not provide the care required of reasonably competent physicians with their training, in the absence of supporting evidence as to the standard expected of the average of the medical group within which his clients fell. To this end, he argues that the only medical evidence before the court as to the level of care to be expected from general practitioners of their training in these circumstances was elicited through the cardiologists and a Dr. McVicker, none of whom, in his view, were capable of giving the judge a basis to define the requisite norm. In short, it is being contended that in effect there was no standard before the court against which to assess the conduct

of the appellant physicians.

45 At the date of his testimony, Dr. McVicker was an emergency room physician working full time as a casualty officer at the G.B. Cross Hospital in Clarenville. He had graduated from medical school in 1989, some two years after the incidents with which this appeal is concerned. Although in the interim the doctor had pursued post graduate studies in emergency medicine, the trial judge's acceptance of him as an expert witness was qualified. Stating that he had no difficulty accepting Dr. McVicker's evidence on what he knew of current practice, he declined to accept his opinion on the standard of care that patients in Mr. Briffett's position were entitled to expect in hospital emergency departments in 1987. The trial judge explained that this was because, not only was the witness not a casualty officer in 1987, but neither had he graduated from medical school. No exception is taken with this ruling. However, counsel for Drs. Johnson and Cooper complains that, notwithstanding it, the trial judge placed full weight upon the opinion of this witness's testimony in making his determination of the standard of care expected of his clients.

46 This complaint cannot be sustained. It is true that the judge, in concluding that Dr. Johnson's care of Mr. Briffett fell short of the standard to be expected from a reasonably competent physician of comparable training, expressed himself to be so satisfied "(o)n an examination of all of the evidence". It is equally true that in his preceding discussion of that evidence, the judge, in several instances, mentions Dr. McVicker's views in tandem with those of the cardiologists. However, on a full reading of the decision, it is obvious that the judgment's pre-occupation was with the cardiologists' testimony. Indeed, this emphasis on the trial judge's part was openly recognized by counsel for the appellant physicians when, in his opening remarks in presenting his argument from the well of the court, he noted that the thrust of the case revolved around the evidence of the two cardiologists, i.e. Drs. Stone and MacCallum. Thus, the claim that the judge set the standard on which he judged the impugned medical conduct on the opinion of Dr. McVicker must be rejected.

47 Counsel's objection to the use of the cardiologists' evidence to establish the average standard against which the appellant doctors' conduct was measured is that, not being in general practice, these specialists were not in a position to offer expert testimony as to the relevant norm. In relying on their testimony, he argues, the court was subscribing to a higher standard than what should have been properly prescribed for a general practitioner.

48 However, this contention is untenable. Both specialists, having been trained as general practitioners before acquiring their specialty, and being members of the faculty teaching student doctors, could be considered well versed in what should be expected from average general practitioners in the proper care of patients with potential heart problems in hospital emergency units in 1987. There is no reason why Drs. Stone and MacCallum should be regarded as other than qualified to voice opinions on what should have been the level of skill, knowledge and judgment expected from average casualty officers in the position of Drs. Johnson and Cooper in diagnosing and treating patients with signs of coronary problems, such as Mr. Briffett presented. The trial judge was not, therefore, in error in receiving these cardiologists' evidence as to the appropriate standard of care.

49 The transcript shows Drs. Stone and MacCallum to have been in substantial agreement as to the appropriate standard of care for reasonably competent physicians standing in the shoes of Drs. Johnson an Cooper on the morning in question and as to their failure to meet that standard in their care of Mr. Briffett. Both stated that the patient's complaints of pain and his history provided a profile of major risk factors for heart disease. Each felt that Mr. Briffett was misdiagnosed and should have been admitted to the hospital's coronary care unit. They also agreed that a follow-up E.K.G. and blood tests were in order.

50 In fact, the only material discernible difference in the testimony of the two specialists relating to this question of negligence is that Dr. MacCallum appeared more inclined to offer explanation for the fault of the appellant physicians. Thus, he spoke of the difficulty in diagnosing heart attacks, stating that up to 20% of them will be missed by general practitioners and pointing out that as a cardiologist "the ability ... to understand chest pain is a full time job for me". He then discussed aspects of Mr. Briffett's situation and symptoms which might have served to confuse the doctors attending Mr. Briffett. However, this commentary serves only as an explanation for the negligence and not a justification for it. There is no doubt that the two cardiologists were at one insofar as the appropriate standard of care was concerned and that Drs. Johnson and Cooper fell short of it.

51 Moreover, as is noted in the foregoing resumé of the circumstances, Dr. Johnson openly acknowledged that she had

misread as normal the E.K.G. taken after Mr. Briffett's arrival and that she would probably have repeated it had she realized the test showed an irregularity. In Dr. Cooper's case, the trial judge appears to have considered her negligence as the greater inasmuch as he concluded that the care provided by her to Mr. Briffett fell "far short" of that required of a physician of her training, whilst Dr. Johnson fell merely "short" of that mark. The difference in degree is evidently attributable to her failure to re-examine the patient and re-assess the working diagnosis. Instead, the uncontradicted evidence led the judge to conclude that Dr. Cooper's involvement with Mr. Briffett was "perfunctory" and almost "curt" after he disputed the diagnosis of Dr. Johnson and Dr. Cooper's ensuing suggestion of arthritis pain. Thus, the admission of one physician and the uncontradicted actions of the other, provide support apart from the testimony of Drs. Stone and MacCallum for the finding of negligence.

52 Finally, it should be noted that counsel for Drs. Johnson and Cooper conceded at one point in his oral argument that his clients had been negligent. This came when addressing the issue of causation where he candidly acknowledged his inability to dispute that Mr. Briffett had not received proper care and should have been placed in the coronary care unit. However, he was quick to point out that this departure from the standard of care should only entitle Mr. Briffett to damages for pain and suffering since, as will presently be discussed, he contests that the deficient treatment caused the heart damage, which he characterizes as unavoidable. He did, however, concede that an appropriate standard of care was lacking and that Mr. Briffett should receive some damage for the pain and suffering which could have been mitigated during his heart attack if he had been given access, as he should have, to the palliative measures then available in the coronary unit.

53 In the result, the contention that the trial judge erred in attributing fault to Drs. Johnson and Cooper in their care of Mr. Briffett must be rejected. The judge made no error in law as to the standard of care to be expected of them and there was ample support for his finding that they had fallen short of it. It remains to consider his decision to impose liability upon them from the perspective of causation.

The issue of causation

54 In order to recover damages for negligence, a causal link must be established between the negligent conduct and the damage. Counsel for the appellant physicians claims error in the trial judge's holding that his clients' actions must be deemed to have resulted in significant damage to Mr. Briffett's heart.

55 As in the trial judge's analysis of the failure to meet the standard of care, counsel for Drs. Johnson and Cooper does not contend that the judge addressed this issue of causation upon wrong legal principles. This concession is equally apt as the judgment follows closely the principles laid down in *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Laferrière v. Lawson*, [1991] 1 S.C.R. 541. This Court has recently had occasion to apply the principles enunicated by *Snell* in *Taylor v. Hogan* (1994), 119 Nfld. & P.E.I.R. 37 at pp. 47-48. Further, reference to that authority is useful in the present appeal.

56 *Snell* deals with proof of causation in medical malpractice cases. In that case Sopinka, J. points out at p. 322 that it is often difficult for the patient to prove causation inasmuch as the "physician is usually in a better position to know the cause of the injury than the patient". Speaking for the Court, he then proceeds to address the solution to that problem proposed by a line of cases which would reverse the burden of proof by inferring causation, notwithstanding the absence of positive evidence of linkage between the tortious act and the victim's injury, upon the claimant establishing that the physician created a risk that the harm which occurred would occur. *Snell* discusses whether this approach is the appropriate basis for founding liability, or if causation should be proven in accordance with traditional principles, viz: on the claimant proving on a balance of probabilities that, but for the defendant's tortious conduct, the injury would not have been sustained.

57 The Supreme Court of Canada in *Snell* rejects the non-conventional concept of reversing the burden by requiring defendants in medical malpractice actions to disprove causation. Thus, the Court affirms at p. 327 that traditional "principles relating to causation are adequate to the task". In so doing, it goes on through Sopinka, J. to observe at p. 328 that:

> ... the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision.

58 Further emphasis was later placed by Sopinka, J. on this last thought when he states at p. 330:

> It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

59 This position articulated in *Snell* was re-iterated in *Laferrière* where, in discussing the difficulties of determining causation in medical malpractice suits, Gonthier, J. observes that the trial judge may be "influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings", but are not governed by such evidence. Then, after quoting from both of the foregoing passages from *Snell* to the effect that causation need not be determined in terms of absolutes, Mr. Justice Gonthier goes on, at p. 606, to emphasize the import to the court of the entire body of proof in attributing causation in the following words:

> ... proof as to the causal link must be established on the balance of probabilities taking into account *all* the evidence which is before it, factual, statistical and that which the judge is entitled to presume.

60 As the foregoing two authorities show, therefore, causation in medical malpractice actions is approached on the footing that the legal and ultimate burden of proving a causal link between negligence and injury rests upon the claimant. This entails proof on the balance of probabilities that the harm would not have been sustained absent the tortious conduct of the physician. It need not, however, be established in terms of certainties; but may be inferred from the evidence as a whole.

61 No exception is taken with the trial judge's assertion of these legal principles. His judgment appropriately articulates them, whilst using *Snell* and *Laferrière* as its principal benchmarks. Counsel for Drs. Johnson and Cooper does claim, however, that the trial judge's attribution of liability to his clients is wanting adequate evidentiary support justifying the finding that their impugned conduct caused the heart damage which Mr. Briffett sustained.

62 As earlier intimated, the principal grounds advanced for taking issue with the judge's holding that there was a causal link between the treatment received by Mr. Briffett from Drs. Johnson and Cooper and the significant damage to his heart center upon the timing of his heart attack and the measures which could have been taken at the Gander Hospital in 1987 to prevent the damage. If the heart attack had occurred when Mr. Briffett entered the emergency department that morning, or if no measures could have been taken in the institution at the time to settle him down and prevent or minimize the eventual damage, then it is unable to be said that Mr. Briffett would not have suffered the heart attack and consequential damage but for the misdiagnoses, the actions and the omissions of the appellant physicians, including their failure to recognize that their patient should have been admitted to the coronary care unit.

-the question of timing

63 Counsel for the appellant physicians takes the position that the trial judge erred in accepting the theory proposed by Dr. Stone that Mr. Briffett's "heart attack took place after he left the hospital based on the symptoms of pain" which the latter described. He points out that Dr. MacCallum's view was that Mr. Briffett "was suffering from an evolving myocardial infarction when he attended the hospital on the morning of April 9, 1987". Stressing that neither of these cardiologists "could state with certainty as to when the heart attack took place", and citing *Laferrière's* admonition to carefully analyse all evidence to determine the particular character of the damage, counsel styles Dr. Stone's theory as "extremely faulty" and concludes that the evidence adduced affords convincing proof to the contrary, i.e., that the heart attack occurred whilst Mr. Briffett was in hospital, thereby refuting that his clients' actions caused the damage.

64 By way of rejoinder, counsel for Mr. Briffett relies on the general rules governing appellate review. Thus, he adopts the stance that there was evidence to support the conclusion that his client's heart attack occurred after he had left the hospital; that there is no palpable and overriding error in the judge's assessment of the evidence; and, that the principle of judicial deference accordingly operates to sustain this finding. In view of the ensuing analysis, which does not support opposing counsel's contention of error, this position of Mr. Briffett's counsel must prevail.

65 In addressing counsel's argument challenging the timing of the heart attack, it must be underscored at the outset that the trial judge did not, as the foregoing submission of the appellant physicians' counsel infers, rely exclusively upon Dr. Stone's evidence in arriving at the conclusion that the heart attack essentially occurred after Mr. Briffett had left the hospital.

The judgment contained a discussion of both cardiologists' testimony and a recognition that there was neither agreement nor certainty as to when the heart attack actually happened. In addition to this weighing of competing expert opinion, the judgment reflects an appreciation of other evidence bearing on this question of the timing of the attack. It shows, for example, that the judge's finding was influenced, not only by Dr. Stone's theory, but also by Mr. Briffett's description of his pain as coming really hard when he returned home and as sticking in and staying for three and one-half days. Hence, while the judge obviously lent much weight to Dr. Stone's opinion, which was appropriate and fully justifiable, it cannot be contended that his factual finding as to the attack's timing was based exclusively upon acceptance of Dr. Stone's theory. It was based on all of the evidence as *Laferrière* directs triers of fact in the trial judge's position to do.

66 It is also incorrect to maintain that Dr. Stone based his theory as to the attack's timing "on the symptoms of pain" alone. The description of the pain's progression was certainly a factor. This can be seen from the earlier quoted extract from Dr. Stone's testimony where he uses Mr. Briffett's "account of much more severe pain after he had gone home" to support the view that he "actually had the heart attack" on his return. The transcript clearly shows, however, that Dr. Stone also placed significant import upon the electrocardiogram taken at the Gander hospital on April 9, 1987, and a comparison of it with the subsequent one taken from Mr. Briffett nearly three months later on his admission to the Health Science Centre in St. John's. That E.K.G. evidence was important to his opinion. Dr. Stone was unequivocal in his recorded assertion that, from the later E.K.G., it was "fairly obvious" that Mr. Briffett had had a heart attack, whilst the earlier one "does not show the heart attack which was evident subsequently ...".

67 This assessment receives corroboration from Dr. Hiscock's appraisal of the earlier E.K.G. While Dr. Hiscock did not testify, his notes relative to his examination of it and his consultation report to Dr. Forward of May 26, 1987, had been admitted in evidence. As the foregoing resumé of events subsequent to Mr. Briffett's hospital visit details, Dr. Hiscock found no heart attack showing on the reading but heart disease requiring "further report" and, in his referral to Dr. Stone, he offers the opinion of potential angina. Thus, Dr. Hiscock's assessment of the April 9th, 1987, E.K.G. supports Dr. Stone's statement that it did not evince heart attack. There was, therefore, clearly other evidence besides the pain upon which Dr. Stone based his theory as to the attack's timing.

68 Counsel also challenges the judge's acceptance of Dr. Stone's theory by singling out the opening comments in the cardiologist's discharge report following Mr. Briffett's examination at the Health Science Center. In his opening words in his report, Dr. Stone wrote:

> This 33 year old fox farmer developed angina in January of 1987. E.K.G.'s in April showed new changes consistent with anterior wall myocardial infarction.

In highlighting these comments, counsel is attempting to establish that Dr. Stone could not have been firm in his theory as to the attack happening after the Gander hospital visit since he is stating the April E.K.G. taken after Mr. Briffett's arrival at the emergency department was consistent with myocardial infarction. This is advanced in an apparent attempt to detract from the weight lent to Dr. Stone's opinion as to the timing of the attack by the trial judge.

69 It should be observed that this argument was not developed in the appellant physicians' factum. Neither was Dr. Stone examined directly at trial on this aspect of his discharge report. Nevertheless, in his oral presentation counsel laid considerable stress upon these opening remarks in the discharge report, styling the interpretation of the E.K.G. taken in April as a very telling point that the trial judge did not consider in evaluating the evidence.

70 However, a reading of Dr. Stone's full testimony does not support the contention that this commentary should detract from the very explicit statements made by that specialist concerning the heart attack's timing. A sense of the intent of the highlighted comment is gained from Dr. Stone's response to a question during cross-examination where he was referred to the tracing of the E.K.G. taken in the emergency department on April 9, 1987, and asked to confirm his indication that there was no evidence of either a myocardial infarction or unstable angina in it. Dr. Stone replied that he had not so indicated but had said "there were changes in the tracing which in that setting would have to be interpreted as being relative to what was going on". Immediately after this response, on being asked to elaborate, he went on to state that the changes "do not indicate that the patient was having a heart attack at the time although we don't rule that out either".

71 These comments, in turn, should be read with Dr. Stone's testimony, quoted earlier in this judgment, that the precise time of the attack could not be pin-pointed and no one could state "with absolute certainty" when it had occurred beyond

stating that Mr. Briffett was heading towards it "from the time he got out of bed and was finished up four days later".

72 Considered in light of these comments, the assertion in the discharge report suggesting the crucial E.K.G. of April 9, 1987, "showed new changes" consistent with heart attack assumes a somewhat wider meaning than these words might otherwise convey when taken out of the wider context of Dr. Stone's entire evidence. In this broader perspective, and particularly when read with the foregoing comments from his testimony, the highlighted introductory remarks in Dr. Stone's discharge report may logically be taken to mean that the "changes" alluded to were "consistent with", or as he subsequently stated "relative to", that which "was going on" in Mr. Briffett's body. At the time of making his report, Dr. Stone knew that what had been going on was an evolving myocardial infarction and that the abnormalities in the April E.K.G. tracing were precursors to the eventual heart attack which eventually transpired.

73 The important factor in interpreting that report, therefore, is to construe it in relation to the point in time when it was written. When its opening words are viewed in that light, they do not detract from the clear assertions in Dr. Stone's evidence which, while not ruling out the possibility that Mr. Briffett "was having a heart attack at the time" (as no one, he said, could pin-point that "with absolute certainty"), were unequivocal in affirming that the April E.K.G. did not show that the patient was having a heart attack. Consequently, considered in the full context of Dr. Stone's testimony, the statement in the discharge report, upon which counsel places so much stress, ought to be interpreted only as stating that the crucial E.K.G. showed signs of changes which later events revealed to be consistent with what eventually happened; but that it did not reveal that the patient was having, or had had, a heart attack as did the subsequent electrocardiogram.

74 Thus, the intimation in the argument of the appellant physicians' counsel that Dr. Stone was neither firm nor consistent in his opinion as to the timing of the heart attack must be rejected. The transcript shows him not to have been dogmatic in his views and, as the foregoing excerpts from it indicate, to have eschewed couching them in terms of certainties. However, he was no less definite in his views as to the probable timing. As *Snell* explicitly states, the law does not impose absolutism as the standard for proof of causation. It only requires proof on the preponderance of probabilities. Dr. Stone's testimony sets out a coherent theory of probability as to the attack's timing. The judge did not err in accepting it as such.

75 Counsel, nevertheless, contends that the trial judge erred in placing great weight upon Dr. Stone's evidence and urges this Court to supplant it with Dr. MacCallum's opinion that Mr. Briffett was in the process of suffering a myocardial infarction when he reported to the hospital on the morning in question. Under this scenario, once started, the process could not have been halted irrespective of what actions the appellant physicians might have taken.

76 The short answer to this contention is that, not having succeeded in impeaching Dr. Stone's theory, it must be accepted that there was reliable expert evidence upon which the trial judge could support his finding relative to the timing of Mr. Briffett's heart attack. This resolves this issue insofar as possible appellate intervention is concerned. Judicial deference becomes operative to restrain this Court from substituting its opinion for that of the trial judge on this issue of timing, even if it might otherwise feel inclined to do so. Consequently, the judge's finding that "the main attack probably happened at home" has to be received as one made on the balance of probabilities for which there was adequate supporting evidence. In the result, counsel's attempt to detract from it must be rejected.

77 Before leaving this aspect of the appeal, however, it should be noted that a comparison of the expert evidence shows no appreciable substantial difference between the views of the two cardiologists. This is recognized by the trial judge where he observes that the difference between the specialists may have been "more theoretical or philosophical than factual, in the attempted assessment of both cardiologists of the timing of the actual attack".

78 This impression is supported by the evidence. Dr. MacCallum expressed the view that Mr. Briffett "was in the process of developing a myocardial infarction sometime after 3 o'clock in the morning", when he had awoken at his home with the chest pains which impelled him to the hospital. By the same token, as already noted, Dr. Stone also asserts that Mr. Briffett was in the process of his heart attack "or heading towards it from the time he got out of bed". While they were not in agreement as to when the attack actually occurred, they were, nonetheless, in accord in their opinion that Mr. Briffett had entered the hospital on April 9, 1987, with an evolving heart attack.

79 Therefore, in substance the essential disagreement between these two cardiologists boils down to whether the coronary damage, which Mr. Briffett was later proven to have sustained, could have been arrested and the incipient heart attack

prevented. This inquiry enlists the second branch of the complaint against the judge's finding of causation i.e. that he erred in disregarding evidence which called into question the efficacy of any measures that could have been taken by Drs. Johnson and Cooper in April of 1987 at Gander that might have prevented the myocardial infarction and heart damage. This decision will now turn to evaluate that contention.

-the question of available measures

80 The evidence which counsel for the appellant physicians contends was overlooked was that of Dr. MacCallum. The general thrust of his evidence relating to the measures which his clients could have taken was that nothing, in fact, could have been done at the James Paton Memorial Hospital in April of 1987 to prevent Mr. Briffett's heart attack. He reasoned that, once the process is started, a heart attack can only be aborted by thrombolytic agent. However, he said that thrombolytic drugs, which are used to break up coronary thrombosis i.e. blood clots in the vascular system, were not available or utilized in Gander in 1987. Moreover, he asserted that aspirin which is now used to stop the artery from clotting as well as to treat unstable angina were not routinely utilized in Gander at that time.

81 Consequently, Dr. MacCallum was of the opinion that the most which could have been done that morning was to settle the patient down. By this he meant to make him more comfortable and attempting to relieve his pain by administering oxygen, morphine and nitroglycerin. The general tenor of his evidence, therefore, was that in 1987 there were no measures available to avert the natural progression of the heart attack. It was thus depicted as inevitable and his assessment that the appellant physicians ought to have placed Mr. Briffett in the coronary care unit was directed to palliative rather than preventative purposes.

82 Dr. Stone adopted a different tack when asked to address what could have been done for Mr. Briffett at the hospital, and specifically to offer his opinion whether the heart attack could have been prevented. He replied by stating that his interpretation of events was that Mr. Briffett had "unstable angina or pre-infarction angina" which dictated that he be managed aggressively "to minimize the chances of progression to a heart attack". He then went on to say that, with bed rest, pain relief, oxygen, cardiac monitoring and aspirin, there had been a potential for this man to be settled down and prevented from going into a heart attack.

83 Thus, on their face, these are contrary opinions: one maintaining there were no measures that Drs. Johnson and Cooper could have taken to prevent Mr. Briffett's coronary damage and the other contending that there were. The judgment makes no specific mention of this difference. To the contrary the judge states that there was little conflict between the two cardiologists and that their evidence coincides except in two areas: the timing of the attack which has already been discussed and the use of aspirins.

84 However, while a perusal of the judgment bears out counsel's assertion that no mention was made of the differing conclusions regarding the availability of measures which could have prevented the heart attack, this does not signify error on the part of the trial judge. There was ample evidence adduced through Dr. Stone in this matter supporting the judge's finding that adequate measures were available to prevent Mr. Briffett's heart damage and to parry counsel's claim that the judge erred in disregarding the contrary opinion that nothing could have been done to avoid the damage suffered by him. The judge was not bound to analyze or mention the contrary theory and judicial deference comes into play placing any review of the finding as to adequacy of available measures beyond the purview of this Court.

85 The foregoing application of the principle of appellate respect for factual findings of courts at first instance represents a full and sufficient answer to counsel's complaint of error in disregarding Dr. MacCallum's evidence. It should be observed, however, that an analysis of the judge's reasoning in the case at bar in itself affords independent rational explanations, firstly; why he would not have deemed it necessary to deal directly with Dr. MacCallum's conclusion that nothing could have been done for Mr. Briffett and, secondly; how he was able to perceive little conflict between the opinions of the two cardiologists.

86 The first explanation is linked to the fact that Dr. MacCallum's premise that nothing could be done was based on the view that, when Mr. Briffett had entered the hospital on April 9, 1987, the process had advanced to such a stage that his heart attack had either taken place or, at least, was at such a point as to be inevitable without the thrombolytic drugs which were unavailable in 1987. Inasmuch as the judge had not accepted this point of view, favouring instead Dr. Stone's opinion as to the heart attack's timing and that Mr. Briffett had entered hospital with "pre-infarction angina" that afforded to him a

relatively high probability of avoiding an attack with proper treatment, the judgment's failure to deal in depth with Dr. MacCallum's conclusion of inevitability of the attack is perfectly comprehensible. When the premise on which it was based, being Dr. MacCallum's view as to the attack's timing, was rejected, it was simply rendered moot and further discussion superfluous..

87 On the other hand, the judge's perception of little conflict in the evidence of the two specialists, apart from the aspects of timing and the use of aspirin, admits to an equally intelligible explanation. In adopting Dr. Stone's version as to the timing of the heart attack, the judge obviously must be taken to have also accepted that physician's concomitant opinion that Mr. Briffett had gone to the hospital in Gander with pre-infarction or unstable angina. Thus, the judgment was addressing the question of efficacy of possible measures to prevent heart damage in the context of this type of angina leading into a heart attack. While Dr. MacCallum was satisfied that Mr. Briffett had gone beyond that point, the evidence clearly shows that the two cardiologists were in substantial agreement that measures could have been taken to prevent a patient who had been admitted to the hospital in 1987 in that condition from undergoing a heart attack. In formulating his perception, the judge had the benefit of evidence of both specialists giving responses to questions eliciting from them the probability of such an angina patient avoiding heart attack through hospital treatment which testimony was relatively extensively cited in the judgment.

88 Dr. Stone gave his opinion on the basis that this was the actual situation with which the emergency room physicians were confronted. On the other hand, Dr. MacCallum expressed his view as a hypothesis of what could be done for a patient in that condition, notwithstanding his conclusion that Mr. Briffett was not in the stage of unstable angina leading into heart attack but had reached the point where his incipient heart attack could not be arrested.

89 When Dr. Stone was asked for an estimation of the chances of preventing a heart attack in a patient in Mr. Briffett's situation who had entered hospital with unstable or pre-infarction angina, he acknowledged the difficulty of giving any percentage. However, he did go on to say that most "will settle down and not have a heart attack". He then ventured his view that "the chances of settling him down would have been somewhere between 70 and 75 percent".

90 For his part, Dr. MacCallum, who was familiar with the circumstances at the James Paton Memorial Hospital in 1987, made the following statements in response to questioning that was also quoted by the trial judge:

> ... Well, in Gander what they would've done ... if they had made the diagnosis that this man ... was having what we call prolonged heart pain which was probably going to lead to a heart attack unless we stopped it, then they would put him in the coronary care unit ... given him oxygen and morphine and nitroglycerin to see if that relieved him.

91 Then, after reviewing drugs such as "calcium entry blocking drugs and beta blockers" that would have been available to treat persons with this type of prolonged heart pain, he was asked to confirm whether that in such situations "not all patients that go in with progressive angina go on to have a heart attack". To this query Dr. MacCallum responded:

> Yes. Well, 10 percent of them do. Only about 10 percent.

92 From the foregoing it can be seen that Dr. MacCallum was actually more optimistic in his estimation as to the efficacy of measures that would have been available at the hospital in Gander to prevent a patient experiencing "unstable angina or pre-infarction angina" from suffering a coronary attack. He places the odds of averting such heart damage at 90%, contrasted with Dr. Stone's maximum of 75%. Hence, it is clear, in addressing what he considered a hypothetical situation in relation to this issue of available measures, that Dr. MacCallum was in substantial agreement with the position that there was treatment that could have been administered in the coronary care unit in 1987 to avert heart attack being suffered by an individual having the angina which the trial judge found Mr. Briffett to have had. In such circumstances it was logical that the judge should have concluded there was no difference in the specialists' views as to the potential for avoiding his heart attack.

93 Counsel for the appellant physicians attempts, nonetheless, to undermine the soundness of this conclusion of accord by stressing the undisputed differences between the specialists on the use of aspirin. The evidence indicates that such usage in the treatment of cardiac symptoms is of relative recent discovery, originating during the eighties. Dr. Stone suggests it would have been part of the accepted treatment regime for Mr. Briffett's condition in 1987, whilst Dr. MacCallum said it would not. Both cardiologists appear to have been categoric in their respective positions.

94 As noted, Dr. Stone included the use of aspirin as part of the aggressive management which he felt would have been accorded to Mr. Briffett if he had been admitted to the hospital's coronary care unit in 1987. His evidence was explicit in asserting that "it was fairly common in 1987 to use aspirin in patients with unstable angina". Under cross-examination the transcript records him as remaining steadfast in stating that the chance of heart attack can be reduced with such patients "by 50 percent just by aspirin alone" and in elaborating that by 1985 the effect of aspirin in the treatment of unstable angina had been:

> ... published in the New England Journal of Medicine which is the most widely read, ... so everybody in the medical world ... was aware of that and the enthusiasm for it has grown since.

95 The transcript shows Dr. MacCallum as being equally equivocal in his opposite view. As already noted, he maintained that not only were the thrombolytic drugs in use today unavailable; but that "aspirin to stop the artery from clotting" was not "routinely available" or, if available, was not "routinely utilized in Gander in 1987". Earlier he was recorded as asserting:

> ... aspirin was not standard therapy given at that moment anywhere, really. Some people were doing, it but it was not standard therapy. And we as physicians in St. John's were not even doing it standardly ... until late 1988 ... we started, when the paper came from the Montreal Heart Institute ... we started doing it on a fairly regular basis.

96 The judgment shows the judge to have been fully aware of this disagreement over the likely therapeutic use of this medication. The divergent expert views were discussed and weighed, after which the judge concluded that "the use of aspirin at that time was fairly common". In challenging this finding, counsel is seeking to undermine the basis of the overall holding that potential existed at the Gander Hospital in 1987 for avoiding Mr. Briffett's heart attack by removing from the treatment regime then accessible a medication that the accepted medical opinion reckoned sufficiently potent to reduce the chance of Mr. Briffett going on to suffer heart attack fifty percent.

97 This challenge cannot be sustained, however. A review of the record shows no palpable error on the part of the trial judge which would serve to override this finding. There was evidence provided by Dr. Stone to support it and the invocation of Dr. MacCallum's contrary opinion cannot serve to set aside a valid exercise of the trial judge's finding of fact in this area of expert testimony. The judge's preference for Dr. Stone's opinion may have stemmed from the fact that the cardiologist approached this matter throughout as the treating of a patient with unstable or pre-infarction angina while Dr. MacCallum, in the main, had his mind turned more so to a person actually in the process of heart attack. Moreover, although Dr. MacCallum was firm and consistent in his view that the benefit of using aspirin in treating cardiac problems was not known at the time, it will be noted from the foregoing excerpt that he does qualify his position somewhat by stating aspirin's usage was not "standard therapy", thereby leaving room to infer tacit acknowledgement on his part that the practice was known before publication in 1988 of the Montreal Heart Institute paper. In any event, there is nothing in the record which would justify appellate intervention in the judge's finding of common use of aspirin in 1985 in these circumstances.

98 It should be stressed that Dr. MacCallum's disagreement with this finding detracts neither from the perception discerned and noted by the judge of little conflict in the evidence of the two specialists nor from that cardiologist's statement that only ten percent of patients having prolonged heart pain leading to a heart attack go on to suffer them. As the resumé of Dr. MacCallum's evidence shows, his conclusion on the likelihood of averting heart attack for the hypothetical angina patient did not include the use of aspirin amongst the drugs or medication. Hence acceptance of use of aspirin in the treatment regime at the time does not materially detract from the judge's conclusion that these cardiologists were virtually at one in respect of the high probability of a person in Mr. Briffett's adjudged position avoiding heart attack at Gander in 1987. While Dr. MacCallum retained reservations over the timing of Mr. Briffett's attack and the potential of averting it, his opinion that heart damage could be avoided by placing the hypothetical patient with pre-infarction angina in the coronary care unit, therefore, remains intact and unimpaired by his diverse view respecting the use of aspirin in 1987.

99 In yet another arm of his argument, counsel for the appellant physicians maintains that this probability was just as realizable by Mr. Briffett at his home as in the coronary care unit at the hospital. He bases this on his claim that Mr. Briffett had available essentially all the medical treatment necessary for a patient suffering from unstable or pre-infarction angina in 1987 to ward off heart attack. He identifies this therapy as bed rest, which Mr. Briffett acknowledged taking during the three

and one-half days following his release from the hospital; pain relief medication, through the demerol obtained through Dr. Robbins; and, aspirin, by filling the prescription for entrophen given to him by Dr. Cooper prior to his hospital departure.

100 In support of his premise as to the sufficiency of these measures, counsel points to Dr. Stone's testimony that the aggressive management which Mr. Briffett would have received at hospital entailed bed rest, pain relief, aspirin, oxygen and monitoring. He then underscores that, apart from the heart monitoring, oxygen was the only component in Dr. Stone's aggressive management regime for minimizing the chances of heart attack by an unstable or pre-infarction angina sufferer that Mr. Briffett did not receive at his residence. Then, counsel directs attention to evidence to the effect that neither oxygen nor the monitoring had medical efficacity in the prevention of myocardial infarction. On these facts counsel bases his assertion that it was irrelevant whether the treatment was received at home or in hospital.

101 From this standpoint, he argues, the trial judge must be reckoned to have fallen into error in overlooking the availability at Mr. Briffett's home of these means which the evidence showed to be effective for averting heart attacks in persons with his adjudged condition. While counsel takes no issue with the unanimous cardiological assessment that Mr. Briffett should have been placed in the coronary care unit, he urges that the failure to do so cannot be substantially connected with the ensuing heart damage in view of his sufficient means at home to avert it. As earlier noted, he would accordingly limit liability for his clients' negligence to the incremental pain and suffering that Mr. Briffett incurred as a result of experiencing what he regards as an unavoidable heart attack at home, rather than in the palliative environment of the hospital's coronary care unit.

102 With respect, this arm of counsel's argument disputing the judge's finding of causal link between his clients' negligence and the significant damage to Mr. Briffett's heart, although resourceful, cannot be sustained.

103 In the first place, Dr. Stone casts some doubt whether Mr. Briffett really had at his disposal the most effective medication in his entrophen prescription, in terms of heart attack prevention. Thus, in his testimony, he conjectures that the entrophen had been given for relief of pain for the misdiagnosed chest inflammation and comments that the dosage of some 650 milligrams "would not be the usual dose given to somebody to prevent them having a heart attack". He subsequently emits doubt on entrophen's effectiveness even as an analgesic by going so far as to say: "(I)f you want to give something for quick pain relief, it would be the last thing you would chose" because of its coating and slow absorption properties.

104 Be that as it may, even if the entrophen supplied to Mr. Briffett were to be accepted as equivalent to the dosage of aspirin appropriate for heart attack prevention, counsel's argument must still be deemed untenable. This is because the treatment which Mr. Briffett could access at home cannot be equated to the care he would have received in the coronary care unit, notwithstanding the bed rest and availability of generally acceptable medications. There is more to a coronary care unit than rest and medications, as important as they undoubtedly are. These units are specialized sections of hospitals, recognized as superior to any others in such institutional settings, for treating patients with coronary symptoms. This is borne out from Dr. Stone's evidence where he stated that such units are specially designed to manage patients "who have had heart attacks or are likely to have them". Shortly afterwards, he speaks of not keeping such individuals in emergency rooms but of putting them "somewhere where people are used to look after them".

105 These statements provide full answer to counsel's claim of irrelevancy whether Mr. Briffett's treatment was received at home or in hospital. In the coronary care unit Mr. Briffett's heart would have been monitored and he would have been attended by trained personnel who, even in 1987, would have had access to a wider range of drugs and pain relievers than the demerol and entrophen that Mr. Briffett had secured. In this regard, the expert evidence refers to the advantages of coronary care units as settings for settling down patients with brewing heart attacks and for their requisite aggressive management. Dr. Stone describes these units as such and intimates that, in them, most of the patients with unstable angina "settle down with whatever combination of stuff we give them".

106 Such settings contrast with Mr. Briffett's depicting of himself as being alone in a chronic worsening condition inconsonant with his relatively uneventful diagnosis; as suffering acute pain; as experiencing shortness of breath; and, as having to navigate bathroom visits by supporting himself on furniture and walls. All of these portray sharp contrast with what would have transpired had he been placed instead in the coronary care unit and dispel counsel's argument of irrelevance as to where Mr. Briffett was cared for in the days following his hospital discharge. Solely from the standpoint of diminished stress from the settling down and expert management, a rational inference can be drawn as to the enhanced probability of avoiding

heart attack if the appellant physicians had not failed to have Mr. Briffett admitted to the coronary care unit.

107 Therefore, there can really be no equation of the care that could have been self-administered at home with that which Mr. Briffett would have received if he had been admitted to the coronary care unit, as both expert witnesses felt he should have been. Counsel's argument as to irrelevancy of admission to the coronary care unit must, accordingly, be rejected.

108 As a final footnote to this discussion of counsel's claim of error on the trial judge's part in disregarding evidence calling into question the efficacy of measures available in 1987 to prevent Mr. Briffett's heart damage, and in attributing causation for it to Drs. Johnson and Cooper, some explanation should be given to the absence of reference to cases cited by their counsel in support of their arguments in that regard. Two of these, decided in the General Division of the Ontario Court of Justice, received specific emphasis by counsel: *Bloudoff v. Dolezel*, rendered on March 30, 1992 [Doc. 25045/87, Chapnik J.]; and, *Wilton v. Genik*, handed down on June 26, 1995 { Doc. 31363/88, Wright J.]. Neither appears to have been reported and *Wilton* is in the course of appeal.

109 Counsel placed particular reliance upon *Bloudoff* in his oral argument and presents it as a similar factual situation. Like Mr. Briffett, the patient in that case was discharged from a hospital with a misdiagnosis of his actual condition which subsequently developed into a heart attack. As in the case at bar, the negligence also occurred in 1987, when it was acknowledged that the treatment for evolving myocardial infarction was not as knowledgable or sophisticated as it became subsequently. Indeed, virtually echoing the evidence in this case, the available treatment was described as being confined to oxygen, bed rest, nitrates, beta and channel blockers and intravenous morphine for pain. Moreover, as was the trial judge in the present circumstances, the court in *Bloudoff* was called upon to decide between somewhat differing views of two expert witnesses whose competence in the field of cardiology was undeniable.

110 In stressing these similarities, counsel makes much of *Bloudoff's* assertion that the measures available in 1987 had "proven to be ineffective in preventing the development of myocardial infarction ... to any significant degree". Thus the court concluded that the patient would have sustained acute myocardial infarction even if his condition had been properly diagnosed and treated in August, 1987. Counsel urges adoption of the same reasoning with respect to the circumstances that transpired in the James Paton Memorial Hospital in Gander in April, 1987. Accordingly, he puts forth *Bloudoff's* result as an appropriate precedent for rejecting in this case the judge's holding that the medical negligence was a significant contribution or substantial cause of the heart attack and for confining damages to pain and suffering, which was the outcome in that case.

111 The decision in *Wilton* was handed down after this appeal was argued. Leave was given to counsel for the appellant physicians to file it for the consideration of the court and both counsel filed submissions concerning its relevance. That case also involved a claim of negligence arising from a patient, who had been complaining of severe chest pains, being sent home from the emergency ward of a hospital and who subsequently was stricken with heart seizure. In that instance the damage was fatal as Mr. Wilton unfortunately dropped dead two days after his discharge.

112 The factors advanced by counsel for Drs. Johnson and Cooper in support of *Wilton's* relevancy to the case at bar were: the trial judge's finding of medical negligence was founded on similar failings on the part of the attending physician, viz: - a failure to obtain a proper history of the patient; to provide an appropriate diagnosis; and, to provide appropriate discharge advice. Particular stress is laid on *Wilton's* holding that the defendant physicians' negligence did not cause Mr. Wilton's fatal heart condition and on its examination of the treatment methodologies, as they existed in October of 1987, for the care of patients with unstable angina and myocardial infarction.

113 In connection with this last point relating to the review of available treatment measures, the trial judge in *Wilton* accepted expert medical evidence to the effect that "the consequences of using aspirin and heparin were not well known in 1987" and that it was not then standard practice in a community hospital to give this medication to cardiac patients. On the basis of this testimony *Wilton* found that the patient "probably would not have been given aspirin and/or heparin". Counsel seizes that finding and argues for its adoption in this appeal.

114 Counsel cannot use this finding, however, as he attempts to do, to buttress his challenge disputing the holding in the case at bar that the use of aspirin was fairly common at the time of Mr. Briffett's brief hospital sojourn in April of 1987, seeking thereby to impair the holding that preventative measures were available to have averted Mr. Briffett's heart damage. The expert evidence on which that finding was based related to a community hospital in Ontario. It cannot serve, particularly

in the absence of opportunity for cross-examination, to contest the judge's finding in this case of aspirin's common use, which was based on accepted testimony from an associate professor in this Province's medical school who must be assumed to have been apprised of the methodology available to general practitioners in Gander at the time of treating a patient whose complaint was within his specialty. The finding in *Wilton* is not transposable to the case at bar. It is no more relevant to the circumstances prevailing at the emergency room in Gander on April of 1987 than the trial judge's findings in this matter would be pertinent to the happenings in the ward at the Ontario hospital in October of the same year.

115 Although *Wilton* cannot serve to rebut the trial judge's finding relative to the common use in 1987 of aspirin, it should be observed, nonetheless, that it does support the claim that its use in the treatment of cardiac patients was known at the time, albeit not well known. Thus, insofar as general medical knowledge was concerned, it tends to corroborate Dr. Stone's position, not necessarily as to the frequency of this medication's use, but as to the general awareness in the medical profession prior to 1987 of the positive effect of aspirin in the treatment of unstable angina. In this context, it should also be observed that *Bloudoff* affords similar support in that the judgment refers to a study reported in 1986 by the Canadian Medical Association Journal "which demonstrated the preventative benefits of aspirin in heart patients". Thus, in the main, these cases tend to support Dr. Stone's position that there was knowledge prior to 1987 of the utility of aspirin in preventing heart damage and the judge's consequential holding of inclusion of aspirin in the treatment regime for pre-infarction angina patients at that time that he imported into his conclusion as to causation.

116 These cases cannot, however, serve as precedents in the sense that their results ought to determine the outcome of the case at bar which is the principal reason for their production to this Court by counsel for the appellant physicians. Findings of negligence and causation and of the consequential attributing of liability in medical malpractice cases will hinge on the circumstances of each case which will generally be distinguishable, one from the other.

117 *Bloudoff* can be distinguished from the instant case in its ultimate holding of it being "more likely than not" that the patient would have sustained an acute myocardial infarction even if he had been properly diagnosed and treated. This finding that the medical negligence was not the substantial cause of the heart attack stemmed from evidence that it was more likely that the attack was sustained between 12 and 18 hours prior to the patient's admission to hospital, which obviously contrasts sharply with the finding as to the timing of Mr. Briffett's attack. Similarly, no true factual analogy can be drawn in *Wilton* as there, on the basis of a pathologist's report, the judge concluded, in direct contrast with what the judge concluded should be inferred from the facts in the case at bar, that it was more probable that nothing could have been done for Mr. Wilton even if he had been admitted to hospital. These distinctions support the stance of Mr. Briffett's counsel that those cases have no particular relevance to his client's circumstances and explain their absence from the foregoing discussions on causation.

118 Actually, the precedent value of such cases is generally considered marginal. They are usually employed for the guidelines they set out within which the relevant circumstances at hand must be weighed. Of particular relevance to the issue of causation in this case, for example, are the general directions contained in *Laferrière's* earlier cited emphatic instruction to take into account "*all*" of the evidence in weighing the adequacy of proof as to causal linkage and in *Snell's* endorsement at p. 324 of the position taken by the House of Lords which Sopinka, J. described as:

> ... promoting a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion.

A perusal of the judgment in relation to the transcript of evidence shows that the judge brought this approach to bear in that his analysis represents a comprehensive weighing of all of the evidence in arriving at the critical finding that measures were available which probably would have avoided Mr. Briffett's heart attack and consequential coronary damage.

119 In the result, for reasons outlined in the foregoing discussion, it must be affirmed that there was sufficient evidence to support the judge's conclusion that there were "medical techniques and treatments" available in the coronary care unit whose use probably would have averted Mr. Briffett's heart damage. By the same token counsel's claim must be rejected that the judge disregarded testimony which called into question the efficacy of measures accessible in April of 1987 at Gander for the treatment of coronary conditions from which Mr. Briffett was found to have suffered. In fact, as the foregoing discussion bears out, there was substantially unanimous expert opinion as to the effectiveness of measures then available for preventing a person with unstable or pre-infarction angina from going on to have a heart attack. The judge's holdings on this critical aspect of causation was neither impaired by counsel's arguments attacking the judge's finding as to the fairly common use of aspirin; nor by his argument as to the irrelevancy of the failure to admit Mr. Briffett to the coronary care unit; nor by his

attempt to apply other medical malpractice decisions as precedents in this case. In sum, there was no palpable error in the judge's conclusion that but for the appellant physicians' failure to give to Mr. Briffett access to the measures available at the James Paton Memorial Hospital in April of 1987, the significant damage to his heart probably could have been averted. Accordingly, his decision on this point is beyond the purview of appellate review.

Summary and disposition of liability issue

120 No issue was taken with the legal framework that the trial judge applied in attributing liability to Drs. Johnson and Cooper. Counsel's concession in that regard was apropos. The judge correctly related the standard of care applicable in medical malpractice actions to the competence which ought reasonably be expected from the average of the group of physicians to which these casualty officers belonged on April 9, 1987, when discharging their duties in the emergency room of the James Paton Memorial Hospital at Gander. He equally accurately proceeded on the footing that the causal link between the negligence and injury rests on the claimant in these malpractice cases, just as it does in any action in tort, on the balance of probabilities, and not in terms of absolute certainty.

121 Counsel's general complaint of the judge's failure to support his findings so as to bring the circumstances of this case within this correct legal framework is rejected. An examination of the record establishes the judgment as constituting a full, careful and integral analysis and treatment of all of the evidence, including that adduced through sometimes divergent expert medical opinion. It also shows that there was sufficient evidence to found the finding of liability.

122 As to the first pre-requisites of liability, viz: - the reasonable standard of care to be expected from the appellant physicians, the court had adequate evidence through the testimony of the two cardiologists to define the appropriate criterion upon which to gauge the allegations of negligence. The judge did not err in his application of that standard. In particular his finding that Dr. Johnston had fallen short, and Dr. Cooper far short of it, is amply supported by the acknowledged misreading by Dr. Johnson of the E.K.G. that was taken; by the omissions to take a follow-up E.K.G. and blood tests; the misdiagnosis; the failure of Dr. Cooper to re-examine Mr. Briffett and to re-assess the working diagnosis of Dr. Johnson; and, the failure to admit their patient to the coronary care unit.

123 As to the second *sine qua non* of tort liability i.e. causation, the foregoing analysis illustrates the difficult and thorny nature of the problem with which a trial court is often confronted in resolving that issue in medical malpractice suits. On the one hand, it is well recognized that proof of causation is often difficult for the patient who is less favourably situate than the physician to know the cause of his or her injury. While the patient must have a legitimate expectation to compensation for injuries caused through negligence in his or her medical treatment, the problem of proof cannot, on the other hand, be resolved by making the physician liable for deteriorations in the patient's health where there is no substantial connection between the doctor's tortious act and subsequent reverses in the patient's condition. This would not only be unfair to the attending physician by making him or her the effective guarantor of the patient's cure, it would also be harmful to the public's interest inasmuch as such a policy would tend to expose physicians to unlimited liability, engender the practice of defensive medicine and place a disproportionate burden on health care system costs.

124 Laforest, J. In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 3 at p. 29 intimates that a weighing of the public interest is an appropriate concern when considering liberalizing the rules for recovery in malpractice cases, albeit this caution was expressed in terms of justifying enforcement of statutory limitation periods. Sopinka, J. speaks in the same vein in *Snell* where, at p. 327, he notes that potential accelerating insurance costs are appropriate societal concerns in attributing medical responsibility for negligent acts which are not substantially connected to the alleged injury or harm. A fair balance between the societal and individual interests appears to be best assured by an in depth comprehensive analysis of the evidence or, in the terminology of *Snell* and *Laferrière*, through a robust and pragmatic approach to all of the evidence. The necessity of such an in depth analysis of the proof is accentuated in medical malpractice cases because patients often have pre-existing conditions, such as Mr. Briffett's coronary problems presented in this case, and trial judges are faced with the extremely difficult problem of sorting out whether the alleged damage was the immediate product of that condition, thereby rendering the physician's negligence irrelevant insofar as causation is concerned.

125 The judgment shows the court in the case at bar to have been equal to that task. As the foregoing review of the decision shows, such an approach was taken in the trial judge's treatment in finding a causal link between the negligence of Drs. Johnson and Cooper and Mr. Briffett's subsequent "significant" heart damage. There was ample evidence to support the

judge's finding that if Mr. Briffett had received the appropriate standard of care the damage would probably have been prevented. For reasons explained in the foregoing discussion, counsel's attempt to undermine the evidentiary base of this conclusion through attacking findings respecting the timing of the heart attack and the alternate measures available to prevent it must be rejected. In the absence of palpable error, the judge's treatment of causation must also be upheld.

126 In the result, the appeal against the trial judge's finding of liability on the part of the appellant physicians must be rejected and his holding that Drs. Johnson and Cooper were negligent in diagnosing and treating Mr. Briffett is affirmed. There remains for consideration their counsel's challenge to the assessment of resultant damages.

The assessment and its appeal

127 A little over eight months after handing down its decision on the appellant physicians' liability, the court reconvened to address the level of compensation to which Mr. Briffett was entitled. After hearing evidence and argument bearing on that question, the same trial judge concluded that this 37 year old father of two was unable to continue his seasonal pattern of work as a millwright and, in fact, was "for all legal purposes totally disabled". Immediately before stating this conclusion of total incapacity, the judge had summarized his reasons for reaching it with the following words:

> ... I do not believe that there can be any doubt but that he is unable, to a substantial degree, to engage in the only occupation for which he is fitted. His limited education, his lack of other training and experience would, in effect, disqualify him from any other occupation. While retraining of individuals is a rather popular concept today, one cannot help but wonder what, if anything, could the plaintiff be retrained to do which would be within his physical and intellectual capabilities. Even if such training was available, the possibility of his obtaining any gainful employment at this time is, in my view, extremely questionable.

128 The judge then went on to find, not only was gainful employment no longer a reasonable possibility for Mr. Briffett, but his entire lifestyle "has been dramatically altered" in that he now must cope with serious curtailment of his daily activities and with substantial adjustments to his normal enjoyment of life.

129 As a result, the judge assessed Mr. Briffett's damages at $441,000.00 comprising: $400,000.00 for loss of past earnings and future earning capacity; $40,000.00 non-pecuniary damages for loss of amenities and enjoyment of life; and $1,000.00 for "out-of-pocket" expenses.

130 Counsel for Drs. Johnson and Cooper advances four grounds of complaint against this assessment. They may be summarized as follows:

> 1. Firstly, that the judge erred in his interpretation and application of the "thin skull" doctrine in evaluating the damages. The gravamen of this complaint is that there was a failure to appreciate the incapacity to work would have occurred independently of the tortfeasors" intervention, thereby calling seriously into question any award for future lost income or for other damages;

Secondly, error is claimed in the treatment of collateral benefits in the judge's calculation of Mr. Briffett's future loss of income in two respects. Firstly, the failure to deduct Canada Pension Plan total disability payments, for which Mr. Briffett qualified as a result of his heart disease, is viewed as "a bonanza and double compensation" that ought to have been taken into account in assessing lost earning capacity; on the other hand, it is maintained that the judge should not have included unemployment insurance benefits as expected income in arriving at a measure of permanent future income;

Thirdly, the measure of $400,000.00 to compensate for lost past and future earnings is called into question. Counsel for the appellant physicians complains that, in setting the amount, the judge acted without explaining the basis of the award and that the figure appears to have been simply plucked from the air with no evidentiary base; and,

Fourthly, error is claimed in the judge's failure to consider the potential of Mr. Briffett to mitigate his damages as presented by evidence relating to his residual earning capacity insofar as the award for lost income is concerned.

131 From the foregoing, it can be readily seen that the principal focus of this appeal from the damages awarded is directed towards the $400,000.00 allowed for loss of past and future earning capacity. Indeed, the last three grounds center entirely upon that head of damage. No complaint is registered by the appellant physicians against the measure of $40,000.00 for loss of amenities and enjoyment of life and of $1,000.00 for expenses. These two items of damage are only called into question through the general complaint as to the judge's treatment of the "thin skull" doctrine to which this appeal will now turn.

The "thin-skull' doctrine

132 Mention was made of that doctrine by the judge in responding to the defence's position which asserts that, even if Mr. Briffett suffered a heart attack after his release from hospital in April of 1987, it was only a matter of time before he would have been incapacitated by his pre-existing heart condition. Consequently, the defence had argued, damages ensuing from the incapacity ought in no way be attributed to either Dr. Johnson or Dr. Cooper and they should not be penalized; or, if they are to bear any measure of Mr. Briffett's damages, there ought to be a substantial reduction since, at most, the appellant physicians can be considered only to have aggravated a pre-existing condition.

133 The judge accurately interpreted this position as raising the question of "whether or not a pre-existing condition is a valid consideration in assessing the damage for which a negligent defendant may be liable". In addressing the law inherent to that issue he makes, for the first time throughout these proceedings, mention of the "thin-skull" rule which simply lays down the general principle that a tortfeasor must take the victim of his or her negligence as he or she finds that victim.

134 Drawing obvious support from this rule, the judge rejects the contention that Mr. Briffett's heart attack and incapacity was inevitable. Thus, he asserts:

> I am not prepared to accept this argument. The very basis for the finding of negligence on the part of the defendant was that with a proper diagnosis and treatment, the heart attack suffered by the plaintiff could have been averted. Accepting the defence argument that he would have had a heart attack and would have become totally incapacitated anyway is, in my view, contrary to the medical evidence presented at trial. Certainly it was impossible to predict with any precision whatsoever that the plaintiff would at any particular time suffer a heart attack.

135 The judge had acknowledged that there was room within the "thin-skull" doctrine for the tortfeasor to escape full liability for a victim's incapacity if it was demonstrated that the negligence only aggravated a pre-existing condition. However, he dismisses the notion that this transpired in the case at bar with the following words;

> This is not a case of aggravation of an active pre-existing condition. This is the culmination of this condition in a situation where a failure to properly diagnose and treat it resulted in a finding of negligence against the defendants.

136 In substance, therefore, the judge is pointing out that counsel's premise of the inevitability of Mr. Briffett's heart attack had already been rejected in the finding at trial of a causal link between the appellant physicians' negligence and the significant heart damage. Applying the rule that tortfeasors take their victims as they find them, the court held that the abnormal state of Mr. Briffett's health existing at the time of the physicians' negligence did not absolve them from liability for the entire amount of damages attributable to his disabilities following his heart attack.

137 As noted, counsel for the appellant physicians now challenges this holding, claiming it results from a misinterpretation and misapplication of the "thin-skull" rule. The principal thrust of this argument boils down to a reiterated insistence that Mr. Briffett's myocardial infarction would have occurred in any event and that the judge erred in not so finding. In pressing this position counsel re-stresses his submission at trial that Mr. Briffett's disability and subsequent unemployability was the product of his pre-existing "severe multivessel coronary artery disease, which causes his angina". To support this contention, counsel draws from Dr. Stone's evidence at the trial and from that given at the assessment hearing by Dr. Eugene Mullins, a general practitioner who had recently opened a clinic in Glovertown when Mr. Briffett first consulted him on July 10th, 1987. It will be noted that this was immediately after his release by Dr. Stone from the Health Sciences Centre where his heart attack was first confirmed. Counsel placed particular emphasis upon Dr. Mullins' testimony

that attributed Mr. Briffett's incapacity to his angina, ascribing in turn that condition, not to his heart attack, but to his multi-vessel coronary disease.

138 Counsel also cites authorities stating that the evidence must be carefully analyzed to determine the particular character of the damage sustained (*Laferrière* per Gonthier, J. At p. 609) and that an attempt must be made to separate, from the totality of the symptoms and disability, the portion of damages which would have happened in any event. (*Kolonel v. Kenney* (1993), 98 Nfld. & P.E.I.R. 1 (Nfld. T.D.) per Puddester, J. At p. 23.) This, he alleges, the judge failed to do. Had it been done, he goes on to claim, the appellant physicians could only be justifiably held liable for the pain and suffering experienced by Mr. Briffett for the time period that he would have been in hospital. This branch of his argument, therefore, asserts that damages should only ensue with respect to that degree of aggravation of Mr. Briffett's condition.

139 The obvious gist of these positions is that the judge erred in his interpretation and/or application of the "thin-skull" doctrine in failing to recognize that where a pre-existing condition was the direct cause of the incapacity, as is contended to be the situation here, the taking by the tortfeasors of their victim as he actually was means the appellant physicians had in their care an individual already destined for the significant heart damage which ultimately and inevitably resulted and for which they were not responsible, except insofar as their conduct may have aggravated Mr. Briffett's immediate suffering.

140 It is apparent from the foregoing argument that counsel is purporting, from the standpoint of the judge's treatment of the "thin-skull" doctrine in his assessment decision, to revisit the effect of Mr. Briffett's pre-existing coronary condition, if not to re-open the issue of causation itself. To determine whether such a course is open to the appellant physicians' counsel in the circumstances of this case, it appears opportune to recall the history, effect and role of the doctrine. This will serve to bring the receivability of counsel's arguments more sharply into focus and more clearly define the relevancy of pre-existing conditions to assessment of damages in light of the "thin-skull" rule.

141 The "thin-skull" doctrine was propounded at the beginning of the present century by Kennedy, J. In *Dulieu v. White & Sons*, [1901] 2 K.B. 669 (U.K.). In that case it was alleged that the defendants' servant had negligently driven a "pair-horse" van into a public-house in London where the proprietor's pregnant wife was behind the bar. The statement of claim sought to recover damages in consequence of the severe shock caused to the woman that allegedly resulted in her falling seriously ill and giving premature birth to her child.

142 The defendants demurred, in effect contending they had no obligation to respond to the claim as the injuries in respect of which damages were sought were too remote. They argued that no action for negligence would lie where there was no physical injury caused to the plaintiff. Inasmuch as it was the shock received by the woman which "so acted upon her then state of health" to produce the injury to her person, that damage, in their submission, was too remote a consequence of their servant's negligence.

143 *Dulieu* turned, therefore, upon the issue of whether an action would lie when the only physical impact did not accompany but was a consequence of the fright or shock visited upon the expectant mother by the van driver's breach of his duty; or, whether the ensuing damages were too remote. In addressing the issue of remoteness, Kennedy, J. made reference to two American cases. One of these involved a factual situation strikingly similar to the case at bar where the plaintiff was nearly run over through the negligent management of horses and as a result of her "terror so caused fainted, lost consciousness, and subsequently had a miscarriage and consequent illness".

144 In addressing the American case's dismissal of the tort action on grounds that the injuries to the expectant mother "could not have been reasonably anticipated, and over which the defendant had no control", and in disagreeing with that position, Kennedy, J. Stated at p. 679 of *Dulieu*:

> It may be admitted that the plaintiff in this American case would not have suffered exactly as she did, and probably not to the same extent as she did, if she had not been pregnant at the time; and no doubt the driver of the defendant's horses could not anticipate that she was in this condition. But what does that fact matter? If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury at all, if he had not had an unusually thin skull or an unusually weak heart.

145 Accordingly, in the case before him Kennedy, J. held that physical injury which was a reasonable consequence of

fright was actionable and, more importantly to the case at bar, that the unforeseeability of a victim's more vulnerable than normal condition does not render the consequence of a tortfeasor's negligence too remote so as to free him or her from full liability for the resultant injury. As a result of the concluding words used to describe the victim's increased susceptibility, the phrase "thin-skull" doctrine, or alternatively the "egg-shell skull" rule were coined to describe this principle that tortfeasors must take their victims as they find them.

146 In the intervening years since *Dulieu* debate has ensued whether negligent defendants should bear liability for the direct consequences of their acts or omissions; or for their foreseeable probable consequences. The first approach was articulated in *Re Polemis and Furness Withy & Co. Ltd.*, [1921] 3 K.B. 560 (C.A.). Later the Privy Council overruled *Polemis* and opted instead for the second approach of foreseeability. (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388.) Since then, a series of judicial decisions have qualified and refined *Wagon Mound's* role of foreseeability in tort responsibility. A fuller discussion of the evolution of the foresight test and analysis of its utility in resolving issues of remoteness of damage and proximate cause is provided in the 4th edition of Mr. Justice Linden's text on "*Canadian Tort Law*" at pp. 305-334.

147 With the advent of the foresight test, some uncertainty naturally developed over the continued effect of the "thin-skull" doctrine inasmuch as tortfeasors taking of their victim as they found them necessarily implies, as the foregoing passage from *Dulieu* indicates, that the anticipation of the victim's more fragile condition was irrelevant. Nevertheless, the injection of the notion of foreseeability as a criterion of remoteness of damage did not attenuate in any way the operation of the doctrine. Neither *The Wagon Mound* nor subsequent authorities developing the foresight test serve to dilute the rule which remains intact and has been universally applied over the years in its terms as originally enunciated in *Dulieu* (See *Linden: Canadian Law of Torts*, 4th ed., Butterworths, at p. 325; Salmond and Heuston on *The Law of Torts*, 19th ed., Sweet & Maxwell, at p. 613.

148 In fact, the probable reason why the debate over infusion of foreseeability as a factor in determining the remoteness of damages for tortious acts or omissions never did impact upon cases where responsibility for negligence of victims with pre-existing conditions is in question is explained by Wilson, J.A. (as she then was) in *Cotic v. Gray* (1981), 124 D.L.R. (3d) 641 (Ont. C.A.). In that case, Wilson, J.A. directly addressed "whether or to what extent the reasonable foreseeability test for the recovery of damages is applicable in a thin-skull case". She concluded at p. 671:

> The concept that the wrongdoer takes his victim as he finds him has little to do with foreseeability. It has a great deal to do with who, as a policy matter, should bear the loss when for reasons of peculiar vulnerability the victim of the defendant's negligence suffers greater injury or a different type of injury than the average victim would have suffered. It premises, as it were, a norm of vulnerability of the average person and makes the wrongdoer rather than the victim bear the damage suffered by those falling short of the norm.

So explaining the doctrine in terms of policy rather than foreseeability is more compatible with its logic which, as *Dulieu* notes, counts as irrelevant whether the more vulnerable than normal condition of a tort victim could have been anticipated.

149 The foregoing historical sketch demonstrates this principle of tortfeasors taking their victims as they find them to be well entrenched and unaffected over the years by evolving concepts of foreseeability in the attribution of damages so that, today, it stands intact and justifiable on grounds of policy. For purposes of the present discussion, however, the primordial and most salient point to be drawn from the foregoing historical account is that the doctrine was conceived and remains a principle of remoteness of damage. As such, the doctrine would normally be discussed when the issue of causation of the wrongdoer's negligence was being addressed.

150 There can be no room for doubt that the doctrine, although not specifically mentioned as such, was nevertheless substantially explored and applied by the trial judge in his judgment attributing liability to the appellant physicians. The judge was obviously well aware of Mr. Briffett's pre-existing condition as it occupied a prominent place in his treatment of causation. It is inherent in his finding of liability in this case that the judge determined the appellant physicians had to take their patient with that condition as they found him. The judgment effectively applies the doctrine in its essential holding that Mr. Briffett's unstable or pre-infarction angina did not render the physicians' negligence too remote to preclude a conclusion that, but for their errors, the heart attack and subsequent damage probably would not have occurred.

151 With the effect of Mr. Briffett's angina having already been dealt with in this proceeding, the immediate question

which arises is the continued relevancy of that pre-existing condition in the assessment of damages for which the appellant physicians have been found liable. The response to that question affords full answer to counsel's general complaint directed towards the entire award of damages, which rests upon his attempt to revisit the effect of Mr. Briffett's pre-existing condition. It will be noted that this was the question, albeit in somewhat wider terms, identified by the judge as flowing out of the attempted re-injection into the assessment hearing by the appellant physicians' counsel of the inevitability of Mr. Briffett's incapacity. This aspect of the inquiry will now turn to inquiring whether it is open to counsel to raise that circumstance again at the assessment of damage stage.

152 A persuasive answer to this question is provided by *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (H.L.) which addresses a trial judge's deduction of 75% from the damages to which the plaintiff would have been otherwise entitled on grounds that there was a 75% chance that the injury might have developed in any event. In holding such a course to be in error, Lord Bridge of Harwich had the following to say at p. 783:

> As I have said, there was in this case an inescapable issue of causation first to be resolved. But if the plaintiff had proved on the balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt attention, avascular necrosis might still have developed.

This reasoning affords a succinct and complete rationale for rejecting any attempt to revisit Mr. Briffett's pre-existing coronary condition in assessing his damages and to depict his heart attack as inevitable, thereby gaining immunity for the appellant physicians from full liability for their negligence.

153 As in *Hotson*, the "inescapable issue of causation" had also been resolved in the case at bar. It was conclusively found in the judgment on liability that Drs. Johnson and Cooper materially contributed to Mr. Briffett's heart attack and resultant total disability. Just as full recovery was accordingly allowed in *Hotson* notwithstanding that the vascular disease may have happened in any event, there should be no discount here from the full measure of Mr. Briffett's damages because of his pre-infarction angina which could have led to a heart attack. This flows out of the principle that wrongdoers must take their victims as they are.

154 In the attendant circumstances, therefore, the issue of causation had been resolved and it was no longer open to counsel at the assessment to reopen it by revisiting Mr. Briffett's pre-existing condition and claiming inevitability of his damages. The judge clearly recognizes this where he declines in his decision to entertain counsel's argument of inevitability because "(t)he very basis for the finding of negligence" was that the heart attack could have been averted. Moreover, his own reference to the "thin-skull" doctrine in his assessment decision was not made with a view to re-assessing his finding with respect to causation in his judgment ascribing liability; but rather to reject counsel's arguments aimed at re-opening that question. No exception can be taken with the judge's position in that respect.

155 The foregoing analysis should not be construed, however, as inferring that pre-existing conditions may never be valid considerations in assessing damages. While first and foremost a remoteness factor that would normally be expected to be addressed in the analysis of causation whilst addressing a tortfeasor's liability for negligence, cases may well arise where the prior condition of the victim will be a relevant consideration at the assessment stage.

156 One such instance may occur where a court is only called upon to assess damages and there was no prior opportunity to deal with the effect of the victim's pre-condition in the context of addressing whether the undisputed negligence had only a definable aggravating impact on the disability. In such cases, of which *Kolonel* upon which counsel places substantial reliance is one, no exception can be taken to the relevancy of the victim's pre-condition in assessing damages from the viewpoint of inquiry whether the wrongdoer should bear the full brunt of damages for the victim's disability, or if the negligence only aggravated the prior condition thereby warranting "a discount from the full measure of damages". However, in such instances and any others where the victim's pre-condition may be a valid consideration at the assessment stage, as *Hotson's* reasoning supports, none can include circumstances, such as this appeal presents, where the issue of causation had already been resolved in full appreciation of the victim's pre-existing condition and responsibility for full liability has been laid at the feet of the wrongdoers.

157 This conclusion remains unaffected by the authorities cited by counsel for the appellant physicians in support of his

premise that there ought to be a substantial reduction in the damages awarded because his clients' negligence should be viewed as only having aggravated Mr. Briffett's pre-existing unstable angina. No exception can be taken with propositions advanced by counsel through those cases that careful regard must be had to the character of the damage sustained and that a court must segregate from it that which would have been inevitable in any event. The issue is not whether such an analysis should be conducted as much as when it should be. Here, in the circumstances presented by these proceedings, it was properly undertaken as a remoteness of damage concern when the judge fully weighed the effect of Mr. Briffett's pre-existing condition in his robust and pragmatic approach to all of the evidence that he was enjoined by *Snell* and *Laferrière* to conduct. Counsel cannot expect that conclusion to be revisited in the subsequent assessment.

158 The judge was implicitly adopting this stance when, in rejecting counsel's claim for substantial reduction of damages, he states "(t)his is not a case of aggravation of an active pre-existing condition" but one of "culmination" of it. This commentary relates to the judge's earlier finding where he had already analyzed the physicians' negligence as the climactic cause of triggering a heart attack which probably would have been prevented with proper diagnosis, care and attention. They also revert back to his concluding that had proper treatment been received the total disability would not likely have ensued and to his judgment that Drs. Johnson and Cooper had materially contributed to that situation. Thus in stating this was a case of "culmination" of Mr. Briffett's pre-existing condition, the judge is effectively holding that it could no more be revisited under the guise of aggravation to bring about a reduction in damages than it could be to obtain complete immunity from them.

159 Finally, even if liability had been undisputed rather than adjudicated leaving way for the pre-existing angina condition to become valid consideration for the assessment of damage hearing, it should be underscored that Dr. Mullin's evidence, which counsel advances as evidence attributing Mr. Briffett's incapacity to his angina resulting from his multi-vessel coronary disease, would have been insufficient to affect the other expert evidence upon which the judge based his finding of causation at trial, if all that evidence were presented in one hearing. In fairness to Dr. Mullins it should be said that counsel's interpretation of his evidence in that respect is somewhat selective. In any event, it would be quite exceptional if the opinion of a general practitioner were to supplant that of a cardiologist in the field of his or her expertise. This is all the more so since Dr. Mullins' assessment of Mr. Briffett's disability was drawn in large part from correspondence received from Dr. Stone. It would be incongruous if any differing interpretation by Dr. Mullins of Dr. Stone's opinion were to be accepted over the latter's statement of his own viewpoint.

160 In the result, counsel's first complaint against the judge's damage assessment of misconstruction and misapplication of the "thin-skull" doctrine must be rejected. That general rule affecting the standard for remoteness of damage was given due effect in the judge's assessment of the proximate cause of Mr. Briffett's disability in his judgment attributing liability for it to the appellant physicians. Since the role of the doctrine throughout its history is to serve as a factor in gauging remoteness and proximate causation, this was the proper stage of the proceeding for it to be considered.

161 Accordingly, it was not open to counsel for the appellant physicians to revisit the effect of Mr. Briffett's pre-existing unstable or pre-infarction angina condition at the damage assessment stage. The fact that the "thin-skull" doctrine was specifically mentioned for the first time in the judge's assessment decision affords no lever to do so. Reference was then made to the doctrine for the purpose of rejecting re-introduction of the pre-condition upon which the rule is based because it was "(t)he very basis for the finding of negligence". The judge was correct in taking this position as the doctrine was implicitly considered in assessing the effect of Mr. Briffett's pre- condition when the "inescapable issue of causation" was first resolved.

162 Thus, the judge made no error in holding that counsel's premise of the inevitability of Mr. Briffett's heart attack had already been rejected in the finding at trial of a causal link between the appellant physicians' negligence and the significant heart damage. It may not be raised again during the assessment to relieve or substantially reduce the adjudged liability of Drs. Johnson and Cooper for the full measure of damage flowing from the disability. To do so would be tantamount to according a right of appeal in the same proceeding to earlier holdings taken in it. Moreover, the additional evidence relied on in the assessment to revisit the issue of causation was insufficient in any event.

163 Consequently, this first ground of appeal that directs an attack on the award of damages generally is rejected. This appeal will now turn to the second one, and the first to center exclusively on the award for loss of past or future earning capacity i.e. the collateral benefits.

The treatment of collateral benefits

164 Counsel for the appellant physicians contends that in setting the lost income component of Mr. Briffett's damages the judge should have deducted the disability payments that he and his two dependent children are receiving from the Canada Pension Plan and not have included unemployment insurance benefits as a factor in measuring his lost income.

165 The only specific mention of the Canada Pension Plan benefits in the assessment decision was limited to noting that Mr. Briffett has been receiving full disability pension benefits since Dr. Mullins supplied the Canada Pension Disability Division of Health and Welfare Canada with an opinion that he was unable to carry on any form of employment because of the severity of his heart disease. However, lack of further reference to these statutory payments in the decision, coupled with the size of the award, suggest that they could not have been taken into account in reduction of the $400,000.00 assessment of lost income.

166 Counsel for the appellant physicians argues that the failure to bring these disability payments into account clearly resulted in double compensation which is contrary to the inherent principles of damage recovery. In support of his position, he places heavy reliance upon *Ratych v. Bloomer*, [1990] 1 S.C.R. 940.

167 Counsel for Mr. Briffett responds by referring, in turn, to *gill v. Canadian Pacific Railway*, [1973] S.C.R. 654 which, he maintains, held that Canada Pension Plan benefits paid for by the individual accepting them are not deductible from loss of income claims. He states that this principle is still good law and remains unaffected by *Ratych*.

168 The appellant physicians' argument for taking these disability payments into account appears not without certain force when considered solely in relation to the fundamental principle of tort law that an injured party should be compensated for the full amount of the loss sustained, but no more. The fact that Mr. Briffett is receiving his Canada Pension disability benefits for the same loss of his ability to work as was caused by the appellant physicians' adjudged negligence does lend an air of double recovery to the failure to take them into account into calculating the loss of income. Indeed, without more, an award for lost income which is not adjusted downwards to take into account these benefit receipts would appear to clearly infringe the basic principle that he should not receive compensation beyond his actual loss.

169 However, various authorities over the years have carved out exceptions to that principle through holdings that certain collateral benefits related to the disability or loss occasioned by a defendant's negligence ought not to be deductible from recoverable damages, despite their ostensible ring of double recovery. One such exception, enunciated over a century ago, excepts benefits payable under a private accident insurance policy from the calculation of compensation payable to tort victims. The rationale for this is that the insurance contract was the cause of the injured party receiving the money and it was considered unjust that the tortfeasor should benefit from the victim's foresight in obtaining the policy (*Bradburn v. Great Western Railway Co.* (1874), [1874-80], All E.R. Rep. 195 (Ex. Ct.) at p. 197).

170 Despite departures from the *Bradburn* exception, it had received general support over the years. In 1969 not only was it re-affirmed by the House of Lords; but it was also extended to employment disability pensions to which the injured party had made compulsory contributions. Thus, disability payments from a pension fund to a twelve year police veteran were directed to be ignored in assessing the officer's financial loss caused by severe injuries sustained by him through the negligent operation of the defendant's motor vehicle (*see Parry v. Cleaver* (1969), [1970] A.C. 1 (H.L.)). Having first re-iterated the injustice perceived in *Bradburn* of allowing the benefit from money spent on premiums under a private insurance contract to enure to the tortfeasor, Lord Reid at pp. 14-15 of *Parry* concludes that there should be no difference between insurance arranged by the victim of negligence with his or her employer and that which he or she effected privately with an insurance company insofar as the non-deductibility from his or her damages of disability benefits were concerned.

171 The Supreme Court of Canada, in *Gill v. Canadian Pacific Railway*, upon which counsel for Mr. Briffett relies, further extended the non-deductibility exemption for disability payments derived from personal insurance and employment pension benefit contracts to Canada Pension Plan benefits. Borrowing from the reasoning in *Bradburn* and *Parry*, the Court upheld an appellate court's decision to overrule a holding at trial that the present value of pensions received under that statutory plan by the widow and children should be deducted from damages awarded for the death of their husband and father as a result of the negligent operation of a motor vehicle. In so holding, Spence, J., speaking for the full Court, described

payments under that statutory plan at p. 669 as "an exact substitute for a privately arranged insurance policy". As a result he held at p. 670 that:

> ... pensions payable under the Canada Pension Plan are so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute.

172 It is relevant to note that the same provisions in the legislation which led Spence, J., to conclude that this statutory plan had the same attributes as private insurance arrangements are present in today's version of the statute. Thus, the *Canada Pension Plan* R.S.C. 1985 c. C-8 continues to provide in ss. 8 and 9 that individuals in the class of pensionable persons shall by deduction from their wages make an employee's contribution from their remuneration and employers must contribute to the plan as well. The present day enactment also continues, through s. 44, to provide for pension benefits payable on retirement, disability or death. Notwithstanding the continuing in effect of these same statutory provisions which had led to the conclusion in *Gill v. Canadian Pacific Railway*, counsel for the appellant physicians, nonetheless, argues for the deduction of the disability benefits received by Mr. Briffett and his children under the Canada Pension Plan in calculating his loss of income. As noted, he bases his argument upon *Ratych*.

173 The issue in *Ratych* was whether the injured party, who had lost time from work, could recover from the tortfeasor damages for loss of earnings when he had been paid his full salary pursuant to the collective agreement governing his employment. McLachlin, J. speaking for the majority, resolved the question negatively. She reasoned that this would amount to double recovery since the employee sustained no wage loss as a result of the tort because his employer had continued to pay his salary. The distinction drawn between Mr. Ratych's situation and those encountered in *Blackburn*, *Parry* and *Canadian Pacific Railway* was that the benefits received in those cases were made from insurance type contracts to which the injured parties made contributions. To the contrary, *Ratych* dealt with a full salary payment under his employment contract with neither contribution nor equivalent loss being exacted from the employee; nor with the right in the nature of subrogation by the employer being established (see pp. 983-4).

174 The gist of counsel's position appears to be that *Ratych* heralds a retrenching from that taken in *Canadian Pacific Railway*, somewhat similar to what occurred in the wake of *Blackburn*, and a curtailing of any further extension to the collateral benefit exception to the double recovery principle. Hence, counsel urges this Court to "follow the rationale for damages" as enunciated in *Ratych* and distinguish *Canadian Pacific Railway* on the basis that it "dealt with fatal accident scenarios as opposed to personal injury".

175 Such a distinction is unsustainable, however. In the first place, while *Canadian Pacific Railway* was a fatal accident case, it was following the *ratio* that pension payments should not be deducted that was adopted by the majority of the Law Lords in *Parry*, which was a personal injury case, and which Spence, J. had described on p. 667 as "most convincing". *Secondly*, McLachlin, J. specifically indicated that her decision in *Ratych* was not intended to affect the Court's decision in *Canadian Pacific Railway* by observing at p. 970 that *Ratych* did not deal with "the deductibility of wage benefits". She also "expressly approves of the principles set out in *Parry* and held that Canadian Pension Plan payments should not be deducted from the plaintiff's damages". Finally, this principle was tacitly re-affirmed in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, per Cory, J. at p. 400.

176 Accordingly, the non-deductibility of Canada Pension Plan disability benefits from a negligence victim's damages is well entrenched in the law applicable in this Province. Mr. Briffett paid for the payments he is receiving in respect of his disability. The fact that his contributions were compulsorily made to a statutory pension scheme does not detract from the conclusion that he derives the benefits through a collateral contract from which it would be unreasonable and unjust for the tortfeasor to profit. Thus the judge did not err in not taking these statutory payments into account in framing the award for lost income.

177 The complaint with respect to the judge's treatment of unemployment insurance receipts is not of exclusion, but rather that these collateral benefits were included as income in projecting Mr. Briffett's lost future earnings. Actually, the text of the assessment decision leaves some degree of uncertainty as to the judge's use of previous unemployment benefits received by him in the calculation of his lost income and future earning capacity. On the one hand, the judge asserts that he does "not accept the use of U.I. benefits to be factored in as a permanent component of annual earnings". On the other, immediately afterwards he observes: "it is a fact that the plaintiff has received U.I. benefits in the past and these are, of

course, reported as part of his earnings". As will presently appear in discussing the basis of the lost income award, this last statement refers to the scant evidence adduced of Mr. Briffett's previous earnings showing unemployment insurance benefits as a significant component.

178 In fact, it is difficult to conceive how the award of the size of $400,000.00 for that head of damage could have been reached in the circumstances of the case at bar without including projected continued receipt of that statutory benefit. Indeed, subsequent comments indicate that the judge's misgivings over the use of unemployment insurance benefits in the calculation centered more on a perceived inability to assume they would always be available; rather than to disregarding them altogether.

179 Thus, the assessment decision must be viewed as having included past unemployment insurance receipts as a factor in projecting income loss. Counsel for the appellant physicians argues this was an error, maintaining that receipts from a statutory collateral benefit scheme designed for temporary periods of unemployment ought not be included in measuring potential permanent future income. With respect, this contention is unsustainable.

180 As its name imparts, unemployment insurance, like Canada Pension, is a type of insurance contract or plan. It similarly requires persons engaged in insurable employment to pay an employee's premium through wage deductions and imposes liability upon employers to make reciprocal contributions (see the *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, ss. 51 and 53). In contrast with the pension legislation that provides for payments on retirement, disability or death, the benefits payable under s. 6(1) of the unemployment enactment are predicated on a required qualifying employment period. The Act, therefore, is designed to provide a measure of continued remuneration to individuals whose employment terminates after working a minimum period during which contributions on their behalf were being made to the plan.

181 It is difficult to conceive why benefits received under such a statutory scheme should not be an element in computing lost income. In *Parry*, Lord Reid held at p. 16 that contributory pensions should be regarded as earned income because "(t)he products of the sums paid into the pension fund are in fact delayed remuneration for his current work". This reasoning appears equally applicable to unemployment insurance benefits. The fact that they are the product of compulsory statutory contributions, or that they might also result in more benefits being received than the sum of contributions, does not preclude the proceeds from being similarly treated as delayed remuneration.

182 Therefore, as in all insurance type schemes, private or public, these unemployment benefits for which the injured party has paid are not to be taken into account so as to reduce the tort victim's damages. Giving effect to that principle insofar as unemployment remuneration is concerned, however, requires their inclusion in the computing process; rather than their exclusion as in the case of disability benefits. This is because unemployment benefits relate to what the victim was receiving as delayed remuneration prior to the disability and has lost; rather than to what might have supplemented his income afterwards as a benefit from a collateral arrangement.

183 Consequently, no difficulty stands in the way of including unemployment insurance benefits as part of the victim's past remuneration pattern in calculating lost income and the judge cannot be said to have erred in so proceeding. Not to do so would be just as unfair to the victim as deducting Canada Pension Plan disability payments from his damages. Mr. Briffett was a seasonal worker and was entitled to have the moneys he could establish as receiving as a result of his temporary periods of unemployment included in measuring permanent future income.

184 The problem presented by the unemployment insurance in this case is not its inclusion in the income base as a general proposition; but in assuming, on the basis of the evidence before the judge, that Mr. Briffett would continue to qualify to the same extent in the future. This leads into the third general complaint registered against the assessment which is directed towards the measure of the lost income. In addressing this part of the appeal, this decision will first address the attack upon the judge's alleged approach which is contended to have resulted in the $400,000.00 amount for lost wages being plucked from the air. Then, the fourth error of failing to consider Mr. Briffett's capacity to mitigate will be evaluated before returning to assessing the magnitude of income award itself.

The impugned approach

185 In his criticism of the approach adopted, the appellant physicians' counsel complains that statistical evidence was adduced on behalf of the parties but the judge merely took a global approach without explaining how he quantified the

$400,000.00 award. Claiming to be at a loss as to how that figure was reached, counsel argues that the actuarial method of assessment should have been employed, instead of a global one with no explanatory evidentiary base offered.

186 In response, counsel for Mr. Briffett argues that the choice of which approach to use was "totally within the discretion of the trial judge" and that the circumstances justified his opting for the global method. Moreover, counsel claims that the judge, while not relying on it, used the actuarial evidence that was before him in arriving at the global figure.

187 In a series of three cases which have become generally known as the "trilogy", and through subsequent explanatory decisions refining the positions taken in them, the Supreme Court of Canada, in the words of Professor W.H.R. Charles in the introduction to this text: "*Handbook on Assessment of Damages in Personal Injuries* (second edition, Carswell, at pp. 1 and 2), has:

> ... tried to fashion a body of rational and cohesive principles that would guide lower courts in their assessment of personal injury damages. ... In the course of outlining these principles the Supreme Court also adopted a new method of application. It did so by forsaking the traditional global award approach in favour of an itemization process that relies heavily upon statistical, actuarial and economic evidence presented by expert witnesses.

188 As can be discerned from the first of the "trilogy" cases, viz: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, in forsaking "the traditional global award approach", the Supreme Court directed that general damages be assessed in separate amounts under appropriate heads of damage. Speaking for the court at pp. 235-60 Dickson, J., held this approach to be the only way of meaningfully reviewing the award on appeal; of affording reasonable guidance in future cases; of disclosing to litigants the components of the overall award; and of thereby assuring them that their claim had been given thoughtful consideration.

189 The Court then went on to underscore the problems of making once and for all lump sum awards in assessing the respective categories of damages. In so doing Dickson, J. somewhat decries at p. 236 the failure to devise a system to respond to a victim's need for long-term care and loss of earning capacity by having damage payments "subject to periodic review and variation in light of the continuing needs of the injured person ...". It was, therefore, in default of capacity to tailor damage awards to meet evolving actuality that *Andrews* recommends reliance upon actuarial evidence as the next best means of assessing lost earning capacity. Thus, in the absence of the perfect perception of hindsight, it recommends resort be had to the best means of foresight, i.e. the expert evidence of those qualified to predict financial needs in terms of probabilities and life expectancy.

190 *Andrews*, therefore, gives guidelines as to the most reliable way to arrive at fair compensation for tort victims. To this end it directs that general damages be assessed under specific headings and recommends that heavy reliance be placed on the more structural actuarial method in assessing lost income as the best available means of determining a just measure of compensation in circumstances where the law requires final recompense to satisfy all future contingencies.

191 Nevertheless, it is important to note for the purposes of this discussion that the Court in *Andrews* both recognized the actuarial method, like any forecast, is not infallible and was promoting it as the best, but not the exclusive, method of assessing lost earning capacity. This is apparent from the following commentary on pp. 236-7 of *Andrews* where Dickson, J. states:

> The apparent reliability of assessments provided by modern actuarial practice is largely illusory, for actuarial science deals with probabilities, not actualities ... it is obvious that the validity of answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid ... actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump sum awards, however, we are tied also to actuarial calculations as the best available means of determining awards.

192 While actuarial evidence is presented in *Andrews* as the most reliable approach for assessing a tort victim's loss of income, the foregoing passage clearly sounds a note of caution against courts being lulled into a false sense of confidence by accepting such calculations in blind faith as decisive of the reasonableness of the compensation. In stating that the "apparent

reliability" of actuarial assessments is "largely illusory", the Supreme Court is underscoring that the method is only as sound as the assumptions on which it is based. Behind its mathematical format lies the inescapable reality that it remains an exercise in predicting the future, the absolute reliability of which is beyond the ken of human certitude.

193 A *caveat* is conveyed in the foregoing passage, therefore, against actuarial evidence being accepted as inviolate. The method is to be accepted as providing the most reliable structure within which to fashion an award for lost income. However, courts are not to place such absolute credence on it so as to effectively delegate their ultimate responsibilities as finders of fact to professional actuaries. They are no less constrained to weigh such evidence as they are with any other expert testimony.

194 Within the context of the foregoing, therefore, the "trilogy" through *Andrews* appears to simply direct that resort be had to the actuarial approach as the most reliable method of assessing lost earning capacity, provided the evidence is substantial and the assumptions upon which its conclusions rest are realistic. It does not hold this approach to be the only means of making such assessments; but only "the best available means". If no actuarial evidence is adduced, or such as is to be considered unsatisfactory, a court does not have the option of refusing to make an award, but must assess compensation as best as it can on the evidence available using the conventional global method.

195 Resorting to this conventional method in such circumstances does not contravene the principal directive of *Andrews* to forsake "the traditional global award approach". That directive speaks to disapproving global awards of general damages as a whole, in favour of considering them under the various heads of damage caused to the victim through his or her personal injuries. In the case at bar the judge complied with this instruction by dealing with each category of damage separately, except in his treatment of pre-trial and post-trial income loss which will be discussed presently.

196 However, the judgment in *Andrews* does not preclude resort to global awards in assessments of specific heads of damage, such as loss of income. Where actuarial evidence is non-existent, insufficient or its assumptions are found unreliable, the requirement to make a once and for all lump sum award virtually dictates that the Court rely on the global approach. *Andrews* must be taken to have recognized this in characterizing actuarial calculations as the "best" method.

197 Moreover, it should be underscored that resort to one method does not foreclose the utility of the other. Thus, even where sound actuarial evidence affords sufficient basis to frame an award, a judge may still make a global assessment to further test the fairness of the award. If the initial actuarial projection appears out of line, a revisiting of the postulates on which the calculations are made may be in order before arriving at final decisions. On the other hand, where actuarial evidence is insufficient, recourse may well be had to reliable portions of the statistical evidence in framing the global award. Moreover, reference to the structure provided by the actuarial method may assist in giving a measure of assurance that all relevant factors and contingencies legitimately bearing on the award were addressed. Chief Justice Goodridge, in his decision of the components contained in the actuarial formula in *Dobbin v. Alexander Enterprises Limited* (1987) 63 Nfld. & P.E.I.R. 1 at pp. 9-12, outlines a compendium of these relevant elements. For the foregoing reasons, therefore, neither method should be treated as mutually exclusive, but as complementary, one to the other.

198 In the result, it must be concluded that the actuarial approach is to be considered the more reliable of the two approaches. Resort should undoubtedly be had to it in assessing loss of income provided evidence of sufficient quality is forthcoming at the assessment hearing. The mere adduction of statistical evidence does not, however, as the argument of counsel for the appellant physicians infers, mean that the actuarial method must, *ipso facto*, be employed. Neither is it strictly correct to argue, as does Mr. Briffett's counsel, that the choice of approach lies "totally within the discretion of the trial judge". The method that should have been used depends upon the nature and quality of the evidence available to the assessing judge. In addressing the appropriateness of the judge's use of the global approach in the case at bar, there are two aspects of the evidence before him that have immediate bearing on the inquiry as to justification of his choice.

199 In the first place, it is important to appreciate, as the judge pointed out, that the evidence of past earnings was somewhat scant. While Mr. Briffett testified to having worked as a millwright for some thirteen years, the only evidence of prior years' earnings was for 1985 when he received $12,911.78, comprising $4,586.78 earnings and $8,325.00 unemployment insurance benefits; and, for 1986 when his income totalled $19,777.03, comprising $12,271.03 in earnings and $7,506.00 unemployment insurance. The discrepancy between the two years' earnings is explained by a broken leg that had incapacitated Mr. Briffett in 1985. Therefore, despite his thirteen year career as a millwright, the judge, in effect, had

evidence of earnings for only one full year.

200 It should be noted that no account was taken in any of the calculations of past earnings of any income from fox farming. This is because, although Mr. Briffett is described both as a millwright and a fox farmer, his relatively brief foray into this latter venture was unsuccessful, yielding no profits and his counsel had not pressed the court to take it into consideration in measuring income loss.

201 The second important factor in considering the judge's approach is that the actuarial evidence presented by counsel on both sides was provided through professional chartered accountants. Although they were experienced in their fields, and their presentations showed a working knowledge of actuarial science, they were not actuaries and were not represented as such by counsel. While fuller reference will presently be had to their testimony, it is suffice to note at this juncture the considerable discrepancy between each accountant's measurement of lost earnings: Mr. William C. Budgell supplied a report at the instance of Mr. Briffett's counsel measuring lost earnings at $601,301.00; whilst Mr. John H. Courtenay, who gave testimony at the request of the appellant physicians' counsel, set that loss at $312,789.00 in his written review of that report.

202 It is in this setting that the judge's adoption of the conventional global approach must be addressed. In explaining his reasons for proceeding on this basis, the judge stressed the absence of evidence of prior years' earnings, except for 1986 and the aborted 1985 work year. Not only, in his view, was this insufficient to establish a regular wage profile, it rendered problematic acceptance of the contention advanced on Mr. Briffett's behalf that unemployment benefits be considered a recurring component of past income in calculating lost earnings.

203 There is no doubt, for reasons already explained, that a seasonal worker who is able to show a pattern of unemployment insurance receipts should be entitled to have them considered as a component in computing lost income. However, it is important to show some record of regularity of receipt of these benefits inasmuch as eligibility for them depends, not only on securing work, but the duration of it. The judge recognized this. It was the uncertainty of Mr. Briffett continuing to regularly qualify for benefits on a consistent basis given his occupation and the less than bright employment prospects as well as continued changes in the program similar to those effected since its inception that led him to describe himself as unconvinced that "a calculation of future loss of income based on U.I. benefits as a constant is a reliable way to approach this question".

204 It was, therefore, this inability to establish a constant income stream which caused him to shrink from the actuarial in favour of the global route. He summed up his choice in the following words:

> The uncertainty associated with using U.I. benefits combined with only one year's earnings as a base line brings into question whether any significant or beneficial use can be made of what is called the actuarial approach.

These remarks signify the judge felt there was an insufficient income data base obtainable from the paucity of evidence with respect to income and capacity to earn. This insufficiency of income assumptions, therefore, obviously led him to consider as illusory any confidence in what he later described as "the mathematical precision inherent in the actuarial method".

205 No issue can be taken with that conclusion. It finds further support in the very nature of the actuarial evidence adduced. The deficiencies in the quality of that evidence are manifest in the wide discrepancies between each accountant's lost income calculations; the constant unemployment benefits assumption in the report of Mr. Briffett's accountant; its use of discount rates patently favouring the victim; equally perceptible discount rates supporting the appellant physicians' diminished exposure in their accountant's review of the former report; that review's erroneous premise that Mr. Briffett's pension benefits were deductible from the quantum of damages; and, neither accountant's qualifications to give expert actuarial opinion forecasting outcomes in terms of probability and life expectancy. These defects, of which a perusal of the judge's reasoning shows tacit awareness, afford ample justification additional to the insufficiency of the income data base for the decision not to use the actuarial approach.

206 The foregoing analysis shows the judge's election to use a global approach in his assessment of Mr. Briffett's loss of income not to have been taken capriciously, but to have been a deliberate decision which was the product of a due regard to the principles enunciated by the "trilogy". It also discloses an unerring appreciation of the direction implicit in *Andrews* to fully explore the feasibility of resorting to the actuarial approach. Inasmuch as this resulted in finding the "best available means of determining awards" incapable of furnishing a reliable result because of insufficiency of dependable income data

assumptions and actuarial opinion, the preferred approach was shown to be unreliable in the circumstances and recourse to the conventional global method was in order.

207 Consequently, despite the parties' adoption of the actuarial approach and their urgings that he embrace their respective versions, the judge, mindful of *Andrews'* cautionary note as to possible illusory reliability of that method where evidence was insufficient and assumptions undependable, took the only course left open to him which was not foreclosed by *Andrews*, exercised his fact finding powers and rejected rigid adherence to the actuarial method finding such an approach unsuitable in the circumstances before him. Irrespective of his adoption of that position, however, it should be noted that, during his assessment of lost earning capacity, the judge acknowledged that the evidence of the accountants, giving their actuarial versions of what would be a fair measurement of damage, "was of some assistance". This evinces respect on the judge's part to the fullest possible extent of the Supreme Court's promoting of actuarial type evidence as the most reliable. It also provides an example of one method complementing the other.

208 In the result, the judge's decision to rely primarily on the conventional global method in assessing lost income must be regarded as one taken in full consonance with the law and the evidence before him. The appellant physicians' complaint against this choice must accordingly be rejected.

209 Consideration remains to be given to the actual quantum of that award. Before doing so, however, it appears appropriate to deal with the final complaint having impact upon the measurement of these damages, i.e. the judge's failure to give effect to Mr. Briffett's capacity to mitigate his damages.

The question of mitigation

210 In the introductory remarks outlining the assessment decision and its appeal, the judge's reasons for proceeding on the footing that Mr. Briffett was totally disabled were explained. From this standpoint the judge went on to conclude that gainful employment was no longer a reasonable possibility for him.

211 Counsel for the appellant physicians disputes that conclusion. He takes the position that some consideration should have been given to the potential for Mr. Briffett to manage light work to a certain degree in the future. Since counsel's disagreement with the judge's finding as to the prospects for employment centers upon his evaluation of the evidence, particularly that of an occupational therapist who had performed a functional capacity assessment of Mr. Briffett, the validity of counsel's contention must be tested against an appraisal of the total body of proof bearing on that issue.

212 The medical evidence adduced at the assessment hearing was in concord with similar opinion expressed at trial and conveyed the definite view that Mr. Briffett should not be employed at "any type of labour intensive work ... that he was doing prior to his myocardial infarction". After referring to corroborating evidence presented at the hearing by the occupational therapist, who agreed that Mr. Briffett was unable to return to his previous heavy work, and to Mr. Briffett's own testimony of experiencing recurring chest tightness when persisting in even minimal activity, the judge concluded at the outset of his decision that Mr. Briffett's condition rendered him incapable of performing "any of his previous activities required, for example, in a position such as a millwright".

213 As to the residual capabilities of this heart attack victim, the therapist testified to a belief that, despite his inability to undertake heavy work, Mr. Briffett "could manage light or sedentary work", such as clerical activity. The judge quoted this opinion, as well as the more absolute one of Dr. Mullins to the Canada Pension Disability Division, that has already been referenced, stating that Mr. Briffett is unable "to carry out any form of employment".

214 Later in his decision, the judge synthesizes these divergent views by drawing upon a Supreme Court of Canada authority equating total disability with substantial inability to perform all of the duties of one's position (*Sucharov v. Paul Revere Life Insurance Co.*, [1983] 2 S.C.R. 541 per Laskin, C.J.C. at p. 546). Applying this criterion to Mr. Briffett's circumstances, the judge classified him as being unable to perform the only occupation for which he was fitted to any substantial degree. At the same time, as the earlier cited passage summarizing his reasons for concluding total disability shows, the judge finds the possibility of Mr. Briffett obtaining any employment extremely questionable.

215 From this standpoint, it is apparent that the judge treated the occupational therapist's assessment of capacity to

perform light or sedentary work in the circumstances of the case at bar as an affirmation of Dr. Mullins' opinion of incapacity to carry out any form of employment. Thus these ostensibly divergent opinions were effectively received as expressing one coherent view of Mr. Briffett's total disability insofar as any realistic prospects of employment were concerned. This analysis was undoubtedly supported by the judge's overall impression of Mr. Briffett as a man who "was literally afraid to exert himself to any great degree as he has the constant fear of having another attack", which apprehension was not misplaced in the judge's view.

216 Actually, it should be recognized that the judge did not entirely dismiss the possibility of Mr. Briffett gaining some remunerative position in the future. This appears from his opening comments in addressing the quantum of damages for lost income and earning capacity when he stated that, notwithstanding the bleak prospects, "with some kind of training the plaintiff may be able to generate some income". However, he then describes such a likelihood as "little more than speculation". Thus, to all intents and purposes, the assessment should be regarded as proceeding on the footing that there was virtually no prospect of Mr. Briffett mitigating his loss of earnings through remunerative work.

217 The foregoing review of the judge's reasoning provides no ground to question his treatment of Mr. Briffett's prospects of future employment. There was quite adequate evidence to support this position and no fault can be taken with the decision's rationale in that respect. Accordingly, counsel's complaint that consideration should have been given to the potential of Mr. Briffett mitigating his damages through light work in setting the quantum of damages must be rejected.

The quantum of damages

218 In considering the appropriateness of the sum of $400,000.00 as a measure of Mr. Briffett's lost income and earning capacity, this Court must be governed by, and have due regard for, the scope of appellate review of such awards. In *Andrews*, referring to the frequently cited comments of Lord Simon in *Nance v. B.C. Electric Railway Co.* (1951) A.C. 601 at pp. 613-614, Dickson, J. sets out at p. 235 the well recognized constraints upon appeal courts in reviewing damage awards in the following terms:

> ... no appellate court is justified in substituting a figure of its own for that awarded at trial simply because it would have awarded a different figure if it had tried the case at first instance. It must be satisfied that a wrong principle of law was applied, or that the overall amount is a wholly erroneous estimate of the damage.

219 As the foregoing analysis of the assessment decision shows, the claims by counsel for the appellant physicians that the judge had proceeded on wrong principles of law have been rejected. There now only remains to be explored whether the amount awarded with respect to loss of income and earning capacity was so inordinately high as to be reckoned a wholly erroneous estimate of damage.

220 Such an appraisal is rendered somewhat complicated by the judge's decision to treat lost income to the trial date and future earning capacity as one head of damage. He explained that, since he had opted to use the conventional or global approach, he perceived "no valid reason to differentiate between pre-trial and post-trial loss of income". However, some issue must be taken with that position which, with respect, does not adequately reflect the full import of *Andrews*. As already noted, while the Supreme Court of Canada in that case did not dismiss use of the global approach when assessing separate heads of damage such as lost future earning capacity, it did direct that it should not be employed so as to englobe in one aggregate sum different categories of damages.

221 Pre-trial and post-trial losses of income really fall into separate categories in the sense that they engage different considerations. The former is retrospective allowing the loss to be calculated from the more perfect perspective of hindsight on the basis of known information. Post-trial losses, on the other hand, are prospective leaving their assessments to rest on predictions of what might likely occur in the future, including amongst others, such contingencies as life expectancy, future rates of inflation and investment and potential patterns of the injured party's aborted career. In fact, the difference between the two are such that the relatively more simply calculated pre-trial income losses are generally classified as special damages; while these accruing afterwards are treated as general damages. Because of the different viewpoints from which their assessments proceed as well as the inherent informative advantages of separate amounts for individual categories of damages that Dickson, J. lists in *Andrews*, including the facilitating of conducting a meaningful review on appeal, there was with all

due respect for contrary opinion good reason for the judge at first instance to have indicated separately the sums that were being ascribed to pre-trial and post-trial income losses.

222 By the same token, where such apportionment has not been made, appellate treatment of complaints against the composite award will be assisted if it is, nonetheless, possible to make a reasonable estimation from the text of the assessment decision of the split that the judge would likely have made between pre-trial and post- trial income losses, if they had been separately treated. This is achievable in the case at bar since the judge's reasoning contains findings of income assumptions under which he was operating in making the assessment. These enable a sufficiently reliable estimate of the pre-trial component of his income award to be extrapolated.

223 The first of these assumptions can be discerned at the point in his decision where the judge was expressing difficulty in including unemployment benefits as a constant component of Mr. Briffett's income. He then made the following comments concerning average earnings:

> The plaintiff himself testified that as a millwright his annual average earnings would be in the vicinity of $20,000.00 to $22,000.00 per year. He did not present any documentation to support this contention, but one presumes it is probably somewhere in the ball park.

With the lesser figure being taken as the judge's income estimate, it is quite easy to set the before and after income split at $100,000.00 and $300,000.00 respectively inasmuch as the time lapse between the debilitating heart attack and the trial was a little more than five years. Hence, the amount attributable to pre-trial income, according to such an interpretation of the minimum salary figure, might quite rationally be set at the product of five times $20,000.00.

224 While that figure appears to be a reasonable and modest annual remuneration for anyone engaged in Mr. Briffett's former occupation, it is not absolutely clear if the judge was anticipating unemployment insurance benefits in the lower estimate of $20,000.00. If not, the judge's minimal assumption of Mr. Briffett's average income projected bi-annually should be set at a lesser sum than the $20,000.00.

225 Such a downward adjustment would follow from his difficulty in accepting these benefits as a constant component of income. He resolved this dilemma by ultimately assuming that Mr. Briffett would have received them "for probably about 50% of the time that he would be gainfully employed" which resulted in the judge further assuming "that for the remaining 50% of the time he would have worked at reduced level of income, not qualifying him for U.I. benefits". The only year for which any indication of the potential split of his income between earned wages and unemployment remuneration is available was in 1986, where it will be seen that the ratio approximated 60% and 40%. It can readily be seen that this would produce a bi-annual income of $32,000.00, allowing for a failure to qualify for 40% of the lower income level of the $20,000.00 estimated annual income 50% of the time.

226 Adopting, therefore, this reasoning as establishing the lowest possible estimate of Mr. Briffett's earning capacity, one arrives at an average annual income of $16,000.00. Spread over the five year period this leaves the bare minimum amount attributable to special damages for pre-trial income loss at $80,000.00 and, conversely, the post-trial general damages at $320,000.00.

227 Accordingly, this inquiry into whether the judge's assessment for loss of income and earning capacity can be said, in the words of Dickson, J. in *Andrews*, to be a "wholly erroneous estimate of the damage" will proceed on the footing that $80,000.00, rather than $100,000.00, constitutes the estimate of pre-trial income loss that can be extrapolated from the judge's reasoning. These proportions cast this appeal in the fairest possible light for the appellant physicians. This is because more scope exists to attack the composite earnings estimations with the more readily ascertainable special damages set as low as possible, and the resultant $320,000.00 post-trial loss of earning capacity estimate, more vulnerable to challenge with higher level of contingencies and assumptions involved in its computation, conversely placed at its highest.

228 Moreover, the fairness of estimating $80,000.00 for Mr. Briffett's pre-trial income losses is quite justifiable. As the foregoing commentary shows, it was reached through a relatively simple calculation based on known data derived from events past and upon the most conservative feasible assumptions. Furthermore, unlike estimations of prospective earning capacity, its computation is uncomplicated by having to reckon present monetary values based on future variables, assumptions and contingencies that defy precise definition. In addition, since the tortfeasor had the use of that money in the

pre-trial period, a logical case can be made for increasing that sum to allow a reasonable interest return on it for the victim. For all of these reasons, the attribution of $80,000.00 for five years loss pre-trial income is unassailable on grounds of excess in the circumstances of this case.

229 Therefore, the ultimate question boils down to whether $320,000.00 was too much to award this 37 year old totally disabled heart attack victim for loss of future earning capacity. It is in providing adequately for this type of future pecuniary loss, and in fairly fixing non-pecuniary compensation, that the law encounters its greatest difficulties in achieving its overall objective in setting damages, i.e. to compensate the injured party for the full amount of the sustained loss, but no more. It is only by achieving this end, which McLachlin, J. describes at p. 962 of *Ratych* as "a fundamental principle of tort law", that both parties will have been treated with equal fairness.

230 Ideally, in the case of a prospective lost earning capacity award which must be made on a once and for all lump sum basis, the objective of providing for full compensation but no more is only attainable through the award of one capital sum which will ultimately realize the dual goals of fully compensating the victim for his or her injuries, whilst protecting the tortfeasor from the burden of over indemnification. On the one hand, therefore, such a sum would firstly have to be in an amount which, when invested at interest rates prevailing from time to time, will furnish the victim, up to the earlier happening of his or her retirement or death, with the same benefits that he or she would have received if capable of continuing his or her career pattern. Only then can it be said that the victim has been compensated to the full extent that money permits. On the other hand, the capital sum would also have to be such that the fund resulting from it will be exhausted on the earlier happening of the victim's retirement or death. Only such an outcome would preclude the over indemnification that the law's basic principle of full compensation but no more recognizes as necessary if absolute fairness to the tortfeasor is to be recognized in an award of damages.

231 It is patently obvious that no human agency possesses the properties necessary to so foresee life expectancy, let alone all of the myriad contingencies impacting on fulfillment of this twofold goal of perfect compensation. It is thus impossible to absolutely assure that the award will bring the equally valid concerns of full but not over compensation into exact balance and thereby perfectly serve and protect each party's interests. The law, therefore, must content itself with accomplishing the objective as nearly as possible. It does this by entrusting the assessment of such prospective damages to judicial estimate, or perhaps more accurately, to educated guesstimate. At the same time, as *Nance* underscores, it precludes appellate second guessing of the discharge by the tribunal of first instance of this extremely difficult task in the absence of mistake in principle or patently erroneous estimate.

232 Recognition of the difficulty of the undertaking, however, does not necessarily insulate from the purview of appellate review a figure simply plucked from the air with no evidentiary foundation, as counsel describes the way in which the $400,000.00 sum was reached in the case at bar. The contention that such was the manner in which the judge arrived at this figure, however, must be rejected out of hand. It certainly cannot be seriously maintained with respect to the portion attributable to pre-trial losses for reasons explained in the foregoing commentary. Neither can such a complaint be credibly levied against the judge's treatment of the residual amount deemed referrable to post-trial earning capacity losses.

233 To the contrary, the judge's treatment of the factors relating to the latter category reflects an integral awareness of the full range of relevant elements and contingencies bearing upon a considered measure of prospective lost earning capacity. For example, he took into consideration the total disability of Mr. Briffett; the sparse past earnings record; the contingency associated with unemployment insurance receipts; the seasonal pattern of the victim's prior employment; the prospect of his continuing mobility in seeking employment; his family history of heart disease; his continued, although reduced, smoking habits; and, even such parts of the accountant's evidence as was adjudged "of some assistance". In short, the decision must be counted as a considered one and may not be dismissed as merely cursory or superficial as counsel's argument would depict it.

234 A decision which so evidently addresses all applicable principles and relevant factors, in the absence of any basis to hold the amount awarded inordinately high, must receive appellate approbation simply on the basis of due judicial deference. In the present circumstances, however, in addition to curial deference, an analysis of the decision affords bases for rough calculations which afford further affirmative support for the appropriateness of that figure.

235 The record of the proceedings shows that the present value of the capital sum to be provided has to be an amount sufficient to replace the twenty-seven years of Mr. Briffett's lost earning capacity. This is based on the fact that he had

entered his thirty-eighth year at the time of the assessment so that his disability may reasonably be treated as having deprived him of working up to the normal retirement date of sixty-five years.

236 This assumption of a full working life span is made totally mindful of the fragile pre-existing state of Mr. Briffett's health as evidenced by his severe arterial disease and pre-infarction angina which have already received full discussion. It has also been formed cognizant of the evidence of his family heart disease and continued smoking. However, all of this evidence was directed to the argument of causation and the effort to avoid, or substantially reduce, the assessment of any award *ab initio*. Little, if any, of it went directly to the question of the duration of compensation for lost earning capacity on the grounds of diminished life expectancy. Whatever adverse assumptions might have been drawn from the evidence in that respect, it appears, both from the judge's reasoning and the amount of his award, that he did not elect to make them.

237 Therefore, in the absence of a compelling evidentiary base warranting review of this apparent stance by the judge, the assessment of prospective earning capacity must proceed on the footing that Mr. Briffett's pre-existing health problems were not such as would have precluded him from continuing his normal work pattern for the ensuing twenty-seven years until normal retirement. In the absence of direct expert evidence as to life expectancy, either before or after the heart attack, it is only fair that the assessment of lost earnings should proceed on the expectation that Mr. Briffett will reach normal retirement age. Any other course in the circumstances would be mere speculation.

238 Hence, the judge's task was to estimate as accurately as possible the capital sum required to furnish the equivalent of twenty-seven years of this totally disabled individual's earning power. In attempting to arrive at a reasonable estimate of that sum, let it once more be assumed, for the purpose of putting the appellant physicians' complaint in the best possible light, that Mr. Briffett's earnings at the beginning of that period were $16,000.00. This is the figure which was earlier calculated on assumptions then explained as the lowest possible estimate of his annual income. That annual sum breaks down into $1,333.33 per month. To provide such a monthly sum over twenty-seven years would require a capital sum of the present value of approximately $215,000.00 assuming a 6% interest.

239 However, not only is that capital sum based upon a minimal estimation of starting income, but it contains no management fees that courts may make provision for in such awards and, most importantly, no allowance is made for inflation. While no provision for negative contingencies is reflected in that sum, there appears to be no doubt that when all of these factors are taken into account, particularly inflation allowance, a significant net increase over the $215,000.00 sum would be expected to instill satisfaction that a fair estimate of the capital sum required to provide Mr. Briffett's full compensation had been made.

240 Compelling support for inferring that a fair estimate would require an award in excess of the $215,000.00, and be more in the vicinity of $320,000.00, can be deduced from an analysis of the evidence of the accountant testifying on behalf of the appellant physicians. As earlier recounted, this witness was Mr. Courtenay who, in addition to his professional accounting credentials, is actively associated with a well established employee benefit and insurance counselling firm in this Province. Mr. Courtenay had tendered in evidence his written calculation of lost earnings of Mr. Briffett in the form of a review of Mr. William C. Budgell's corresponding report that was furnished at the instance of Mr. Briffett's counsel and contained his opinion as to the calculation of these losses.

241 In his testimony, Mr. Courtenay explained that he had prepared his review in the same format as Mr. Budgell's report to minimize confusion; had started with the latter's original numbers; and had adjusted them step by step "until I finally come to my final numbers at the end of the day". His review and explanatory testimony showed that he generally adjusted downward the assumptions and figures posited in Mr. Budgell's report. This resulted, nonetheless, in his arriving at an amount of $241,448.00 as the appropriate present value of lost future earnings to be paid to Mr. Briffett. The most significant aspect of this calculation, however, is that it is based upon the assumption that the present value of Canada Pension Plan disability benefits received by Mr. Briffett and his two children were to be deducted from the quantum of the award for lost future earnings.

242 For reasons explained in the foregoing discussion on the correct treatment of collateral benefits, that assumption that these statutory benefits were to be deducted from those damages is clearly incorrect. The effect of this erroneous premise is substantial. Mr. Courtenay's own figures show the total deduction in respect of the children's temporary benefits alone totalled $15,591.00. Since Mr. Briffett's own permanent benefit resulted in deduction of $8,706.00 from his estimated

earning capacity in 1992, and could be reckoned to continue at no less than that amount each ensuing year, it is obvious that the taking into account of his benefits had a significantly greater impact.

243 Indeed, it would appear impossible for the amount of Mr. Courtenay's computation of the present value of lost future earnings to be less than the $320,000.00 if these Canada Pension Plan disability benefits had not been factored into his calculations. In other words, on proper legal assumptions his calculations would have supported the judge's award. The appellant physicians should not be heard to complain of the amount set for damages for lost income and earning capacity if the estimation of appropriate compensation proffered by them, when properly adjusted to conform with governing principles, would have resulted in an award at least equal to that made by the judge.

244 In the result the complaint registered by the appellant physicians against quantum of the $400,000.00 for loss of pre-trial income and for the present value of lost post-trial future earnings is rejected. The judge addressed all relevant factors and the total amount that he set for these two categories of damage cannot be said to be inordinately high or to represent a wholly erroneous estimate of the damage sustained. Deference must be accorded to his assessment of that figure in these circumstances. The fact that rough calculations can be deducted from data found in the course of these proceedings affords further support for affirmative affirmation of the $400,000.00.

245 This finding completes consideration of all issues raised by the appellant physicians in this appeal. There remains to consider the cross-appeal taken by Mr. Briffett seeking an upward adjustment of these damages.

The cross-appeal

246 Mr. Briffett in his cross-appeal contends that the judge's assessment both for income loss and for non-pecuniary general damages should have been higher. His complaint relating to the pecuniary award for loss of income and future earning power is directed towards the judge's use of the global method. He argues that the actuarial approach should have been employed and that Mr. Budgell's actuarial measurements of these income losses ought to be accepted. In his oral presentation counsel points to the $200,000.00 difference between Mr. Budgell's total calculation, which properly excluded consideration of the Canada Pension Plan disability benefits, and the $400,000.00 actually awarded. He suggests the differential establishes that the judge in arriving at his global figure must be taken to have deducted those benefits from the portion of the overall damages attributable to loss of post-trial future earnings and, inasmuch as such a course is incorrect in law, the lost income award should be revised upwards.

247 With respect, that argument is unsustainable. For reasons fully outlined in dealing with the appeal, including the size of the award, it is rational to view the $400,000.00 award as properly not having taken these disability benefits into account. The judge's reasoning for not accepting Mr. Budgell's report, apart from his lack of expert actuarial qualifications, was because there was no reliable foundation upon which to base any actuarial approach. Moreover, the thrust of his decision also indicates that he must have felt the assumptions on which conclusions were based were too favourably weighted in favour of the party at whose instance he was testifying, just as Mr. Courtenay's tended in the other direction.

248 In the final analysis this first complaint must be rejected because of the absence of error in principle; of the indications that all relevant factors were taken into account; and of an inability to state the estimate was erroneous. Thus, the deference that is due with respect to damages awarded at trial applies just as equally to a complaint that it is too low as it does to one that is too high. In neither event may an appellate court interfere.

249 In the other ground of the cross-appeal the adequacy of the non-pecuniary damages for pain and suffering and loss of amenities of life is directly brought into issue for the first time. In addition to his inability to work since his coronary episodes in April of 1987, Mr. Briffett has also had to cope with significant curtailment of his daily activities and with substantial adjustments to his normal enjoyment of life. Thus, as the judge noted, he can no longer enjoy his previous recreations of hunting, fishing, boating, snowmobiling and other outdoor activities to anywhere near the extent to which he had been accustomed. The judge found that this coupled with his well founded emotional stress had dramatically altered his lifestyle; but that the heart attack, nonetheless, had not curtailed Mr. Briffett's "appreciation of life itself ... to the extent often suffered by others even less fortunate than he".

250 Following this appraisal of Mr. Briffett's circumstances, the judge noted that "the upper limit now for non-pecuniary

damages restated to take into account the effect of inflation would be somewhere in the range of $236,000.00". From this standpoint he made his award of $40,000.00 in the following words:

> Taking into consideration the pain suffered by the plaintiff during the three or four days of the attack, the psychological and emotional trauma still being experienced by the plaintiff, the change in his lifestyle and his expectations, the award of non-pecuniary damages is $40,000.00.

251 Non-pecuniary damages present, perhaps, the greatest challenge to setting an award which will be faithful to the fundamental principle governing the assessment of tort damages that the injured party be awarded the full amount of the loss sustained and no more. Being non-pecuniary, they defy any semblance of approach through a systematic method designed to translate the loss of amenities, enjoyment or expectation of life into a fair measure of compensation in monetary terms. There is an obvious fictitious and irrational air or ring to any assumption that money can permit compensation to any extent for consequences of injuries whose very nature is non-pecuniary.

252 This dichotomy is implicitly addressed in *Andrews* by Dickson, J. where, at p. 261, he discusses the basis for non-pecuniary awards in the following terms:

> The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also be arbitrary or conventional. No money can provide true restitution.

253 *Andrews* then went on at p. 265 to set the upper limit for non-pecuniary losses at $100,000.00 in case of the most serious instances of such losses, like those of the young adult quadriplegic then under consideration. The other "trilogy" cases affirmed the need of prescribing an upper limit and fixed the amounts of compensation for the extremely serious non-pecuniary losses before them at $100,000.00 as well (see: *Teno v. Teno*, [1978] 2 S.C.R. 287 at pp. 334-335; and *Thornton v. Prince George Board of Education*, [1978] 2 S.C.R. 267 at pp. 284-285). It should be observed in passing that Spence, J., at p. 334 of *Teno*, while agreeing with the value of uniformity in awards of non-pecuniary damages and accepting that this might be achieved by setting upper limits, nonetheless can be construed as inferring that there might be occasions where exceeding those limits when he speaks of the need to always allow flexibility and to provide for exceptional cases.

254 Nevertheless, after the "trilogy" the upper limit guideline of $100,000.00 became the point of reference and discussion in setting non-pecuniary compensation. Just as Wilson, J. concluded in *Cotic* that the "thin skull" doctrine's conception of wrongdoers taking their victims as they find them has little to do with principles of tort law and a great deal with policy, it would equally appear that the setting of an arbitrary upper limit in assessing non-pecuniary loss has as much to do with policy as it has with inability to prescribe any formula to precisely measure such losses. The foregoing commentary by Dickson, J. in *Andrews* directly confirms this impression. Shortly after making these comments, he voices concern over non-pecuniary damage soaring "to dramatically high levels" as in the United States. The same apprehension moved Spence, J. at p. 333 of *Arnold* to score the "very real and serious social burden of these exorbitant awards". There can be little doubt, therefore, that the limitation placed upon awards for non-pecuniary losses by the "trilogy" was largely motivated by policy concerns over holding these awards and consequential societal costs to reasonable bounds.

255 The adoption of this policy, nevertheless, engendered considerable judicial debate. In his *Handbook on the Assessment of Damages in Personal Injury Cases*, Professor Charles gives an outline at pp. 51-61 of subsequent reaction to it in the "trilogy's" aftermath. Three aspects from the *Handbook's* account have particular bearing on the outcome of Mr. Briffett's complaint of alleged inadequacy of the $40,000.00 non-pecuniary award in this case.

256 Firstly, the debate whether $100,000.00 was unequivocally prescribed as the outer limit was resolved some nine years later where, in the *Handbook's* words at p. 54, it was made "perfectly clear that $100,000.00 was intended to be the maximum amount to be awarded". This clarification was made in *Lindal v. Lindal*, [1982] 2 S.C.R. 629, where the Supreme Court, once more through Dickson, J. reaffirmed at pp. 640-641 "a rough upper limit of $100,000.00 for non-pecuniary loss in cases of severe personal injury".

257 Secondly, the *Handbook* observes that the prescribed limitation was never considered as having been expressed in

constant dollars and the Supreme court was generally accepted as intending the expressed ceiling of $100,000.00 be increased to reflect inflation. Some room appears to exist to wonder if there might not be a certain fragility in the logic in relating increases for non-pecuniary damages to economic criteria where it has been unequivocally recognized that such compensation by its very nature does not lend itself to monetary measure. Be that as it may, the Supreme Court of Canada has sanctioned such inflationary adjustments in *Lindal* where it made clear at pp. 640-641, that the reaffirmed "rough upper limit of $100,000.00" was "subject to increase upon proof of, or agreement as to, the effect of inflation on the value of the money since the decisions of this Court ..." in the "trilogy".

258 Thirdly, the *Handbook* points out that *Andrews* directs that the "functional method" be employed when prescribing non-pecuniary awards within the appropriate upper limit. The underlying purpose and philosophy behind this method, noted by that text at p. 54, is "to provide the injured person with reasonable solace for his misfortune". *Andrews* had explained at p. 262 that solace was not meant "in the sense of sympathy" but "because it will serve a useful function in making up for what has been lost in the only way possible ...". In using that approach, the *Handbook* notes at p. 56 that *Andrews* endorses the practice of courts:

> ... awarding money not because faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost.

259 Before relating Mr. Briffett's circumstances to the foregoing legal context, the absence of resort to earlier decisions should be noted. It is recognized that the foregoing excerpt from *Andrews* intimates that such comparisons could be helpful. Moreover, their use as a gauge of fairness might be viewed of particular utility where a value is placed on uniformity as a check on excessive escalation of non-pecuniary awards. However, no earlier decisions were cited by counsel, which may explain why a perusal of reporting services produced no earlier decision sufficiently comparable to serve as a gauge to fairness in the present circumstances.

260 As noted, the upper limit for a non-pecuniary award at the date of the assessment was taken to be $236,000.00. There was evidence to support this figure from a table reflecting the consumer price index as of October, 1991, which showed $100,000.00 adjusted to inflation at January, 1978, to be the increased sum in round figures accepted by the judge. The fact that the inflated sum represented the adjusted figure nearly two years prior to the assessment is of little consequence. It gives an adequate point of reference and, inasmuch as it was adduced through Mr. Briffett's witness, could hardly be repudiated by his counsel as being too low.

261 The inquiry into Mr. Briffett's complaint, therefore, will be conducted on the footing that $236,000.00 represented the outer limit for non-pecuniary awards at the time of the assessment. The appropriateness of the $40,000.00 award is left to be tested against the philosophy and principles governing evaluation of such losses and the law conditioning the scope of appellate review.

262 The most salient factor arising out of the foregoing account of the philosophy shaping the quantum of non-pecuniary awards is the limited concept of solace to which the monetary compensation is to be related. A deep sense of compassion can indubitably be felt for any young person debilitated by a heart attack as a result of the negligence of others. The loss in terms of human happiness and enjoyment of life cannot be understated. However, neither can it be quantified in terms of money. No pretension is made that money can provide solace in the sense of sympathy. This is why *Andrews* intimates non-pecuniary awards are not to be directed towards compensating for lost or impaired faculties but are aimed at providing physical arrangements which can make life more endurable.

263 In the present case, the judge found that Mr. Briffett's lifestyle had been dramatically altered by his heart attack. However, this does not necessarily translate into a high level of non-pecuniary compensation towards the limits reserved for the most serious cases. There was no specific evidence of the costs associated with adjustments to his way of life and perhaps there could not have been. However, the judge did make the observation that Mr. Briffett's "appreciation of life itself" had not been reduced to the same extent as often is experienced by "others even less fortunate than he".

264 This last comment is most telling. It must be received as made by the judge from his vantage point of having seen and observed Mr. Briffett during the proceedings in which he testified. As the foregoing discussion of the legal framework within which such assessments are to be conducted shows, non-pecuniary awards, while required to be fair and reasonable, are

nonetheless arbitrary and conventional. There is no basis to hold the $40,000.00 to be inordinately low. While necessarily arbitrary, the judge's decision, in character with his disposition of the issues throughout the proceedings, shows a considered treatment of all relevant factors bearing upon a fair and reasonable compensation for non-pecuniary losses. Accordingly, in these circumstances this Court must reject the proposal that it interfere with the award and hold the arguments advanced by Mr. Briffett for an increase in it to be unsustainable.

Summary and Determinations

265 For the foregoing reasons, the trial judge's finding of liability in negligence of Drs. Johnson and Cooper in respect of their diagnosis and treatment of Mr. Glen Briffett whilst he was a patient at the James Paton Memorial Hospital in Gander is affirmed. The judge made no error in finding that these doctors fell short of the standard of care to be expected of them. Neither did he err in his approach in finding a causal link between the negligence of Drs. Johnson and Cooper and Mr. Briffett's significant heart damage. Accordingly, the appeal against the trial judge's finding of liability must be rejected.

266 The complaints of both the appellant physicians and Mr. Briffett against the subsequent assessment of damages must also be rejected. It was not then open to the appellant physicians to seek to avoid liability for the full measure of damages by re-opening Mr. Briffett's pre-existing condition of health. Notwithstanding the appellant physicians' claims to the contrary, the trial judge did not err in his treatment of collateral benefits, his use of the conventional global approach and his treating of Mr. Briffett as totally disabled with no potential to mitigate damages in his assessment of lost income and future earning capacity. Neither did he err in rejecting each side's complaints against the quantum of the lost income assessment; nor in Mr. Briffett's objection to the inadequacy of the award for non-pecuniary losses. Accordingly, the judge's assessment of damages totally $441,000.00 for loss of income and earning capacity; non-pecuniary losses; and, out-of-pocket expenses must be affirmed.

267 In the result, the appeal and cross-appeal are dismissed. Mr. Briffett is entitled to his party and party costs of the appeal and the appellant physicians to theirs on the cross-appeal.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Mazzuca v. Alexakis | 1994 CarswellBC 2548, [1994] B.C.J. No. 2128, 50 A.C.W.S. (3d) 226, [1994] B.C.W.L.D. 2477 | (B.C. S.C., Sep 20, 1994)

1994 CarswellBC 159
British Columbia Court of Appeal

Dillon v. LeRoux

1994 CarswellBC 159, [1994] 6 W.W.R. 280, [1994] B.C.W.L.D. 1226, [1994] B.C.J. No. 795, 42 B.C.A.C. 176, 47 A.C.W.S. (3d) 67, 67 W.A.C. 176, 89 B.C.L.R. (2d) 376

DOUGLAS LAWRENCE DILLON v. JOHANNES M. LeROUX

Hinds, Goldie and Finch JJ.A.

Heard: November 8-9, 1993
Judgment: April 11, 1994

Counsel: *J.P. Lepp*, for appellant.
J.R. MacLeod, for respondent.

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.B Future loss of earning capacity

Headnote

Damages --- Damages in tort — Personal injury — Prospective pecuniary loss — Effect of plaintiff's employment status — General

Medicine and health disciplines — Doctors — Duties and liability — Negligence — Defendant family physician, acting as relief emergency physician, treating plaintiff on admission to hospital emergency department — Plaintiff displaying heart attack symptoms — Defendant ruling out heart attack diagnosis following electrocardiogram — Defendant consulting on-call internist several hours later — Internist diagnosing heart attack following repeat electrocardiogram — Appeal court upholding trial court's finding of negligence.

Damages — Personal injuries — Assessment — Aggravation of pre-existing condition — Defendant physician negligently failing to diagnose heart attack on plaintiff's admission to hospital — Trial judge finding defendant's negligence resulting in 80 per cent of resulting damage to plaintiff's heart muscle — Appeal court upholding damage assessment on aggravation basis and trial judge's apportionment.

Damages — Personal injuries — Pecuniary damages — Loss of future earnings and benefits — Loss of earning capacity — Trial judge erring in calculating plaintiff's "future loss of income" on arithmetical basis rather than assessing loss of earning

capacity.

The plaintiff, 33, was admitted to hospital in Nanaimo just after 2:00 a.m., complaining of sharp chest pains; tingling in his hands and feet; a sweating, clammy feeling; difficult breathing; and epigastric pain. Those symptoms had appeared between 1:30 and 1:45 a.m. The defendant was a family physician, with no emergency room training, performing relief emergency room work at the time. He ordered an electrocardiogram. He then performed a cardiac enzyme test and administered morphine for pain. His initial diagnosis ruled out heart attack in favour of a diagnosis of reflux esophagitis. At 2:55 the defendant ordered another electrocardiogram. The plaintiff's symptoms persisted and the defendant called an internist at 5:45 a.m. The internist ordered a third electrocardiogram at 6:23 and, on seeing the results, he diagnosed a heart attack. The plaintiff was rushed to Victoria and an angioplasty was performed to open a blocked artery. By that time, however, much of the plaintiff's heart muscle had been damaged by lack of oxygen. As a result of the damage, the plaintiff was unable to return to his work in a sawmill as a sorter/patrolman. He did not seek other less physically demanding types of employment. Instead, he decided to become a writer, which produced annual average earnings of approximately $15,000. He sued for damages. The trial judge found negligence. He held that, given the plaintiff's complaints and the results of the electrocardiogram, a reasonably competent family practitioner would have made a working diagnosis of myocardial infarction. As well, the judge found the defendant negligent in failing to consult the internist sooner. He was negligent in deciding to treat the plaintiff for reflux esophagitis without considering the more serious alternatives. The judge also concluded that proper and timely treatment would have significantly reduced damage to the plaintiff's heart. The judge held the defendant liable for 80 per cent of the damage and its consequences. The trial judge assessed non-pecuniary damages at $100,000, pre-trial income loss at $83,302, future income loss at $393,986 and special damages at $3,758. He reduced the total of those amounts by 20 per cent, resulting in a net award of $464,836. In reaching the future income loss award, the trial judge concluded that, in embarking on a writing career, the plaintiff had failed to properly plan his life in order to mitigate his loss. He increased the plaintiff's anticipated annual income from $15,403 to $25,000 in calculating the future loss award. The defendant appealed both liability and damages; the plaintiff cross-appealed the determination that the negligence of the defendant was causative of 80 per cent, rather than 100 per cent, of the injuries sustained to his heart.

Held:

Appeal allowed in part; cross-appeal dismissed.

Per HINDS J.A. (GOLDIE J.A. concurring): With respect to the findings of negligence, there was conflicting expert evidence concerning the significance of the first electrocardiogram viewed in conjunction with the plaintiff's symptoms. The trial judge had the opportunity to observe the various expert witnesses and to assess the weight to be given their sometimes conflicting testimony. There was no basis to overrule the trial judge with respect to his finding that the defendant should have made a working diagnosis of heart attack rather than reflux esophagitis. The defendant knew an experienced internist was on call and reasonably available. There was ample evidence to support the trial judge's finding that the defendant should have called the internist shortly after the first electrocardiogram. There was ample evidence to support the finding of negligence in the decision to treat the plaintiff for reflux esophagitis rather than myocardial infarction.

The plaintiff failed to prove, on a balance of probabilities, that he could not earn as much as before by pursuing some other occupation. He was adamant that he would not consider any occupation other than a writer. The trial judge erred in not having regard to the burden of proof on the plaintiff and he erred in calculating the plaintiff's "future loss of income" instead of determining the plaintiff's future loss of earning capacity. Further, the judge calculated the plaintiff's future loss on an arithmetical basis, instead of assessing the loss of earning capacity by taking into account all relevant evidence. On the evidence, an appropriate assessment of the plaintiff's loss of capacity to earn income was $165,000.

With respect to the apportionment of damages, it was clear the plaintiff's heart muscle had suffered some damage prior to his arrival at hospital. The defendant's negligence constituted "aggravated damages." As in the case of apportionment of fault, an appellate court ought not lightly interfere with a trial judge's apportionment of damage caused by a pre-existing active source and the subsequent tortious conduct of a defendant. There was no palpable and demonstrable error in the appreciation of the legal principles to be applied or a misapprehension of the facts by the trial judge and there was no basis upon which to vary the apportionment made by him.

Per FINCH J.A. (dissenting): It was open to the trial judge to estimate the plaintiff's residual capacity to earn income as something more than what he might earn as a writer. The resulting award was not so far out of line as to warrant the court's

interference.

Table of Authorities

Cases considered:

Considered by majority:

Belknap v. Greater Victoria Hospital Society (1989), 1 C.C.L.T. (2d) 192, *(*sub nom. *Belknap v. Meakes)* 64 D.L.R. (4th) 452 (B.C.C.A.) — *referred to*

Earnshaw v. Despins (1990), 45 B.C.L.R. (2d) 380 (C.A.) — *applied*

Haag v. Marshall (1989), 39 B.C.L.R. (2d) 205, [1990] 1 W.W.R. 361, 61 D.L.R. (4th) 371, 1 C.C.L.T. (2d) 99 (C.A.) — *referred to*

Hall v. Hebert, [1993] 2 S.C.R. 159, 78 B.C.L.R. (2d) 113, [1993] 4 W.W.R. 113, 15 C.C.L.T. (2d) 93, 101 D.L.R. (4th) 129, 152 N.R. 321, 45 M.V.R. (2d) 1, 26 B.C.A.C. 161 — *referred to*

Hotson v. East Berkshire Health Authority, *(*sub nom. *Hotson v. Fitzgerald)* [1987] A.C. 750, [1987] 2 All E.R. 909 (H.L.) — *distinguished*

Ilic v. Fleetwood (1993), 87 B.C.L.R. (2d) 273, 36 B.C.A.C. 248 (C.A.) — *referred to*

Jaegli Enterprises Ltd. v. Ankenman, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, *(*sub nom. *Taylor v. Ankenman)* 40 N.R. 4 — *referred to*

Kitchen v. McMullen (1989), 50 C.C.L.T. 213, 62 D.L.R. (4th) 481, 100 N.B.R. (2d) 91, 252 A.P.R. 91 (C.A.) [leave to appeal to S.C.C. refused (1990), 105 N.R. 399, 103 N.B.R. (2d) 270, 259 A.P.R. 270] — *referred to*

Marshall v. British Columbia (1988), 23 B.C.L.R. (2d) 320 (C.A.) — *applied*

McGhee v. National Coal Board, [1973] 1 W.L.R. 1, [1972] 3 All E.R. 1008 (H.L.) — *considered*

Palmer v. Goodall (1991), 53 B.C.L.R. (2d) 44 (C.A.) [leave to appeal to S.C.C. refused (1991), 54 B.C.L.R. (2d) xxxiv, 135 N.R. 160] — *applied*

Pryor v. Bains (1986), 69 B.C.L.R. 395 (C.A.) — *applied*

R. v. Morin, [1992] 3 S.C.R. 286, 16 C.R. (4th) 291, 41 M.V.R. (2d) 161, 76 C.C.C. (3d) 193, 142 N.R. 141, 131 A.R. 81 — *referred to*

Rendall v. Ewert, 38 B.C.L.R. (2d) 1, [1989] 6 W.W.R. 97, 36 C.P.C. (2d) 117, 60 D.L.R. (4th) 513 (C.A.) [leave to appeal to S.C.C. refused [1990] 1 W.W.R. lxxii, 40 C.P.C. (2d) xlvii] — *referred to*

Snell v. Farrell, [1990] 2 S.C.R. 311, 110 N.R. 200, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94 — *considered*

Stein v. "Kathy K." (The) ("Storm Point" (The)) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 — *referred to*

Taylor v. Asody (1974), [1975] 2 S.C.R. 414, 49 D.L.R. (3d) 724, 3 N.R. 381 — *considered*

Westco Storage Ltd. v. Inter-City Gas Utilities Ltd., [1989] 4 W.W.R. 289, 59 Man. R. (2d) 37 (C.A.) [leave to appeal to S.C.C. refused [1989] 6 W.W.R. lxviii, 102 N.R. 400] — *referred to*

Wilsher v. Essex Area Health Authority, [1988] 2 W.L.R. 557, [1988] 1 All E.R. 871 (H.L.) — *considered*

Woelk v. Halvorson, [1980] 2 S.C.R. 430, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181, 33 N.R. 232, 24 A.R. 206, 114 D.L.R. (3d) 385 — *applied*

Considered in dissent:

Earnshaw v. Despins (1990), 45 B.C.L.R. (2d) 380 (C.A.) — *referred to*

Palmer v. Goodall (1991), 53 B.C.L.R. (2d) 44 (C.A.) [leave to appeal to S.C.C. refused (1991), 54 B.C.L.R. (2d) xxxiv, 135 N.R. 160] — *referred to*

Petersen v. Bannon (1993), 84 B.C.L.R. (2d) 350, 107 D.L.R. (4th) 616, 37 B.C.A.C. 26 (C.A.) — *referred to*

Statutes considered:

Court Order Interest Act, R.S.B.C. 1979, c. 76 — *referred to*

Appeal and Cross-Appeal from judgment of Leggatt J., [1992] B.C.W.L.D. 2291, awarding judgment for damages for medical negligence.

***Hinds J.A. (Goldie J.A.* concurring):**

Introduction

1 This is an appeal by the defendant, a family physician, against a judgment [[1992] B.C.W.L.D. 2291] in which he was found liable in damages in the amount of $464,836.80 for injury sustained to the plaintiff's heart as a result of alleged negligence in treating the plaintiff in the emergency department of the Nanaimo General Hospital (the "hospital").

2 The plaintiff has cross-appealed the determination of the trial judge that the negligence of the defendant was causative of 80%, rather than 100%, of the injury sustained to the plaintiff's heart.

3 Before considering the alleged errors in the judgment of the trial judge I shall summarize briefly the circumstances which gave rise to this litigation.

Circumstances

4 On December 21, 1988, the plaintiff, who was then 33 years old, was lying in bed watching television. Between 1:30 and 1:45 a.m. he felt a sharp pain in his chest which increased in intensity. He got up and walked about his apartment and soon realized that his hands and feet were tingling, he was perspiring, and his breathing was impaired. He thought he was having a heart attack. He called an ambulance, which soon arrived, and he was transported a short distance to the hospital where he arrived at 2:04 a.m.

5 Upon arrival at the hospital the plaintiff explained to the admitting nurse his symptoms including a severe chest pain, tingling in his extremities, perspiration, and difficulty in breathing. He also complained to the nurse of pain in his upper abdomen. The nurse recorded that his blood pressure was elevated.

6 The defendant was a 35-year-old family physician who had received his medical training in South Africa. He had emigrated to Canada and had practised in northern Alberta before establishing a family practice in Parksville, Vancouver Island, in August, 1988. In South Africa he had received six months training in orthopaedic surgery and six months training in anesthesia which were helpful attributes for the conduct of a family practice of medicine. He had no special training as an

emergency room physician.

7 In the autumn of 1988 there were three physicians who handled the majority of the emergency room work at the hospital. They requested other physicians in the general Nanaimo area, including Parksville, to relieve them from time to time. Pursuant to that request the defendant was working as the emergency room physician at the hospital on the early morning of December 21, 1988.

8 The defendant attended to the plaintiff shortly after his admission to the hospital. He perused the patient's chart and the assessment of the admitting nurse and by questioning the plaintiff ascertained his symptoms, which were similar to the symptoms the plaintiff had given to the nurse. On physical examination the defendant found no irregular heartbeats, no arrhythmias, no cardiac abnormalities and a normal steady pulse. He found a tenderness in the upper portion of the stomach. He ordered an electrocardiogram, cardiac enzyme testing and an x-ray. The electrocardiogram was completed at 2:15 a.m. and Dr. LeRoux interpreted it to be aberrant but not diagnostic of myocardial infarction. The cardiac enzyme test results were within an acceptable range. The x-ray was normal.

9 The defendant's initial or "working diagnosis" as recorded by him on the hospital chart under the heading of "Diagnosis" was:

> Reflux esophagitis R/O myocardial ischemia & pericarditis.

In lay terms the working diagnosis was heartburn, and the differential diagnosis was to rule out temporary restriction of the blood to the heart, which could lead to myocardial infarction (a heart attack), and to rule out inflammation of the sac around the heart.

10 Above the working diagnosis on the hospital chart Dr. LeRoux had also written:

> R/O early anterolateral M.I.

In lay terms that meant rule out an early anterolateral heart attack.

11 At 2:30 a.m. morphine was administered to lessen the plaintiff's pain. A few minutes later, at 2:35 a.m., the plaintiff vomited what was described by the nurse as brownish emesis, or vomit. The defendant then prescribed antacids for the reflux esophagitis and gastritis, intravenous fluid to prevent dehydration, and four litres of oxygen per minute for his breathing. The plaintiff's heart rhythm was to be monitored continuously.

12 A second electrocardiogram was taken at 2:55 a.m. The defendant testified that it reassured him. At 3:40 a.m. the plaintiff again vomited and the nurse noted small emesis of bright sanguineous fluid. The defendant testified that he felt further reassured and turned his attention to other patients in the emergency room.

13 At 5:00 a.m. the defendant learned that the plaintiff's pain persisted. He ordered a further enzyme test the results of which, while still within the acceptable range, had increased from the earlier enzyme test. At 5:45 a.m. the defendant telephoned Dr. H.C. Welch, an internist who was on call, and requested his immediate attendance. Dr. Welch arrived at the hospital at 6:00 a.m. and he reviewed the two previous electrocardiograms, the two enzyme tests, and the chart. He examined the patient and ordered a further electrocardiogram. It was completed at 6:23 a.m. It clearly revealed a myocardial infarction. After telephoning Dr. Noel Chant, a cardiologist in Victoria, Dr. Welch directed that the plaintiff be sent to the Royal Jubilee Hospital in Victoria which was a tertiary hospital equipped and staffed to deal with serious heart disorders.

14 At 7:30 a.m. the plaintiff left the hospital by ambulance and arrived at the Royal Jubilee at approximately 9:00 a.m. He was attended by Dr. Chant who caused an angiography to be done on the plaintiff and immediately thereafter he performed an angioplasty which cleared the blocked left anterior descending coronary artery. While the operation was a success, the heart attack suffered by the plaintiff resulted in the death of some heart tissue and that has affected his stamina and his ability to do heavy physical work.

15 On the issue of liability, this is what the trial judge stated, commencing at p. 7 of his reasons for judgment [pp. 7-9]:

Liability

I have come to the conclusion that the plaintiff must succeed on the issue of liability. A careful review of all the medical evidence leads me to the conclusion that in spite of the relative youth of the plaintiff the complaints made to the attending physician of pain and tightness in the chest, of clamminess, of tingling in the hands, combined with the electrocardiogram, was diagnostic of myocardial infarction.

It is important to remember that even though there is some evidence of blood and that is a contra indication for the use of thrombolytic therapy, the discovery of that blood was well after a proper diagnosis should have been made and I have no doubt at all that if consultation commenced at an appropriate time, thrombolytic therapy would have been immediately instituted. Until 3:40 that morning there was no sign of bright blood [and] the appropriate therapy would have been the use of streptokinase after the first electrocardiogram, certainly after the second. By the time Dr. Welch had arrived on the scene he was limited in his choice of treatment. The only alternative left was the angioplasty.

I accept the evidence of Dr. Lubin that a reasonably competent family practitioner would make a working diagnosis of heart attack from the 2:15 electrocardiogram and the other symptoms. I, therefore, find the first element of negligence deals with the initial diagnosis.

The defendant does not have a specialty in emergency medicine or cardiology. With the plaintiff's complaints and an abnormal electrocardiogram he should have sought help if it were available. In the case at bar Dr. Welch, an internist, was on call. I find the defendant was negligent in failing to consult with Dr. Welch until 5:45 that morning. Three and a half hours expired during which time the defendant's heart muscle was being starved of oxygen creating permanent damage. That is the second element of negligence.

The decision to treat for reflex esophagitis, a non life-threatening condition, rather than myocardial infarction, a life-threatening condition, I find to be the third element of negligence. Dr. LeRoux chose to act as if his differential diagnosis included no life threatening alternatives. He also chose to act as if obtaining the advice of a specialist was something of an extraordinary event. Based on a consideration of all the evidence I reach the conclusion that it was incumbent upon Dr. LeRoux or upon any prudent family physician to ensure that he obtained consultation as soon as possible in these circumstances. In relying on his own diagnosis which was in error and failing to obtain a consultation promptly, Dr. LeRoux breached the standard of care required of him.

16 The trial judge concluded that the negligence of the defendant was causative of the majority of the heart damage suffered by the plaintiff. He attributed 80% of that damage to the negligence of the defendant.

17 The trial judge assessed damages as follows:

non-pecuniary damages	$100,000.00
special damages	3,758.00
loss of income to date of trial	83,302.00
future loss of income	393,986.00
	581,046.00
less 20%	116,209.20
Resulting total	$464,836.80

Alleged Errors in Judgment

18 The factum of the defendant (appellant) asserted the following errors in judgment:

1.The learned trial judge erred in finding that thrombolytic therapy should have been instituted after the first or second electrocardiogram.

2.The learned trial judge erred when he failed to consider what would have happened if thrombolytic therapy had been administered after the first or second electrocardiogram.

3.The learned trial judge misapprehended the evidence, and ignored other evidence, in coming to his conclusion that Dr. LeRoux breached the requisite standard of care.

4.The learned trial judge erred in principle when he assessed the Plaintiff's claim for the loss of earning capacity.

5.The learned trial judge erred in concluding that 80% of the damage to the Plaintiff's heart was caused by Dr. LeRoux when there was no evidence to that effect.

19 Two more errors in judgment were alleged in the appellant's factum but counsel for the defendant did not pursue them on this appeal and in accordance with his comments I shall not deal with them.

First Three Alleged Errors

20 At the threshold of the first three alleged errors lies the findings of the trial judge that the defendant failed the standard of care of a reasonably competent family practitioner and was negligent in:

21 1.making a working diagnosis of reflux esophagitis rather than a working diagnosis of a heart attack;

22 2.failing to consult with Dr. Welch in a timely manner; and

23 3.treating the plaintiff for reflux esophagitis rather than for myocardial infarction.

24 With respect to the first finding of negligence it is apparent that there was conflicting expert evidence concerning the significance of the first electrocardiogram viewed in conjunction with the symptoms of the plaintiff.

25 Dr. Stanley Lubin was called by the plaintiff as an expert witness. He had practised as a family physician for 12 years at Sechelt, British Columbia. Thereafter he was appointed as an assistant professor at the University of British Columbia Medical School, and from 1987 until April, 1992 he had been head of the Department of Family Practice at Shaughnessy Hospital in Vancouver. In Dr. Lubin's examination in chief the following questions were asked and the following responses were given:

Q. What does the cardiogram at 2:15 indicate, doctor?

A. This is an abnormal cardiogram, strongly suggestive of an early myocardial infarction, an anterolateral myocardial infarction.

Q. Can you tell us whether or not it is strongly suggestive enough that you would expect a working diagnosis to be made on the basis of it?

A. Yes, I think there are elements in this cardiogram which certainly would have made this for me myocardial infarction, rather, would have been my working diagnosis. There are things in it that are strongly suspicious of an early myocardial infarction.

26 Dr. Lubin testified that in his opinion the second cardiogram taken at 2:55 a.m. was consistent with the working diagnosis of myocardial infarction, and he gave detailed reasons for that opinion.

27 In a similar vein, Dr. D. Peretz, an eminent cardiologist, who was formerly the Chairman of the Intensive Care and

Coronary Care Unit at St. Paul's Hospital, in Vancouver, and a clinical professor of medicine in cardiology at University of British Columbia, testified as follows:

> Q.... And that is a copy of the electrocardiogram taken on Mr. Dillon at 2:55 a.m. — ... What of significance does that cardiogram show?
>
> A. Now — now you can see in the 2:55 that the ST segment, that is after the big downward deflections, the ST segment as it comes up and goes into the wide T wave is actually elevated; that is the classical finding in a myocardial infarction in heart damage.
>
> Q. Yes?
>
> A. So now I would have to say that the 2:15 one showed what's called subendocardial damage, that is, half the thickness of the heart muscle, progression on at 2:55 to the full thickness of the heart muscle.
>
> Q.I see. Does the 2:55 one then help to confirm the diagnosis from the 2:15 cardiogram?
>
> A.Yes.

28 The trial judge had the opportunity, not open to us, to observe the various expert witnesses and to assess the weight to be given to their sometimes conflicting testimony. It is apparent that on the issue of the significance of the first electrocardiogram he accepted the evidence of Dr. Lubin. Thus, there was an evidentiary foundation for the judge's finding. Under those circumstances there is no basis to overrule the trial judge with respect to his first finding of negligence that the defendant should have made a working diagnosis of a heart attack rather than reflux esophagitis: see *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2.

29 The defendant knew that Dr. Welch, an experienced internist, was on call and reasonably available to assist him. There was ample evidence to support the judge's finding that Dr. LeRoux should have called Dr. Welch shortly after the first electrocardiogram was administered.

30 Similarly, there was evidence to support the judge's third finding of negligence. After exploring the meaning of the terms "myocardial infarction" and "reflux esophagitis", Dr. Lubin testified:

> Q. How does [reflux esophagitis] compare in seriousness to myocardial infarction?
>
> A. Usually it's a considerably lesser severity. It is quite painful, but not dangerous ... Myocardial infarction is usually the beginnings of permanent damage to the heart caused by a blockage and because it's permanent, because there is no replacement part for the heart, it is a very serious diagnosis and may be very serious in terms of a person's life expectancy and what they can expect to do ...
>
> Q. Is myocardial infarction life threatening?
>
> A. Yes, it is.

Dr. Le Roux chose to act as if reflux esophagitis (a non life-threatening condition) and myocardial infarction (a life-threatening condition) were of equal importance. On the evidence of Dr. Lubin, they were not.

31 Upon being satisfied that there was evidence to support the three findings of negligence made by the judge against the defendant, I now turn to consider the first three errors in judgment alleged by counsel for the defendant.

32 Since approximately 1980 the standard treatment for myocardial infarction has been the implementation of thrombolytic therapy by means of the injection of streptokinase. It tends to dissolve clotted blood in an artery and thereby allows blood to flow freely to the heart. The heart receives its required oxygen. Streptokinase is normally administered as quickly as possible following the diagnosis of a heart attack. It should be administered within four hours, and not later than six hours after the onset of the symptoms of a heart attack. There is a danger in administering streptokinase. If a patient is

bleeding and receives streptokinase it may not be possible to stop the haemorrhaging because of the anti-coagulant propensity of streptokinase. In that case the patient may bleed to death.

33 Dr. V.F. Huckell, a cardiologist of experience and distinction, testified on behalf of the defendant. He stated that as president of the Cardiac Society he had chaired a committee that had developed guidelines for the use of thrombolytic therapy. He indicated that the guidelines had been prepared in the latter half of 1988, probably in September, 1988. The guidelines for community hospitals, such as Nanaimo Hospital, were as follows:

34 1. classic electrocardiogram changes for myocardial infarction;

35 2. enzyme evidence of myocardial infarction;

36 3. physical symptoms of myocardial infarction.

37 There was no evidence that the defendant, or Dr. Welch, or any of the other doctors who gave expert evidence at the trial, were aware of the guidelines as of December, 1988.

38 The first electrocardiogram was performed at 2:15 a.m. At 2:35 a.m. the plaintiff vomited brownish emesis. There was evidence that it may well have been dark undigested food. At 2:55 a.m. the second electrocardiogram was given. It was not until 3:40 a.m. that the plaintiff vomited again, and for the first time flecks of bright blood were noted by a nurse. There was time for the thrombolytic therapy to have been implemented after the first or after the second electrocardiogram. In my view the trial judge did not err with respect to the first alleged error.

39 Upon reading the whole of the reasons for judgment it is implicit that the trial judge considered what would have occurred if thrombolytic therapy had been given after the first or second electrocardiogram.

40 In support of the submission on the third alleged error, counsel for the defendant referred us to various items that were not commented upon by the trial judge in his reasons for judgment. Mr. Lepp asserted that the judge misapprehended or ignored such evidence. The trial lasted for five days. It involved a great deal of oral and written medical evidence. It is understandable that the judge did not refer to each and every item of evidence. He was not required to do so. See: *R. v. Morin*, [1992] 3 S.C.R. 286 at 296.

41 At the start of his consideration of the issue of liability the judge stated, at p. 7 of his reasons for judgment:

> A careful review of all the medical evidence leads me to the conclusion ...

Later, at p. 8 of the judgment, he stated:

> Based on a consideration of all the evidence, I reach the conclusion ...

Again, under the heading of Causation, he observed at p. 9:

> On a review of the whole of the evidence ...

In the face of those clear and explicit statements I am not prepared to accede to the submission of counsel for the defendant that the judge misapprehended or ignored any of the evidence.

42 At the core of the defendant's three alleged errors lies the request of his counsel that we overturn important findings of fact made by the court below. In the absence of any palpable and overriding errors I am not prepared to accede to this request: see *Stein v. "Kathy K" (The) ("Storm Point" (The))* (1975), [1976] 2 S.C.R. 802.

The Fourth Alleged Error — Loss of Earning Capacity

43 Prior to December 21, 1988 the plaintiff had worked as a sorter/patrolman at a mill owned by MacMillan Bloedel. He

had worked for that company for 13 years. He possessed a grade 10 education. Following his heart attack the plaintiff was unable to do any work for a time. He chose not to participate in his employer's rehabilitation programs. He did not seek other less physically demanding types of employment. Instead, he decided to become a writer. To that end he returned to school and upon graduation enrolled in a Fine Arts Program at the University of Victoria. By the time of trial he had completed two years study in that course. The trial judge made the following significant finding [p. 17]:

> I have come to the conclusion that the plaintiff has failed to properly plan his life in terms of mitigating his future income loss.

44 It was not disputed that while the plaintiff's heart attack did not result in catastrophic injury he was, nevertheless, physically affected to a significant and continuing degree. He was not able to return to his job as a sorter/patrolman. It was too physically demanding. There was evidence that he was capable of doing light physical work. Dr. M.D. Mos covich, an eminent cardiologist who had examined the plaintiff and was called as a witness for the defence, gave the following evidence concerning the plaintiff's ability to work:

> I would assume that this man could do activities that required him to walk around, to carry small objects, things like that rather than a purely sedentary type of lifestyle. From the assessment of the patient, from looking at him and from the tests that we carried out it is suggested that he does have some disability which would obviously hold him back from doing very heavy construction work or something like that. But to do other types of activities I think would be possible.

45 At the time of his heart attack the plaintiff was earning from his employment at MacMillan Bloedel $32,620 per year plus fringe benefits worth approximately 30% of his wages. At the time of trial the plaintiff would have been earning as a sorter/patrolman at MacMillan Bloedel, had he not suffered a heart attack, $34,140 per year plus fringe benefits worth $10,242 for a total of $44,382.

46 There was evidence that the average annual income of a writer, the field of employment chosen by the plaintiff, was $15,403. As a result of the trial judge's finding that the plaintiff had failed to plan properly his life in order to mitigate his loss, he increased the plaintiff's anticipated annual income from $15,403 to $25,000. He used the multiplier accepted by both counsel of 18,566 for the present value of $1,000 from age 38 to age 65. The judge allowed him one year's wages from the date of trial for retraining and calculated what he described as the plaintiff's "future loss of income" as follows [p. 18]:

For one year training programme				$34,140	
Age 38 until age 65					
Income		$34,140			
Benefits (30%)		10,242			

		$44,382			
Multiplier per $1,000 from age 38 to 65 is 18,566					
(Exhibit 1, Tab 12, p. 4, Table 1					
Associated Economic Consultants)					
18,566	x	$44,382	=	$823,996	
Credit projected annual earnings. The annual earnings					
expected in view of the plaintiff's physical condition					
in view of my comments about lack of mitigation I					
place at $25,000, including future fringe benefits					
18,566	x	$25,000	=	$464,150	$359,846
				-------	--------
Net Income Loss					$393,986
					--------

47 After allowing one year's loss of income for retraining, the trial judge calculated the present value of the difference between what the plaintiff would have earned at MacMillan Bloedel as a sorter/patrolman and an arbitrary figure of $25,000 for a period of 27 years — until the time of the plaintiff's anticipated retirement at age 65.

48 In *Woelk v. Halvorson* (1980), 114 D.L.R. (3d) 385 [[1981] 1 W.W.R. 289] (S.C.C.), McIntyre J., speaking for the court, set forth at pp. 388-89 the circumstances under which a Court of Appeal may alter a damage award of a trial judge. He stated:

> 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 the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

49 In the circumstances of this case are we entitled to intervene and alter the damage awarded for future loss? I think we are, on the basis of the following authorities.

50 The case of *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.), involved a young man aged 24 who was injured in a motor vehicle accident. He sustained severe bone fractures and was left with some permanent but minor brain damage. The trial was held before a judge and jury. The plaintiff appealed the damage award. At p. 399 Southin J.A. had this to say:

> In my opinion, the true questions the jury must address in a claim such as this are:
>
> 1.Has the plaintiff's earning capacity been impaired to any degree by his injuries?
>
> 2.If so, what amount in the light of all the evidence should be awarded for that impairment?
>
> As Dickson J., as he then was, said in *Andrews v. Grand & Toy (Alta.) Ltd.*, [1978] S.C.R. 229 at 251, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 8 A.R. 182, 19 N.R. 50:
>
> "It is not loss of earnings but rather, loss of earning capacity for which compensation must be made ... A capital asset has been lost; what was its value?"
>
> In catastrophic injury cases, the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss cannot be determined with any degree of exactitude.
>
> The learned judge ought to have addressed the question as one of impairment and pointed out that there was evidence of a limitation on earning ability.

51 In *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), Southin J.A. expressed herself more fully on the principles to be applied in determining the loss of future earning capacity of a young person not catastrophically injured in an accident.

52 In that case the plaintiff, who was 31 at the date of trial, had been significantly but not catastrophically injured in an accident. Prior to the accident the plaintiff had worked at a supermarket and at the time of trial he would have earned $40,000 per year in that job. After the accident the plaintiff became employed as a stereo installer earning $12,000 a year. The jury awarded him $494,000 for loss of future earning capacity. The defendant appealed. At pp. 58-60 Southin J.A. spoke thus:

> I infer that the jury made the award which it did because it concluded, in accordance with the thrust of the charge, that the respondent was entitled to be compensated, subject to an allowance for contingencies, for the whole of his working life for the difference between what he would have earned as a clerk in Safeway and what he was going to earn as a stereo installer.
>
> In law, such a conclusion is erroneous ...

> Here, we are not talking of a complete loss of earning capacity but of an impairment of that capital asset. See *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 at 399 (C.A.) ...
>
> But with comparatively young plaintiffs — and I do not propose to define "comparatively young" save to say that 31 is well within the description — the jury must be told that it is for the plaintiff to show the extent to which his ability to earn a living as it existed before the injury has been impaired ...
>
> A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job".
>
> What the respondent proved in this case was that he had lost his capacity to follow the sort of occupation he was pursuing at the time of the accident. But that did not prove, on a balance of probabilities, that he could not earn by pursuing some other sort of occupation, as much as before.

53 See also *Ilic v. Fleetwood* (18 October 1993), Vancouver CA016371 (B.C.C.A.) [reported 87 B.C.L.R. (2d) 273].

54 In this case the plaintiff did not "... prove, on a balance of probabilities, that he could not earn by pursuing some other sort of occupation, as much as before" — see *Palmer* (supra), at pp. 59-60. The plaintiff testified that he wanted to be a writer. He was adamant that he would not consider any other occupation, within his physical limitations, that would be more remunerative than what he could reasonably expect to earn as a writer. The trial judge found that the plaintiff was not prepared to seek employment in sedentary fields such as bookkeeping, record keeping or office work.

55 The trial judge did not follow the principle expressed in *Palmer v. Goodall* (supra). Moreover, he calculated the plaintiff's "future loss of income" instead of determining the plaintiff's future loss of earning capacity. Furthermore, the trial judge calculated the plaintiff's future loss of income on an arithmetical basis, instead of assessing the plaintiff's loss of earning capacity by taking into account all relevant evidence.

56 In my view, the learned trial judge erred in principle in respect of the determination of the plaintiff's loss of earning capacity. Accordingly, in accordance with *Woelk v. Halvorson* (supra), we are entitled to intervene.

57 Counsel for the defendant suggested that if we concluded that the trial judge had erred with respect to this head of damages, we should assess the plaintiff's damages ourselves, rather than direct a new trial on that issue which of course would involve both parties in additional expense and inconvenience. Counsel for the plaintiff did not oppose that suggestion.

58 After taking into consideration all of the evidence relevant to this issue and after gazing deeply into the crystal ball I would assess the plaintiff's damages for loss of capacity to earn income at $165,000.

Fifth Alleged Error — Causation

59 In attributing legal responsibility for a particular injury it is necessary to ascertain whether the defendant's culpable conduct was a causally relevant factor. As Sopinka J. explained in *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 at 298-99 (S.C.C.):

> Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.

60 Under the rubric of cause-in-fact, the focus is an historical one and attention is directed to the simple question of what happened, of whether the defendant's conduct produced the injury. It is considered to require a factual inquiry which is resolved by the production of evidence and the drawing of inferences from that evidence.

61 On the question of causation as on other issues essential to the case of action for negligence the plaintiff, in general, has the burden of proof on the balance of probabilities: see *Belknap v. Greater Victoria Hospital Society* (1989), 1 C.C.L.T.

(2d) 192 at 199 (B.C.C.A.). Evidence must be introduced which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. The sometimes rigid application of proof of causation principles has recently been somewhat relaxed.

62 I commence consideration of this issue by reference to the House of Lords decision in *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1. For some years that decision was interpreted as authority for the proposition that under certain circumstances the traditional onus of proof could shift to a defendant. Upon it being established that the breach of duty materially increased the risk of damage occurring, then the burden of proof would fall upon the defendant to refute the causal connection. Sixteen years later the foregoing interpretation was rejected by the decision of the House of Lords in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557. At p. 569 Lord Bridge of Harwich, who delivered the unanimous judgment of the court, stated:

> The conclusion I draw from these passages is that *McGhee v. National Coal Board* [[1973] 1 W.L.R. 1] laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

63 The decision in *Wilsher* was followed in decisions of Courts of Appeal in various Canadian provinces: see *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513 [38 B.C.L.R. (2d) 1, [1989] 6 W.W.R. 97] (B.C.C.A.); *Kitchen v. McMullen* (1989), 62 D.L.R. (4th) 481 (N.B.C.A.); *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*, [1989] 4 W.W.R. 289 (Man. C.A.); and *Haag v. Marshall* (1989), 61 D.L.R. (4th) 371 [39 B.C.L.R. (2d) 205, [1990] 1 W.W.R. 361] (B.C.C.A.).

64 In the latter decision Lambert J.A., who delivered the majority judgment, stated at p. 379:

> The "inference" principle derived from *McGhee*, and from the three Canadian cases to which I have referred, is this: Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.

65 The issue of the burden of proof and the "inference" principle was considered by the Supreme Court of Canada in *Snell v. Farrell* (supra). After canvassing numerous authorities, including *McGhee* (supra), *Wil-sher* (supra) and the four Court of Appeal decisions in Canada above referred to, Sopinka J. concluded, at p. 301:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced.

66 In the instant case the trial judge after reviewing some of the evidence stated [p. 9]:

> I, therefore, find there is a causal connection between what I find to be negligence on the part of the defendant and the damage to the plaintiff's heart.

67 After referring to *McGhee* (supra), *Wilsher* (supra) and *Farrell v. Snell* (supra), the trial judge concluded that he had no difficulty in finding on a balance of probabilities that the defendant's negligence materially contributed to the majority of the damage done to the plaintiff's heart.

68 There was a substantial body of evidence to support the foregoing findings of the judge and there is no basis for interference by this court. Indeed, counsel for the defendant in both his factum and in his oral submissions did not seem to take issue with those findings.

69 The main thrust of his argument on the issue of causation was that the judge erred in holding the defendant 80% liable for the damage done to the plaintiff's heart when there was no evidence to that effect. None of the expert witnesses was asked to express an opinion on the percentage of the damage done to the plaintiff's heart as a result of the negligence of the defendant and none of them volunteered an opinion in that regard.

70 Counsel for the plaintiff, in his cross-appeal, likewise questioned the apportionment of liability. He asserted that the defendant should be held liable for 100% of the damage done to the plaintiff's heart.

71 The main question to be determined is whether, in the circumstances of this case, the trial judge erred in holding the defendant caused 80% of the damage done to the plaintiff's heart.

72 I shall first consider the submission of the plaintiff's counsel that the defendant should be responsible for 100% of the plaintiff's damages. He relied upon two cases: *Hotson v. East Berkshire Health Authority*, [1987] 2 All E.R. 909 (H.L.), and *Wilsher v. Essex Area Health Authority* (supra).

73 The *Hotson* decision dealt with whether a 13-year-old boy's injured hip, which resulted in avascular necrosis, was caused by his falling from a rope tied to a tree, or stemmed from the defendant's negligence in the misdiagnosis of and delay in treating his injury. Based on the findings of fact of the trial judge the House of Lords concluded that the plaintiff's injury flowed from the former and not the latter. Causation had not been established. The defendant's appeal was allowed and the plaintiff's claim was dismissed.

74 At p. 913 Lord Bridge spoke thus:

> The upshot is that the appeal must be allowed on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences. Your Lordships were invited to approach the appeal more broadly and to decide whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a statistical chance which is less than even that, but for the defendant's breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure of damages for the lost chance.

75 Lord Bridge concluded by stating, at p. 914:

> As I have said, there was in this case an inescapable issue of causation first to be resolved. But if the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed. The decisions of this House in *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615, [1956] AC 613 and *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1 give no support to such a view.

76 Lord Ackner expressed a somewhat similar opinion at p. 922:

> In a sentence, the plaintiff was not entitled to any damages in respect of the deformed hip because the judge had decided that this was not caused by the admitted breach by the authority of their duty of care but was caused by the separation of the left femoral epiphysis when he fell some 12 feet from a rope on which he had been swinging.
>
> On this simple basis I would allow this appeal. I have sought to stress that this case was a relatively simple case concerned with the proof of causation, on which the plaintiff failed, because he was unable to prove, on the balance of probabilities, that his deformed hip was caused by the authority's breach of duty in delaying over a period of five days a

> proper diagnosis and treatment. Where *causation* is in issue, the judge decides that issue on the balance of the probabilities. Unless there is some special situation, eg joint defendants where the apportionment of liability between them is required, there is no point or purpose in expressing in percentage terms the certainty or near certainty which the plaintiff has achieved in establishing his cause of action.
>
> Once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100% certainty. The decision by Simon Brown J in the subsequent case of *Bagley v North Herts Health Authority* (1986) 136 NLJ 1014, in which he discounted an award for a stillbirth because there was a 5% risk that the plaintiff would have had a stillborn child even if the hospital had not been negligent, was clearly wrong. In that case, the plaintiff had established on a balance of probabilities, indeed with near certainty, that the hospital's negligence had caused the stillbirth. Causation was thus fully established. Such a finding does not permit any discounting: to do so would be to propound a wholly new doctrine which has no support in principle or authority and would give rise to many complications in the search for mathematical or statistical exactitude.

77 Lord Bridge was dealing with the concept of awarding damages "for the lost chance". Lord Ackner was dealing with the concept of discounting the award of damages to reflect the degree of uncertainty in the establishment, on a balance of probabilities, of causation. Those circumstances are not involved in this appeal.

78 *Wilsher v. Essex Area Health Authority* (supra) dealt with causation. In that case the House of Lords concluded that the trial judge had not made critical findings of fact with respect to the conflict between the testimony of experts and directed, with reluctance, that a new trial be held. The issue of apportionment of causation for the plaintiff's retrolental fibroplasia was not addressed. In my view *Wilsher* does not assist the plaintiff's submission on the issue of apportionment.

79 Counsel for the defendant, in responding to the cross-appeal, relied on *Pryor v. Bains* (1986), 69 B.C.L.R. 395 (C.A.). That case involved the apportionment of an award of damages between two sources or causes of the plaintiff's loss which gave rise to the award of damages. The principle was expressed by Carrothers J.A. at p. 397:

> These two sources or causes of damages can be dealt with, either as a case of aggravated damages or as a "thin skull" case, depending on which of two factual circumstances are found to exist. In a case where a second source or cause of damages is found to aggravate an existing and active first source or cause, that is a case of *aggravated damages* and there may be an apportionment of damages as between the two sources or causes. On the other hand, in a case where a second source or cause of damages triggers the first source or cause which has been found immediately prior to the injury to be merely a latent weakness or susceptibility and not an active source or cause, that is a "thin skull" case and there can be no apportionment as between the two sources or causes and full damages must be awarded against the tortfeasor creating the second source or cause of damages which triggered the latent first source or cause. This distinction became the nub of this appeal. (emphasis added)

80 Applying the foregoing principle, the Court of Appeal upheld the ruling of the trial judge that the pre-existing condition of the plaintiff caused 75% and the defendant's negligence caused 25% of the plaintiff's post-accident injury condition.

81 The matter of apportionment of damages between a pre-existing condition and the defendant's tortious conduct was discussed in Linden & Klar, *Remedies in Tort*, Carswell, 1989, para. 45.1 [vol. 4, title 27]:

> As a general rule, the defendant takes his victim as he finds him and is liable for the full extent of the plaintiff's injuries despite the particular plaintiff's pre-existing physical or psychological susceptibility to injury. Provided that the plaintiff's pre-existing condition is a latent weakness or susceptibility (a "thin skull") which is made manifest only as a result of the defendant's conduct, apportionment between the two causes of damage is not appropriate. *However, where the plaintiff suffers from a pre-existing condition which is an active source of damage prior to the defendant's tortious conduct, the defendant's conduct may be taken as an aggravating factor resulting in an apportionment of damages between the existing condition or source of damage and the second or aggravating source. Thus, where a plaintiff's condition was manifest and disabling prior to the injury inflicted by the defendant, damages should be assessed as if the*

> *plaintiff's condition at the time of assessment resulted from a single cause. The award should then be apportioned so that the damages payable by the defendant constitute only that portion of the total amount assessable in respect to the plaintiff's disability which is fairly attributable to the defendant's tortious conduct.* (emphasis added) [footnotes omitted]

Thus apportionment accords with the underlying rationale of tort law — to reimburse the claimant for the damages suffered at the hands of the defendant: see *Hall v. Hebert*, [1993] 2 S.C.R. 159, at pp. 200-201 [78 B.C.L.R. (2d) 113, [1993] 4 W.W.R. 113]. The cases cited above seem sound, for otherwise the defendant would be made to pay for a disability that the plaintiff would certainly have suffered even if the wrong had not been done.

82 In my view the foregoing principle should be applied in the circumstances of this case. There was evidence that complete occlusion of the artery leading to the plaintiff's heart occurred at between 1:30 and 1:45 a.m. and soon thereafter muscle cells in the heart began to die. The plaintiff had a pre-existing condition that was active and disabling prior to his admission to the Hospital and prior to the time that he came under the professional care of the defendant. The defendant's breach of duty of care increased the damage to the plaintiff's heart. The defendant's negligence constituted "aggravated damages".

83 The trial judge did not err in apportioning the damages. The question remains whether this Court should vary the apportionment of the trial judge whereby the defendant was found responsible for 80% of the damage done to the plaintiff's heart.

84 The general principle with respect to an appellate court varying the apportionment of fault determined by a trial judge was expressed in the dissenting judgment of Dickson J. (as he then was) in *Taylor v. Asody* (1974), [1975] 2 S.C.R. 414, at p. 423:

> Apportionment of fault is primarily and properly a matter within the discretion of the trial judge ... [and] except in a strong and exceptional case, an appellate court will not feel free to substitute its apportionment of fault for that made by the trial judge unless there has been palpable and demonstrable error in appreciation of the legal principles to be applied or misapprehension of the facts by the trial judge.

See also *Marshall v. British Columbia* (1988), 23 B.C.L.R. (2d) 320 (C.A.), where, at p. 325, Carrothers J.A. stated:

> The apportionment of fault is properly a matter within the discretion of the trial judge and ought not to be interfered with lightly by an appellate court.

85 Those authorities deal with the principle to be applied when an appellate court is called upon to review the apportionment of fault made by a trial judge. In my view the same principle is applicable where, as here, the apportionment is in respect of damage caused by a pre-existing active source and the subsequent tortious conduct of a defendant.

86 Here there was no "... palpable and demonstrable error in appreciation of the legal principles to be applied or misapprehension of the facts by the trial judge". Accordingly, I would not be prepared to vary the apportionment made by the trial judge.

Revised Determination of Damages

87

Loss of income to date of trial	$83,302
Special damages to date of trial	3,758
Non-pecuniary damages	100,000
Loss of capacity to earn income	165,000

	352,060

Less 20% for apportionment	70,412

Net award	281,648

88 Pre-judgment interest under the *Court Order Interest Act*, R.S.B.C. 1979, c. 76, shall be allowed as directed by the trial judge.

89 The appeal is allowed to the extent that the award for loss of capacity to earn income is reduced from $393,986 to $165,000, which is subject to the further 20% reduction for the apportionment. The cross-appeal is dismissed.

***Finch J.A.* (dissenting):**

90 I have had the advantage of reading in draft the reasons for judgment of Mr. Justice Hinds. I agree with his proposed disposition, and his reasons therefore, on all but one issue. That issue is the amount to be assessed for the respondent's future loss of earning capacity.

91 The learned trial judge, relying heavily upon evidence of an economist, made an allowance under this head of $359,846, to which he added the equivalent of one year's loss of income for a period of re-training, in the sum of $34,140. The total award under this head was therefore $393,986.

92 The respondent testified that since his heart attack he has engaged in a Fine Arts program at the University of Victoria with a view to becoming a writer. Formerly he had been a mill worker for a forest products company. The learned trial judge regarded his decision to become a writer as a failure on his part to mitigate his damages. He said [pp. 17-18]:

> He insists that it is the only occupation he wishes to engage in and has very little interest in other sedentary, non-physical occupations. The average annual income in his chosen field is $15,403. I have come to the conclusion that the plaintiff has failed to properly plan his life in terms of mitigating his future income loss. The defendant is not obligated to subsidize a choice which may have little hope for significant future income. He has made a conscious decision not to seek further sedentary employment with MacMillan Bloedel. I am not able to say whether such employment is available to him but the plaintiff has made a conscious decision not to seek employment in say, for example, bookkeeping, record keeping or office employment. The best one can do here with the assistance of the economic material filed is to try to make an educated guess at a realistic future income loss figure. There is no question that the loss of ability to do physical work will permanently handicap the plaintiff in his future income earning capacity. It is not at the extent claimed.

93 The trial judge then added the sum of about $10,000 to a writer's average income of $15,400 to reflect what the judge thought the respondent should have been able to earn, but for his decision to become a writer.

94 The appellant says the approach of the learned trial judge is in error. The appellant says that the sum of $100,000 would have been an appropriate allowance, including any compensation for a re-training period. I did not understand the $100,000 amount to be put forward by the appellant on anything but a purely arbitrary basis. The appellant relied upon *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.), and *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 144 (C.A.).

95 In my respectful view, to the extent that the learned trial judge relied upon the respondent's failure to mitigate as a basis for his award, he erred. Failure to mitigate is an allegation of fact which must be pleaded and proven by the defendant: see *Petersen v. Bannon* (1993), 84 B.C.L.R. (2d) 350 (C.A.).

96 There is no such plea in the statement of defence filed in this case. The appellant said simply that he was not negligent, and that his conduct did not cause or contribute to any loss suffered by the respondent. Nor does the evidence appear to have supported the allegation that the respondent failed to mitigate. The learned trial judge was "... not able to say whether such [other sedentary] employment was available to him ..." So if the issue depended upon the respondent's failure to mitigate his

losses, I would have concluded that the respondent should succeed, because the appellant had not discharged the onus of proof.

97 It is apparent, however, that what the learned trial judge tried to do was evaluate the respondent's future lost earning capacity by assessing what his lifetime income would have been at his former employment, assessed on an actuarial basis, and then deducting from that amount his estimate of what the respondent's residual earning capacity was in his impaired condition consequent upon the appellant's negligence. The trial judge determined that the respondent's residual earning capacity had a greater value to him than that to which the respondent proposed to put it as a writer. That is a finding of fact, and one which was supported by the evidence. So while I would not have characterized the case as one where the respondent failed to mitigate his losses, I would agree that it was open on the evidence to the learned trial judge to estimate the respondent's residual capacity to earn income as something more than what he might earn as a writer.

98 The question is whether the resulting award is so far out of line as to warrant this Court's interference. The respondent was born 21 February 1955. He had a grade ten or eleven education. His heart attack occurred 21 December 1988, when he was thirty-three. He had been working for the same employer for thirteen years, virtually all of his adult life. The trial was in May 1992, when the respondent was thirty-seven. So the trial judge had to assess damages for future lost capacity to earn income for the next twenty-eight years. His total award of almost $394,000 would provide the respondent with an annuity of about $20,000 for twenty-eight years (based on the economist's evidence). That is about 60 per cent of his annual income excluding benefits, or about 45 per cent of his annual income including benefits, as at December 1988.

99 This may be compared with the learned trial judge's award of $100,000 for non-pecuniary damages, at a time when the maximum award permissible was approximately $240,000. The proportion allowed to the respondent under this head is just over 40 per cent of what would have been awarded in a case of total disability. Although there is no fixed correlation in law between the awards for non-pecuniary losses and future lost capacity to earn income, one might reasonably expect a certain balance, or proportionality between the amounts awarded.

100 It is said that the respondent's injuries and losses were not catastrophic, in the sense that he is far from totally disabled. He is, however, no longer able to do the job he had successfully performed for thirteen years, and in the language of the trial judge his "... loss of ability to do physical work will permanently handicap the plaintiff in his future income-earning capacity". Clearly the learned trial judge held the view that there was a very substantial physical disability which was bound to be reflected in a diminished ability in the respondent to earn income in the future. The award, while large, does not approach what it might have been in the case of total disability.

101 In all such cases there is some element of arbitrariness in the award for future losses. It is inherent in the nature of the process which requires a present lump sum award for a future loss of capacity, with all of the unknowns and uncertainties that such a loss imports. I recognize that element of arbitrariness in the trial judge's award. I cannot, however, say that the award is out of all proportion to the loss the respondent has suffered. And I cannot say that the amount proposed by the appellant under this head is either less arbitrary than the amount awarded, or a better approximation of what the award should have been. Accordingly, while I am of the view that the award under this head is generous, I am not able to say that it is wholly erroneous or out of all proportion to the loss suffered by the respondent. I would dismiss the appeal under this head.

102 In all other respects I agree with the reasons for judgment of Mr. Justice Hinds.

Appeal allowed in part; cross-appeal dismissed.

End of Document

2000 MBQB 172
Manitoba Court of Queen's Bench

Gros v. Victoria General Hospital

2000 CarswellMan 525, 2000 MBQB 172, 101 A.C.W.S. (3d) 429, 151 Man. R. (2d) 111

Leslie Gros, Plaintiff and Victoria General Hospital and Dr. Bert Finkelstein, Defendants

De Graves J.

Judgment: October 20, 2000
Docket: Winnipeg Centre CI 93-01-71341

Counsel: *Robert Tapper, Q.C.* and *Christopher Wullum*, for Plaintiff.
G. Todd Campbell and *Helga Van Iderstine*, for Defendants.

Subject: Public

Related Abridgment Classifications

Health law
V Malpractice
V.2 Negligence
V.2.a Types of malpractice
V.2.a.ii Failure to diagnose

Headnote

Health law --- Physicians and surgeons — Malpractice — Types of malpractice — Failure to diagnose

Table of Authorities

Cases considered by *De Graves J.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458 (S.C.C.) — referred to

Bauer (Litigation Guardian of) v. Seager, 2000 MBQB 113, 147 Man. R. (2d) 1, [2000] 11 W.W.R. 621 (Man. Q.B.) — considered

Clark v. Sharif (1993), 84 Man. R. (2d) 204 (Man. Q.B.) — referred to

Lapointe c. Hôpital Le Gardeur, 10 C.C.L.T. (2d) 153, 45 Q.A.C. 299, [1992] 1 S.C.R. 382, 90 D.L.R. (4th) 7, 133 N.R. 153, (sub nom. *Chevrette c. Imbeault-Lapointe)* [1992] R.R.A. 363 (headnote only) (S.C.C.) — considered

Maynard v. West Midlands Regional Health Authority (1983), [1984] 1 W.L.R. 634, [1985] 1 All E.R. 635 (U.K. H.L.) — referred to

ter Neuzen v. Korn, [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, [1995] 3 S.C.R. 674, 11

B.C.L.R. (3d) 201, 127 D.L.R. (4th) 577 (S.C.C.) — considered

Wilson v. Swanson, [1956] S.C.R. 804, 5 D.L.R. (2d) 113 (S.C.C.) — referred to

***De Graves J.*:**

The Parties, Nature of the Action, Transcripts of Expert Evidence and Glossary

1 This is a medical malpractice lawsuit. The plaintiff has discontinued his action against the defendant, Victoria General Hospital.

2 Appended hereto as Appendix 1 is a glossary of medical terms and shorthand notes or symbols. Most of the expert trial evidence was transcribed in transcripts separate and individual to each expert to which reference in these reasons will be made.

The Issue and Decision

3 What standard of medical care does an attendant emergency physician owe to a patient admitted to a hospital emergency department for chest and related pains and in that milieu does failure to diagnose correctly that condition amount to actionable negligence or an excusable error in judgment?

4 The defendant committed an excusable error in judgment and the plaintiff's action is dismissed.

Events Prior to Hospital Admission

5 The plaintiff was a 38-year-old single male. During the middle of the night of June 21, 1991 he woke up with left chest and arm pain. As a result the plaintiff with Joanne Wynn, his friend, went from his home to Victoria Hospital for emergency treatment.

Emergency Hospital Attendance and Initial Interview

6 The plaintiff arrived at the hospital emergency department at 0531 hours. He was "triaged" by Paula Boudreau, the attending nurse. He told her that his father had died of a heart attack four years earlier. At 0548 hours the defendant, Dr. Finkelstein, saw the plaintiff. The plaintiff told Dr. Finkelstein of his left upper arm and left chest pain and that this pain was the same from its onset 1 1/2 hours earlier and that he was a smoker. The plaintiff appeared jovial, under no distress and "with a peculiar affect".

Dr. Finkelstein's Examination and Treatment and Excerpts from Emergency Report Form

7 Dr. Finkelstein ordered one electrocardiogram (EKG) at 0600 hours and a subsequent EKG at 0720 hours. After the second EKG Dr. Finkelstein also tested the plaintiff's condition by walking the plaintiff up and down stairs in the emergency ward. Dr. Finkelstein recorded these events in an Emergency Report form a copy of which is appended hereto as Appendix 2.

Discharge, Re-admission and Emergency Treatment

8 At 0738 the plaintiff was discharged. The plaintiff on leaving the hospital was about to take a taxi when he collapsed from a heart attack and lost consciousness. The taxi driver, who was not called, took the plaintiff to the emergency ward where he was re-admitted at 0748. He was resuscitated.

9 The plaintiff claims that he was unconscious for a period of time, without oxygen between 0738 and 0748 and suffered as a result permanent cognitive impairment and related problems resulting in memory loss, severe depression and difficulties in concentration.

10 At 0854 hours a third EKG showed the plaintiff had suffered an acute arterial-septal myocardial infarction with a cardiac arrest. As a result he was kept in the hospital until July 5, 1991 when he was discharged.

Triage Nurses

Paula Boudreau

11 Paula Boudreau, the triage nurse on duty at the time of the plaintiff's initial admission, gave evidence. She impressed me as being competent and conscientious. She recorded the plaintiff's condition in careful detail in the nursing record of the hospital emergency department. Her duties that day ended shortly before the plaintiff's discharge. Before being aware of the plaintiff's collapse following his discharge she prepared a "personal note" shortly after the end of her workday. This note is set out at paragraph 14 below.

12 The hospital nursing record prepared by Paula Boudreau outlines that the plaintiff was 38 years of age and was seen at 0545. The plaintiff stated in the record that he suffered from chest pain and left arm pain one hour ago. She noted "patient not distressed looking". She said the plaintiff told her that his father died of a heart attack four years ago. At 0545 Dr. Finkelstein first saw the plaintiff and ordered an EKG and at 0555 an EKG was done (referred to as 0600 EKG). At 0610 Dr. Finkelstein reviewed this EKG.

13 Nurse Boudreau notes in her hospital record the return of the plaintiff's pain as follows:

> 0700 patient states pain is starting to return. Does not look distressed. Patient walking around in room.
>
> 0720 patient states pain in chest is starting to return.
>
> 0725 repeat EKG done. (0720 EKG)

14 The "personal note" referred to in paragraph 11 was prepared at 0900 the same day. As indicated this note was made without Nurse Boudreau being aware of the plaintiff's collapse following his discharge at 0738. This note is in part as follows:

> Leslie Gross
>
> A# 172711
>
> MHSC# 372191
>
> 91/06/22 (*sic*)
>
> 0531 Typed in by admitting clerk
>
> 0540 Patient taken to xx4 and assessed by P. Boudreau
>
> 0548 Patient assessed by Dr. B. Finkelstein
>
> 0600 ECG done
>
> 0605 Looking at ECG over Dr. Finkelstein's shoulder as he read it. Seeing the peaked T's and S-T elevation in leads U2 + U3 pointed out by Dr. Finkelstein. I asked him if he would like the patient placed on the monitor at least

> until the 2nd ECG was done. He replied no, it wasn't needed as this was non-cardiac chest pain. Dr. Finkelstein was also asked if he wanted any enzymes done & he also said no saying they wouldn't mean anything @ this time. If the ECG changed he would then consider it.
>
> 0725 2nd ECG done & report given by P. Boudreau, R.N.
>
> "Paula Boudreau"

Arlene Judith Abrey

15 Registered nurse Arlene Judith Abrey, as triage nurse, succeeded Paula Boudreau in the emergency department. Her note on discharge indicates:

> 0738 patient discharge home, walking with follow-up instructions by Dr. Finkelstein.

Medical Opinions

16 I will defer a consideration of the plaintiff's treatment following his collapse after his discharge from emergency. At this point I will consider and evaluate the medical professional practice and opinion in respect to the treatment by the defendant, Dr. Finkelstein, and Dr. Finkelstein's diagnosis and opinion of the condition of the plaintiff between the hours of 0525 and 0738.

17 The medical experts reviewed what Dr. Finkelstein saw and did in the milieu of an emergency ward. That involved not only an examination of the plaintiff's conduct, demeanor and other physical signs but also of a scientific assessment or reading of the EKG's taken at 0600 and 0720. In Dr. Finkelstein's assessment of the EKG's there were two possible interpretations: one being an indication of Benign Early Repolarization (BER) and the other being Myocardial Infarction (MI), the former being benign and the latter being dangerous. It was Dr. Finkelstein's view that the EKGs indicated BER.

18 Dr. Anthony Miller, a cardiac specialist, Dr. Neil Swirsky, an emergency medicine specialist and Dr. Sachchida Nand Sinha, a specialist in emergency medicine and cardiology were called as experts by the plaintiff. Drs. Miller and Swirsky were of the opinion based on the EKGs and hospital records that the plaintiff should not have been discharged but instead detained in hospital where the plaintiff's condition could be monitored and during which the plaintiff's diagnosis could be clarified and determined, followed with appropriate care and treatment. Having failed to detain the plaintiff for that purpose, in their view, amounted to professional negligence.

19 The defendant, Dr. Finkelstein, called Dr. A.M. Herd, an emergency medicine specialist who testified that Dr. Finkelstein appropriately and competently treated and diagnosed the plaintiff leading to his discharge. He was of the opinion that there was no negligence or want of care in the circumstances.

Dr. Miller's Evidence

20 Dr. Miller, in reviewing the EKGs said they indicated that:

> 1. "'heart attack in progress'. Specifically an acute anterior wall infarction." (p. 5, lines 10 and 11 of Dr. Miller's evidence),
>
> 2. they were "...suggestive of an evolving acute process." (p. 15, lines 32 and 33) or a threat of a heart attack (p. 16, lines 5 and 6 of evidence of Dr. Miller).

21 As indicated Dr. Miller instead of discharging the plaintiff would have waited and kept the plaintiff in for monitoring even though he could not make a definite diagnosis of myocardial infarction.

22 In the light of the uncertainty of diagnosis Dr. Miller opined:

> Based on the clinical information and the EKGs, I felt that the appropriate standard would have been to detain that patient, and care for him in the emergency department until the diagnosis emerged clearly. (Dr. Miller's evidence, p. 20, lines 13-16)

23 Dr. Miller said in cross-examination his judgment was based on his being an expert cardiologist:

> Q All right. Are you saying that anybody who looks at the same cardiograms you do have to come to the same opinions that you do or else they're wrong?
>
> A I can be wrong at times, but on this - in this particular incident, I would expect a cardiologist to be - to give a general interpretation similar to that which was given.
>
> Q You'd expect a cardiologist to do that?
>
> A I would. (Dr. Miller's evidence, p. 24, lines 6-14)

24 In further cross-examination he modified his opinion somewhat by allowing that a definite diagnosis of myocardial infarction could not be made. He testified:

> Q So I think you confirmed my point. That from those EKGs at six o'clock in the morning and at 7:20 you cannot make a diagnosis of myocardial infarction, can you:
>
> A No.
>
> Q You need to take into account, then, the other things going on with the patient.
>
> A We need more electrocardiographs to confirm whether - which way it's going to go. (Dr. Miller's evidence, pp. 29-30)

Dr. Swirsky's Evidence

25 Dr. Neil Swirsky is an expert in emergency medicine. He agreed with Dr. Miller that the plaintiff should have been kept in emergency for further observation including monitoring, diagnostic testing including a cardiac enzyme test and that there should have been a consultation with an expert cardiologist.

26 He would in examining a patient in an emergency situation follow the "triage principle of emergency medicine". He explained the "triage principle" as follows:

> ...the triage principle means that in assessing a patient, one always has to rule out the worst possible thing that the patient can have, and I guess one of the axioms in emergency medicine is sometimes if you don't think of it, you can miss it. So in any patient who - who appears, regardless of how trivial or atypical their presentation may be, one would always consider the possibility of a potentially serious or a potentially lethal diagnosis. For example, someone with chest pain, one always has to consider the possibility that the person could be suffering a heart attack or a myocardial infarction. (Dr. Swirsky's evidence, p. 5, lines 4-14)

27 In arriving at his opinion he reviewed the two EKGs. He testified that:

1. The 0600 EKG (Tracing 16A of Tab 50 of Ex. #1) revealed "...changes which could be consistent with the early phases of an acute myocardial infarction." (p. 6, lines 17-19 and p. 14 of Dr. Swirsky's evidence).

2. The EKGs were virtually identical (pp. 7, 8 and 41 of Dr. Swirsky's evidence) in respect to BER and MI as they appear in the Tracings of 0600 EKG (16A) and the tracing of 0720 (16B) of Tab 50 of Ex. #1). His testimony was as follows:

> Q Now, Dr. Finkelstein did two EKGs, and we've just looked at them, and I think you have said the second one wasn't much different than the first one?
>
> A Yes.
>
> Q So from the EKGs, at least, it doesn't appear that there was any change in the patient's condition over those - that period of time?
>
> A Well, there certainly wasn't any change in the EKG, yes. (p. 41, lines 15-23 of Dr. Swirsky's evidence)

3. There were features that were consistent with BER and there were a couple of features which were more consistent with MI than with BER (p. 8 of Dr. Swirsky's evidence).

4. The EKGs would have "...to be considered within the entire clinical context..." including "...ache in left upper arm" (pp. 8 and 35 of Dr. Swirski's evidence).

5. BER occurs more frequently in younger patients, that is, patients under 50 (p. 38 of Dr. Swirski's evidence).

6. Where ongoing care is required for MI the patient should be referred to a cardiologist (p. 11 of Dr. Swirski's evidence).

7. There should have been enzyme testing (p. 12 of Dr. Swirski's evidence).

8. Important factors had to be considered such as chest and arm pain, family history, history of smoking (pp. 16 and 35 of Dr. Swirski's evidence) and absence of sweating (p. 34 of Dr. Swirski's evidence).

28 In the final analysis he agreed that "...the decision to discharge a patient, by physicians, from the hospital is an exercise of that physician's judgment, based on the information before them" (p. 44, lines 13-15 of Dr. Swirski's evidence).

Dr. Sinha's Evidence

29 Dr. Sinha is an expert in internal medicine and in cardiology and has done research and written in respect to cardiology.

30 He was at the time on the active staff in the Department of Cardiology in the Victoria Hospital. He was first involved with the patient at 1010 June 21, 1991. He read the two EKGs in the afternoon of June 21, 1991. His opinion of his reading of the 0600 EKG was:

> "...there is high voltage T wave and ST segment elevation in 1, AVL and V1 to V4. There is also ST segment depression in 3, AVF." On those criteria and pertinent information on the top portion of this requisition form, I based my diagnosis, to the best of my knowledge, "EKG is consistent with hyper acute changes of recent anteroseptal myocardial infarction." (p. 5, lines 28-34 of Dr. Sinha's evidence)

He was of the same opinion in respect to the second EKG.

> Q And when you say these two tracings, you're referring now - the first tracing is noted at 16A of the chart and the second tracing is noted at 16B of the chart.
>
> A That's true.
>
> Q And the second tracing is noted by the technician to have been done at 0720 a.m.; am I correct?
>
> A That's true.
>
> Q And your conclusion which you signed off on the bottom right corner is in the interpretation section, 'EKG is consistent with ... acute anteroseptal myocardial infarction.' (p. 7, lines 22-32 of Dr. Sinha's evidence)

31 He was not asked if the plaintiff should have been discharged.

Dr. Finkelstein's Evidence

32 Dr. Finkelstein in 1989 was certified by the College of Family Physicians as having a special competency in emergency medicine. He was at St. Boniface Hospital as a staff emergency physician from 1983 to 1990, a university lecturer in the Department of Family Medicine, assistant professor in that department and was the director of emergency medicine at the Victoria General Hospital at the time of the event.

33 He was the only physician staffing the emergency department at the time of the admission, discharge and readmission of the plaintiff. He described the procedure on a patient's admission and the relative duties of the staff, including the role of the triage nurse. As part of her duties she would take a brief history of the patient, sometimes a brief physical examination to decide where the most appropriate place in the emergency department would be for that patient. In this case Paula Boudreau advised Dr. Finkelstein that there was a patient (the plaintiff) to be seen in treatment room 4 who was having chest pain. Dr. Finkelstein stated that he could not recall Paula Boudreau ever telling him that the plaintiff's father had died of a heart attack some four years prior. However, I accept Nurse Boudreau's evidence that she did tell Dr. Finkelstein of this prior to his examination of the plaintiff.

34 Treatment room 4 was a basic examination room and was equipped with "a gurney, a chair, some basic examining materials, including probably a blood pressure cuff, tongue depressors" (p. 9 of Dr. Finkelstein's evidence). It did not have cardiac monitoring equipment or advanced cardiac life support resuscitation equipment or a crash cart for cardiopulmonary resuscitation.

35 On first seeing the plaintiff the plaintiff greeted Dr. Finkelstein in a quite jovial upbeat sort of voice with the words "how ya doing, guy". (p. 8, line 20, of Dr. Finkelstein's evidence)

36 Dr. Finkelstein recorded the patient's visit and treatment prior to his discharge in his Emergency Report to which I have referred (Appendix 2). Dr. Finkelstein examined the patient at about 0548. His evidence on this examination is as follows:

> Q Now, can you just relate for us, Dr. Finkelstein, the discussion you had initially when you went into the room and spoke with Mr. Gros?
>
> A I asked Mr. Gros several questions about the nature of, of his complaint, including the nature of his described ache. I asked him if he was experiencing any other symptoms with this, including shortness of breath, which he denied, including feeling sweaty, which he denied. I also asked him if he noticed any change in his discomfort when he moved and he stated that it didn't make any difference to him. I also asked him if he's ever had anything similar to this before; he denied that. I did ask him if he was a smoker; he acknowledged that he was. And I asked him if there was any change in the sensation he was feeling now as opposed to when it began, and he stated it was the same.
>
> Q All right.

A I then performed a physical exam.

Q Right, okay. Well, let's take a look at page 3 and you'll see some vital signs on the right-hand side of the page, almost halfway down. (referring to Tab 50, p. 3 of Exhibit 1 - Appendix #2)

A Yes.

. . . . .

Q You see a temperature, a pulse, respirations and blood pressure.

A Correct.

Q Looking at those vital signs, Dr. Finkelstein, was there any concern as a result of what you see?

A None whatsoever. (pp. 12 and 13 of Dr. Finkelstein's evidence)

37 His initial judgment was the plaintiff's condition was not related to the heart. He described his initial clinical impressions as follows:

Q And why would you say on the basis of the history that it was unlikely related to his heart?

A Because of the complete lack of associated symptoms to suggest an individual being in distress, the lack of the shortness of breath, the lack of sweatiness, again the "as a matter of fact" nature of the description, the joviality, the - his - the fact that he was able to walk without any discomfort or apprehension, at that point, after my history, that was my initial, my initial clinical impression. (p. 24, lines 16-25, of Dr. Finkelstein's evidence)

38 Dr. Finkelstein ordered the two EKGs at 0600 and at 0720 hours. His reading of the first EKG noted configuration of the T waves leads to Vs, V3 and V4 and ST elevations. His analysis of these raised the possibility of angina but also in keeping with BER. In view of this uncertainty he ordered the second EKG at 0720.

39 Nurse Boudreau advised Dr. Finkelstein at 0700 that the plaintiff complained that the pain was starting to return. Dr. Finkelstein does not remember being told this. He said this could be and this may have been one of the reasons he ordered a further EKG. Additionally she asked Dr. Finkelstein if the patient could be put in a monitored bed. Dr. Finkelstein allowed this could be but had no memory of this. He compared the two EKGs and opined:

I attributed the two EKGs with unchanged configuration over the hour and a half, together with my clinical examination, as those EKGs representing benign early repolarization, and this being a non-cardiac symptom that this patient was having. (p. 53 of Dr. Finkelstein's evidence)

40 He noted this in the chart and explained his reasons for the note: "...were related to benign early repolarization, which is a static - usually a static EKG condition...." (p. 56 of Dr. Finkelstein's evidence)

41 However, he did allow the readings could be consistent with ischemia or lack of blood supply to the heart or pericarditis (inflammation of heart lining).

42 Then, as a further test Dr. Finkelstein had the plaintiff walk four flights of stairs in the emergency department. This exercise did not produce any change in the symptoms or the way the plaintiff felt. Thus taking into account that the pain was migratory (uncharacteristic of angina or heart pain), the same reading of the two EKGs indicating BER, the plaintiff's casual demeanor, and complete lack of distress he concluded his symptoms were not of cardiac origin. Accordingly Dr. Finkelstein noted under diagnosis in his chart "non-cardiac chest pain" (Appendix 2). He did not order a cardiac enzyme test because it was Dr. Finkelstein's "...clinical impression" that the pain was "very strongly non-cardiac" (p. 60 of Dr. Finkelstein's evidence).

43 Dr. Finkelstein's evidence, particularly at pp. 55-60 of the transcript leading to his diagnosis of pain as being

non-cardiac chest pain and his decision to discharge the plaintiff are repeated and may be collated and summarized as follows:

(a) The tracings in the EKGs indicated BERs.

(b) There was virtually no difference or change in the two EKGs thus indicating or confirming the reading of BERs in each EKG.

(c) Exertion (the stair test) produced no change in symptoms.

(d) The patient's pain was migratory which is distinctly uncharacteristic of angina or heart pain.

(e) The patient's unaffected, casual demeanor and complete lack of distress, with no shortness of breath and no sweat and normal appearance supported his conclusion that the cause of the pain was non-cardiac.

44 I am not unmindful of the basic emergency ward principle that the examining physician is to assume and treat the worst case scenario. But that principle has its obvious limitation. The physician after an appropriate examination for the worst condition and other carefully considered alternatives may well have concluded that the pain and condition was non-cardiac.

45 While I recognize that Nurse Boudreau may have had some concern with Dr. Finkelstein's decision it is, with respect, not her judgment which is controlling but the judgment of Dr. Finkelstein, as attendant physician in charge.

46 However and admittedly Dr. Finkelstein's diagnosis that the pain was non-cardiac in origin was wrong.

Evidence of Dr. Anthony Michael Herd

47 This doctor is a specialist in emergency medicine, recently qualified.

48 Dr. Herd underlines the basic difficulty of this case in assessing clinically chest pain. The important initial features of attempting to diagnose chest pain, and of this there is no dispute among the experts, are:

(a) history of patient;

(b) appearance of patient including signs of perspiration, being pale, shaking;

(c) type of chest pain;

(d) EKGs must be interpreted "in the context of what the patient's presenting with" (p. 26, lines 9-13 of Dr. Herd's evidence).

49 On reading the two EKGs he agrees with Dr. Finkelstein that they disclose BER and not acute myocardial infarction. He opines that the two EKGs being similar over time confirms BER.

50 There was, however, one error of fact on which he based his written opinion of November 8, 1996 (Tab 4, Exhibit 1). At page 4 of his opinion (first full paragraph) Dr. Herd observes: "Also of note that at 0720 hours EKG was done shortly *after* the patient had climbed four flights of stairs (a significant workload)." (Underling added) In fact on my reading of the evidence (pp. 55-57 of Dr. Finkelstein's evidence) the "stair test" had been conducted *after* the administration of the second EKG test.

51 However, this is not of significance when one considers it in the totality of Dr. Herd's evidence. Dr. Herd properly reviewed and evaluated Dr. Finkelstein's treatment and diagnosis.

Medical Standard of Care Vis à Vis Error in Judgment

52 In a medical professional milieu and as a general statement professional errors of judgment are not actionable while breach of duty of medical care may be depending on the circumstances. In examining the criteria of professional errors of judgment in juxtaposition with breach of duty of care the Court must review the physician's care, treatment and decision not with the wisdom of hindsight, nor with the counsel of perfection but with the standard of medical care appropriate to the history, condition and affect of the patient. Included in this medical examination were the clinical signs the patient presented to the examining physician as set forth in paragraph 43 above.

53 The concept of the duty of care and errors in judgment and their interrelation have been considered and defined in the following decisions:

(a) *ter Neuzen v. Korn* (1995), 127 D.L.R. (4th) 577 (S.C.C.) (Sopinka J.)

It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the circumstances. (p. 588)

(b) *Lapointe c. Hôpital Le Gardeur* (1992), 90 D.L.R. (4th) 7 (S.C.C.) (L'Heureux-Dubé J.) at p. 14:

> ...As the judgment from *Hôpital général de la région de l'Amiante* indicates, courts should be careful not to rely upon the perfect vision afforded by hindsight. In order to evaluate a particular exercise of judgment fairly, the doctor's limited ability to foresee future events when determining a course of conduct must be borne in mind....
>
> Both doctrine and case law emphasize that medical professionals should not be held liable for mere errors of judgment which are distinguishable from professional fault. According to Hyde J. in *X. v. Mellen*, [1957] Que. Q.B. 389 at p. 406; [1957] R.L. 210 *sub nom. Mellen v. Nelligan*:
>
> > The surgeon is, certainly, not to be judged by the result, nor is he to be condemned for a mere error in judgment. That error however must, as Rand J. says in *Wilson v. Swanson* [[1956] S.C.R. 804, at p. 812], be "distinguished from an act of unskilfulness or carelessness or due to lack of knowledge". (Underlining added)

(c) *Wilson v. Swanson* (1956), 5 D.L.R. (2d) 113 (S.C.C.) (Rand J.) at p. 120:

> An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge.

(d) *Maynard v. West Midlands Regional Health Authority* (1983), [1985] 1 All E.R. 635 (U.K. H.L.) (Lord Scarman) at p. 636:

> ...the question ... is whether a physician ... guilty of an error of professional judgment of such a character as to constitute a breach of ... duty of care .... (to the plaintiff)

(e) *Clark v. Sharif* (1993), 84 Man. R. (2d) 204 (Man. Q.B.) (Schwartz J.) at 211, para. 61:

> ....An error in judgment has long been distinguished from an act of unskillfulness or carelessness or due to a lack of knowledge.

(f) and more recently as compiled in *Bauer (Litigation Guardian of) v. Seager* (2000), 147 Man. R. (2d) 1 (Man. Q.B.) (Clearwater J.) [unreported] at pp. 74-83 this decision sets forth a comprehensive review of the jurisprudence on medical duty of care, diagnosis and professional judgment.

54 Accordingly I am finding that Dr. Finkelstein erred in judgment but there was no breach of duty of care.

Causation and Sequelae

55 I will now consider the damages to which the plaintiff would be entitled if there had been liability.

56 Following the plaintiff's collapse leaving the hospital the plaintiff was readmitted to the hospital at 0748. It is during this interval of 0738 and 0748 the plaintiff alleges he suffered oxygen deprivation and was brain damaged. It is difficult to identify exactly the time when the heart attack occurred but I am finding that the plaintiff was without oxygen for a considerable period of time, probably in the order of at least six to seven minutes which time was sufficient to impair seriously the plaintiff's brain function. Arlene Judith Abrey recorded the event of the plaintiff's readmission to the hospital as follows:

. . . . .

Triage Record 91-6-21

TIME OF ARRIVAL 0748 ENTRANCE COMPLAINT Arrest

ACCOMPANIED BY Cab driver...

ARRIVAL MODE...

Stretcher X...

SUBJECTIVE Cab driver came into hosp and said he picked a pt up in front lobby. When pt got into cab he began to shake all over. [underlining added]

OBJECTIVE Initially pt unresponsive. Moved head to one side. Pulse present. On bringing stretcher to cab pt pulseless. Pt had just left ER dept. CPR initiated in parking lot.

. . . . .

"Abrey"

Triage Nurse Signature & Status

(No. 19 of Tab 50, of Exhibit 1)

57 Was there brain damage and how much of this brain damage, if any, can be attributed to the premature discharge, lack of monitoring and absence of immediate care and resuscitation?

58 The plaintiff's unconsciousness, resuscitation and gradual recovery cannot, I repeat, be pinpointed with such precision of timing to correlate the absence of oxygen to brain damage. The plaintiff's condition is recorded in the Victoria Hospital Resuscitation Record. It details or confirms the time that the plaintiff was without pulse or heart activity (asystole) at 0748, V. Fib (ventricular fibrillation) 0750, 0751, CHB 0752 asystole 0753, EMD Brachy, intubation 0754, pulse established and fully resuscitated at 0807 (Exhibit 1, Tab 50, pp. 20 and 21). The plaintiff was then taken to the Intensive Care Unit.

59 Dr. Swirsky's evidence on the sequence and relationship of cardiac arrest, oxygen deprivation and resuscitation may be summarized as follows:

(a) that the cardiac arrest had occurred one or two minutes prior to 0745;

(b) what the cabdriver described as *shaking* was probably seizure, which would have been caused by oxygen deprivation;

(c) natural pulse is necessary to good circulation and this was not established until 0754;

(d) the period of 0743 to 0754 translates into an 11-minute period where there were varying degrees of oxygen deprivation;

(e) during this period of time the plaintiff suffered brain damage.

(Dr. Swirsky's evidence, pp. 51-66)

60 Dr. Karen L. Boyd, a family medicine physician, first saw the plaintiff on Saturday following the heart attack. She became, at the family's request on Monday the plaintiff's primary care physician. The plaintiff's condition she diagnosed as anoxic encephalopathy. She was of the opinion that there was consequent brain damage. She described the plaintiff following the heart attack as extremely confused, had large gaps in long term memory, poor short term memory, difficult to manage, babbling at times and generally a difficult management problem at hospital and required restraint. All these signs Dr. Boyd said were consistent with anoxic encephalopathy.

61 The plaintiff was discharged from the hospital on July 5, 1991.

Leslie Eugene Gros - His Background, Business and Present Circumstances

62 The plaintiff at the time of his heart attack was 38 years of age, single and a computer programmer. He had a varied career. His academic career was unexceptional indeed modest. He got his Grade XII in two years completing his course in 1971 with marks that were on the low side. Following high school he took a course at Red River Community College in Business Administration. Then he moved to Calgary, worked in bars, drove taxi as a driver and driver-owner. He returned to Winnipeg in 1978-79. Then he worked for Bristol Aerospace as a nuclear process operator for a little over a year. He took a further course at Red River Community College while continuing to work at Bristol as a quality controller. Then he went to work for Standard Aero for approximately a year to do "Non-destructive Testing", following which he went to work for Versatile and stayed there until 1984. During this time he took computer courses at the University of Winnipeg.

63 In 1984 he quit his job at Versatile. He met John Lawrence Thistlethwaite and Stephan Richard Thorgeirson. He started working as a computer technician at a business known as Computer Vision.

64 He went into business in 1985 with Thorgeirson under the name of Super Micro Services. This business failed and ended in July 1987. Thorgeirson went into bankruptcy on October 3, 1989. Thorgeirson gave evidence for the defendant. It was evident he bore considerable animosity towards the plaintiff. I do not give any weight to Thorgeirson's testimony concerning the plaintiff's competency.

65 There were three traumatic events in the plaintiff's recent life. The first was a motor vehicle accident of June 7, 1987. The second was the death of his father in 1988. The third was his heart attack of June 21, 1991. That one or more and how much of these events affected his economic and personal life is the question. The defendant argues that the three events, as described, could affect his present condition but the plaintiff cannot establish any loss attributable to the heart attack itself. In any event there was no loss, the defendant submits, as the plaintiff's computer business was at best marginal.

66 The plaintiff presented to give evidence business associates, friends and family. This evidence supports the plaintiff's claim that following the heart attack the plaintiff had a change in personality, lacked focus and his professional competence deteriorated. The following is a brief resume of the plaintiff's personality changes pre and post heart attack.

Family

67 *Mary Gros*, the plaintiff's mother, testified that following the heart attack there was a great change in her son's

personality with loss of memory and antisocial behaviour.

68 *Noreen Maynard*, the plaintiff's sister, testified to the same effect. She described the plaintiff's personality and attitude following the motor vehicle accident and said that: "there was (sic) no mental problems following the accident of June/87." But said there were serious personality problems following the heart attack. Her evidence concerning his post heart attack behaviour may be summarized as follows:

(a) he gets along fine as long as there is no conflict, "but the minute something happens he gets angry or if not angry he turns inward and blanks out";

(b) as a result the whole family has learned never to disagree with the plaintiff;

(c) he lacks focus and concentration and cannot follow conversation if there is more than one conversation.

69 *Frank Alvin Maynard*, the husband of Noreen Maynard, was the Deputy Minister of Health until his retirement in December 1994. Maynard testified that prior to the heart attack the plaintiff was outgoing, got along with people, a diligent worker, and had encyclopedic knowledge on some matters. Mr. Maynard was aware of the motor vehicle accident of June 7, 1987 and did not notice any significant changes in his personality resulting therefrom. But after the heart attack Maynard said that the plaintiff became antisocial, noise annoyed him, he became confused when there was more than one person engaged in a conversation, his thought processes were disconnected and he became frustrated and had a minimum of tolerance.

Business Associates

70 *John William Arbuthnot* was a "soft tech consultant" and owns a company known as Novell. He was expert in and designed network system connecting computers and databases. He hired computer programmers including the plaintiff who designed in 1988 a program called Income en Masse. Prior to the heart attack the plaintiff was engaged by the law firm of Taylor Brazzell McCaffrey, Winnipeg and University of Manitoba (Faculty of Management) to do computer programming.

71 After the plaintiff's heart attack Arbuthnot engaged the plaintiff to do programming. However, the plaintiff's work was unsatisfactory in that the plaintiff was unfocused, lacked enthusiasm, did not complete projects in spite of prepayment for jobs.

72 *Dennis Raymond Hayward*, a business associate, met the plaintiff in 1984 or 1985. Hayward had an electronic business known as Tupper Electronics dealing in satellites, receiver dishes, microwaves and computer related hardware. His relationship with the plaintiff was both social and business. He saw the plaintiff a couple of times a month, had dealings with him and socialized with him. They would discuss the plaintiff's work at the plaintiff's home. He was aware of the plaintiff's motor vehicle accident of June 7, 1987 and saw him prior to and after the heart attack.

73 Hayward saw the plaintiff approximately six months after the plaintiff's heart attack. He observed that the plaintiff was different, had a short memory and attention span, became annoyed easily and was repetitive and behaved inappropriately and eccentrically. The plaintiff would undertake to complete projects but never completed them.

74 *Ken Knight*, an auctioneer and former customer of the plaintiff, testified that he hired the plaintiff as a computer programmer. The plaintiff designed a program known as Knight 350, the last one in 1987/88. After the heart attack he engaged the plaintiff to do an update of the computer program. The plaintiff was not able to do it.

75 The most compelling evidence of the plaintiff's change was given by *William Buckels*. Buckels was a computer programmer and consultant. He had a long and productive association with the plaintiff over the years, particularly since 1985 until the 1990's with the plaintiff being in effect his teacher from 1987 to 1990.

76 After the heart attack he testified:

Attack after 1991 he could not focus, could not discuss computer programming. He seemed not to remember very well. I

> would say programmer things with him. He did not have too much recognition of programming after attack. Before attack he was a "monster programmer", focus and memory were excellent.
>
> . . . . .
>
> Before attack he wrote a whole range of programs for "simple" and he wrote variations. He could do in one day what it took others to do in a week.
>
> . . . . .
>
> Since his attack he was flaky, twitchy, could not focus, could not recognize many things we talked about. He would get annoyed at times - Could not talk any more. There was not this change after the motor vehicle accident. (my notes, pp. 151, 152 and 153 of bench book)

77 Buckel started as a computer programmer at $37,000 annually. In 1992 he was employed for Division Capital Fund at an annual salary of $42,000. At the time of giving evidence Buckel's salary was $53,000 annually plus benefits.

78 *John Lawrence Thistlethwaite*, another expert computer programmer, was called. He has known the plaintiff since 1984. He described the plaintiff's knowledge in business at the time as greater than his. The plaintiff did work for law firms, prepared programs for inventory tracking and light manufacturing. He wrote several code generators using advanced database. After the heart attack the plaintiff was less easygoing, a bit reclusive, had trouble with recall, and was vague and unfocused. It was Thistlethwaite's view that his memory was damaged by the heart attack. He said that the motor vehicle accident did not have that affect on the plaintiff.

79 *Ronald Lawrence Coke*, a lawyer with Taylor McCaffrey, a Winnipeg law firm, had engaged in 1986 and on, the plaintiff to do computer programming for that firm in respect to the development of corporate records. Prior to the heart attack the work was done competently. After the attack Coke said the plaintiff's "performance had collapsed dramatically". Coke tried to continue using the plaintiff's services. The plaintiff was not performing well. He was not attending to his assignments. The association ended.

80 The defendant presented *Renee Sierra* as an expert in computer programming. She filed a report (Tab 46 of Exhibit 1). Her evidence dealt with the evolution of the computer industry: the many and substantial transitions in the computer business, the changing demands and increasing sophistication of the industry from 1980 to the present. Her message was that a programmer had to keep up to be competitive. She asserted that the plaintiff had not kept current and would have fallen behind in the commercial race.

81 Programmer salaries in 1992 or 1993 started at $30,000 to $35,000 and today's average salary for a computer programmer would be between $30,000 and $50,000.

82 However, she did not know the plaintiff nor his company, Super Micro Services. She did not know and had not spoken to the plaintiff, Buckels, Thorgeirson, Thistlethwaite or anyone about the quality of Gros's work or get any samples of his work.

83 I find her evidence of limited value except to give an overview of the computer industry.

Psychiatric and Psychological Evidence

84 The plaintiff called as experts Dr. Clyde Beverly Manswell, a psychiatrist, and Dr. Garry Alexander Hawryluk, a neuropsychologist. They testified that the plaintiff likely suffered brain damage as a result of the heart attack.

Dr. Manswell's Evidence

85 Dr. Manswell was consulted as to the plaintiff's insomnia and memory loss. He submitted a report dated January 2, 1997 (Exhibit 1, Tab14). His opinion was that memory was impaired by or related to hypoxia with poor prognosis. However, Dr. Manswell was not aware that the plaintiff had seen and consulted other psychologists and he did not have a full clinical history of the plaintiff. Thus his opinion has to be weighed and qualified on the basis of that limitation.

Dr. Hawryluk's Evidence

86 Dr. Hawryluk in reviewing the plaintiff's personality considered the factors of the motor vehicle accident, the death of the plaintiff's father, and the heart attack. He prepared three reports dated November 8, 1993 (Tab 12 of Exhibit 1), October 14, 1995 (Tab 10 of Exhibit 1) and October 8, 1999 (Tab 11 of Exhibit 1).

87 Dr. Hawryluk's report of November 8, 1993 considered particularly the trauma of the motor vehicle accident as it related to insomnia, depression and aches and pain and that the death of the plaintiff's father contributed to the depression.

88 In respect to the motor vehicle accident, heart attack and alleged business loss, Dr. Hawryluk commented on the plaintiff's complaints as follows:

> Subsequent to his heart attack, Mr. Gros was uncertain as to what changes had taken place in his presentation. He advised, however, that he has been much more forgetful since this event, that "pieces of memory are gone", and that since that time his life "falls between the cracks".
>
> . . . . .
>
> Given the time elapsed since injury, and Mr. Gros' difficulties with chronology and detail, coupled with the absence of significant collateral information pertaining to sleep disturbance, it is very difficult to attribute this man's business failures to sleep disturbance, and whether this sleep disturbance is a direct consequence of his motor vehicle accident. It may well be that the accident was one factor contributing to a deepening depression and the subsequent failure of his business, although other factors appear operative, both as a direct consequence of his motor vehicle accident, and Mr. Gros's diminished coping capacities which are likely attributable to this event. While the issue of the relationship between Mr. Gros's heart attack and motor vehicle accident does not appear to have been raised, in discussion with Mr. Gros it was apparent that a number of stressors experienced as a result of his motor vehicle accident may have been contributory to his subsequent heart attack, although for similar reasons as noted above, it would be very difficult to determine the relative contribution that his motor vehicle accident may have played in this event. (Tab 12, Exhibit 1, pp. 10 and 11)

89 Dr. Hawryluk compendiously reviewed the effect on the plaintiff of the June 1987 motor vehicle accident and the heart attack of June 21, 1991 in his further report of October 14, 1995 (Tab 10 of Exhibit 1). In respect to the motor vehicle accident there were severe physical injuries and psychological "difficulties". These Dr. Hawryluk described as "emotional distress" immediately post-accident which improved over time. The plaintiff had suffered other of life's reverses being the death of his father, failure of his business and significant financial reverses.

90 In the same report Dr. Hawryluk observed that the plaintiff thought that he suffered from loss of memory and "brain related impairment" (Exhibit 1, Tab 10, p. 2). Dr. Hawryluk performed neuropsychological and psychological testing. These tests revealed:

> (a) attention and concentration moderate to somewhat poor, short attention span, significant distractibility and frequent lapses in attention (Tab 10, p. 7, Exhibit 1);
>
> (b) auditory and concentration span well below average;
>
> (c) significant reduction in cognitive efficiency and flexibility (Tab 10, p. 9, Exhibit 1).

91 After, as I have stated, a thorough review Dr. Hawryluk said that the heart attack likely "contributed this man's current clinical presentation":

> ....Given primarily historical and clinical evidence, it would appear that this deterioration has been, in part, influenced by events surrounding this individual's heart attack, and indeed, specifically changes occurring in memory, appear to be attributable to this event. (Exhibit 1, Tab 10, p. 12)

92 In the third report dated October 8, 1999 Dr. Hawryluk revisits and defines the relationship of the motor vehicle accident of June 1987, the death of the father in September 1987 and the heart attack of June 1991. In general terms Dr. Hawryluk observed:

> From a neuropsychological perspective, Mr. Gros' cognitive performance was considered much lower than that which would be expected on the basis of his past academic and occupational history, although the etiology of these difficulties was considered less certain. Mr. Gros was viewed as displaying ongoing memory impairment, which could be consistent with hypoxic brain damage, although there was also psychometric evidence to suggest that memory impairment and instances of "forgetfulness" on Mr. Gros' part were, in part, influenced by variability in attention and concentration and in the capacity to initially assimilate information. Mr. Gros advised that changes in this domain had appeared subsequent to his heart attack, and not his motor vehicle accident, suggesting that factors relating to hypoxia were primarily responsible.... Mr. Gros was considered to have demonstrated a general decline in adaptive abilities since the time of his motor vehicle accident, although a much more pronounced decline in general adaptive abilities appeared to have occurred since his heart attack in 1991. (Exhibit 1, Tab 11, p. 4)

93 He concludes at p. 18:

> ...While Mr. Gros may have had some adjustment related or characterological difficulties which antedate this heart attack, he also appears to have been an individual successful in employment and professional endeavours, who, subsequent to this event, appears to be incapable of managing adequately. Once again, presuming that the foregoing is supported by collateral sources, it would appear that the prime etiological event in this instance is this individual's heart attack, resulting in hypoxic brain impairment subsequently, and of sufficient magnitude to intrude upon this individual's cognitive capacities. This appears to have provoked a psychological reaction in this individual, characterized by both anxiety and depression related features, which further intrude upon this individual's ability to function adequately and adaptively on a day to day level. In the presence of the foregoing, Mr. Gros also appears to attempt to retain a relatively normal facade, which, when challenged, can erode and result in relatively more prominent behavioural and cognitive disruptions. (Underlining added)

94 Based on the evidence of Dr. Swirsky, Dr. Boyd and Dr. Hawryluk I am finding that the premature discharge and attendant delay in care and treatment were materially contributing causes to the plaintiff's brain damage and consequent and continuing cognitive impairment. Accordingly following *Athey v. Leonati* (1996), [1997] 1 W.W.R. 97 (S.C.C.) (Major J.) I am finding that this event has caused economic damage to the plaintiff.

Damages

95 But objectively what has been the economic damage? The plaintiff's pre-accident and pre-heart attack economic performance was not impressive. The following is a recapitulation of his income:

1983 - Doc 25 - Income Tax Return - Employment Income -		$3,824.24
1984 - Doc 26 - Income Tax Return - Employment Income -		$12,842.82
1985 - Doc 27 - Income Tax Return - Employment Income -		$6,608.08
1986 - Doc 28 - Income Tax Return - Employment Income -		$5,469.00
1987 - Doc 29 - Income Tax Return - Employment Income -		$9,886.00
1988 - Doc 30 - Income Tax Return - Employment Income -		$4,000.00
1989 - Doc 31 - Income Tax Return - Employment Income -		$2,784.00
1990 - No Income Tax Return filed		
see Document 37 - Financial Statement Jan 15/90 - Sept 15/90		
see receipt bundles	Receipts	$13,735.55
	Expenses	$11,998.55
	Net Income	$1,736.96
1991 - No Income Tax Return filed		
see receipts bundle	Receipts to June 21, 91	$8,192.59

	After June 21, 91	$6,508.93
		$14,701.52
	Expenses to June 21, 91	$6,790.04
	After June 21, 91	$6,508.93
		$12,713.22
1992 - No Income Tax Return filed see receipts bundle		$14,109.80
	Expenses	$12,499.79
	Net Income	$1,610.01
1993 - No Income Tax Return filed Income		$500.00

(Exhibit 8)
No income tax returns were filed by the plaintiff for the years 1994 and following.

96 Can it be argued that his career was full of promise but then destroyed by the event of his heart attack? The testimony of his friends, co-workers and clients do impressively convey the message that he was a gifted and impressive computer programmer. But this did not on the basis of past economic performance translate into tangible income. I do not accept the plaintiff's counsel's argument that he was on the cusp of better and brighter prospects.

97 In sum what his career does demonstrate is the plaintiff is a gifted computer programmer with limited business acumen.

98 We start on the basis that the plaintiff has been virtually unemployed since the heart attack.

99 However, there is an economic loss: a loss that I will have to infer largely from the plaintiff's prior economic performance including the business operation and failure of Super Micro Services.

100 The plaintiff presented Fred de Koning, an expert business evaluator. I accept his approach to the plaintiff's economic loss as set forth in Tab 23 of Exhibit 1. His prospective income assumptions, however, are totally unrealistic. I would rather start the calculation with an assumed lost annual income in 1991 at $10,000.00 with regular annual increments of 15% continuous until 2007 when the plaintiff would reach age 55. Thereafter the annual increments should be at 10% until the plaintiff reaches the age of 60 in 2012. All other assumptions in Mr. de Koning's statement are acceptable. I would ask plaintiff's counsel as he has suggested to request Mr. de Koning for his revised calculations based on my assumptions of income and annual increments and file the appropriate statement to determine the economic loss.

101 The non-pecuniary loss (general damages) must give recognition to the plaintiff's personality change and deficits. The plaintiff's altered behaviour has in part alienated him from friends and family. His loss of enjoyment of and interest in life is a besetting factor. He is a diminished person. Taking into account and weighing these factors, I would award general damages in the amount of $85,000.00.

102 I would award special damages as agreed to by counsel.

103 On receipt of Mr. de Koning's revised statement I will forthwith deliver an addendum to this judgment setting forth in statement form the overall calculation of damages.

104 In view of my decision on liability, as indicated the plaintiff's action is dismissed. The defendant, Dr. Finkelstein, will have his costs if asked for.

APPENDIX 1

Glossary

EKG or ECG	Electro cardiogram machine is a diagnostic machine which records and graphs electrical activity of heart by electrodes attached to patient's chest. The EKG is a graph being a record of heart activity from 12 different areas: six being called precordial leads recorded as V1 to V6; six being called

	limb leads identified as Roman numerals I, II, III and a VR, a VL and a VF and an expert reading of which may disclose, inter alia, myocardial infarction or BER
S]	subjective
0]	objective
o	no
*	with
o[triangle](Delta)	no change
oSOB	no shortness of breath
o diaph	no diaphoresis (sweat)
oHx	no history
+ smoker	smoker
CV	Cardiovascular
RS	Respiratory System
Affect	an impression of personality, presentation, mood, communication (non-verbal and verbal)
Cardiac enzymes	when heart muscle dies or is damaged the heart muscle may leak enzymes into the blood stream, from which it may be inferred there has been damage to or death of heart muscle. In 1991 there can be a meaningful result if the test is conducted in about 6 hours after heart attack (p. 45 of Dr. Finkelstein's evidence)
MI	Myocardial Infarction
BER	Benign early repolarization - an innocuous heart condition which occurs between 3 to 34% of the population, most frequently in males, more frequently under 50 years of age. It does not cause chest pain. It is usually stable over a lifetime. It is a process of excitation and repolarization. The EKG patterns or features may be similar to those of MI patterns.
CP	Chest pain
NYD	Not yet diagnosed
Anoxic encephalopathy	A complication resulting from oxygen starvation to the brain
Post-99	Post cardiac Arrest
Asystole	Heart and pulse stoppage
CPR	Cardio pulmonary resuscitation
CHB	Complete heart block
EMD	Electro mechanical dissociation - state of heart
Brachy	Brachycardia - slow heart beat

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2006 BCSC 300
British Columbia Supreme Court

Hewlett v. Henderson

2006 CarswellBC 403, 2006 BCSC 300, [2006] B.C.W.L.D. 2746, [2006] B.C.W.L.D. 2750, [2006] B.C.W.L.D. 2817, [2006] B.C.W.L.D. 2818, [2006] B.C.W.L.D. 2819, [2006] B.C.J. No. 367

Herman Jim Hewlett (Plaintiff) and Garry Henderson, M.D. (Defendant)

Cole J.

Heard: September 19-23,26-30, 2005
Judgment: February 21, 2006
Docket: Vancouver S012234

Counsel: G.E. Calder, D.P. McGivern for Plaintiff
C.E. Hinkson, Q.C., K.J. Jakeman for Defendant

Subject: Civil Practice and Procedure; Torts; Public

Related Abridgment Classifications

Health law
V Malpractice
V.2 Negligence
V.2.a Types of malpractice
V.2.a.ii Failure to diagnose

Health law
V Malpractice
V.2 Negligence
V.2.c Standard of care

Health law
V Malpractice
V.2 Negligence
V.2.d Causation

Remedies
I Damages
I.5 Damages in tort
I.5.a Personal injury
I.5.a.ii Principles relating to awards of general damages
I.5.a.ii.D Negligence
I.5.a.ii.D.3 Miscellaneous

Remedies
I Damages
I.5 Damages in tort
I.5.a Personal injury
I.5.a.iv Prospective pecuniary loss
I.5.a.iv.D Diminution of earning capacity

Headnote

Damages --- Damages in tort — Personal injury — Principles relating to awards of general damages — General principles

Damages --- Damages in tort — Personal injury — Prospective pecuniary loss — Diminution of earning capacity

Health law --- Malpractice — Negligence — Types of malpractice — Failure to diagnose

Health law --- Malpractice — Negligence — Standard of care — General principles

Health law --- Malpractice — Negligence — Causation

Table of Authorities

Cases considered by *Cole J.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — followed

B. (M.) v. British Columbia (2003), 18 B.C.L.R. (4th) 60, 19 C.C.L.T. (3d) 1, 230 D.L.R. (4th) 567, [2003] 11 W.W.R. 262, 309 N.R. 375, [2003] R.R.A. 1071, [2003] 2 S.C.R. 477, 44 R.F.L. (5th) 320, 187 B.C.A.C. 161, 307 W.A.C. 161, 2003 SCC 53, 2003 CarswellBC 2409, 2003 CarswellBC 2410 (S.C.C.) — considered

Briffett v. Gander & District Hospital Board (1996), 137 Nfld. & P.E.I.R. 271, 29 C.C.L.T. (2d) 251, 1996 CarswellNfld 76, 428 A.P.R. 271 (Nfld. C.A.) — considered

Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353, 1985 CarswellBC 830 (B.C. S.C.) — considered

Dillon v. LeRoux (1994), 89 B.C.L.R. (2d) 376, 42 B.C.A.C. 176, 67 W.A.C. 176, [1994] 6 W.W.R. 280, 1994 CarswellBC 159 (B.C. C.A.) — considered

Gros v. Victoria General Hospital (2000), 2000 MBQB 172, 2000 CarswellMan 525, 151 Man. R. (2d) 111 (Man. Q.B.) — considered

Gros v. Victoria General Hospital (2001), 2001 MBCA 134, 2001 CarswellMan 413, 160 Man. R. (2d) 7, 262 W.A.C. 7 (Man. C.A.) — referred to

Kielley v. General Hospital Corp. (1995), 136 Nfld. & P.E.I.R. 189, 423 A.P.R. 189, 1995 CarswellNfld 77 (Nfld. T.D.) — considered

Kielley v. General Hospital Corp. (1999), 1999 CarswellNfld 344, 183 Nfld. & P.E.I.R. 1, 556 A.P.R. 1 (Nfld. C.A.) — referred to

Rowe v. Bobell Express Ltd. (2005), 210 B.C.A.C. 136, 348 W.A.C. 136, 2005 BCCA 141, 2005 CarswellBC 560, 39 B.C.L.R. (4th) 185, 29 C.C.L.T. (3d) 206, 251 D.L.R. (4th) 290 (B.C. C.A.) — referred to

***Cole J.*:**

1 The plaintiff, Herman Jim Hewlett, claims damages for the alleged negligence of the defendant, Dr. Garry Henderson, a family practitioner. The plaintiff claims that the defendant failed to diagnose and treat him for a myocardial infarction ("MI") or heart attack.

1. Chronology

2 On 27 March 2000, the plaintiff was participating in an emergency response drill at work. The plaintiff injured his right shoulder while he and another worker were carrying a 240-pound man up a flight of stairs on a stretcher. He reported the injury to the first aid worker at work, took Tylenol, and arranged to see his family physician, Dr. Blackwood, the following day.

3 Dr. Blackwood prescribed Celebrex and icing for the shoulder injury. In the very early morning of 29 March 2000, the plaintiff woke up in great pain. According to the B.C. Ambulance Service dispatch form, his wife called 911 at 1:23 a.m.; the ambulance crew arrived at 1:32 a.m. and transported the plaintiff to Mission Memorial Hospital, arriving at the emergency room at 1:47 a.m. The defendant assessed the plaintiff, ordered Demerol for his pain, and requested an x-ray. After the plaintiff's x-ray, the defendant ordered further pain medication. A nurse administered morphine at 3:15 a.m., and the plaintiff was discharged from the hospital at approximately 4:00 a.m.

4 The plaintiff attended the medical clinic of his family practitioner, Dr. Blackwood, later that morning. Dr. Blackwood prescribed more painkillers and ordered blood work. After reviewing the blood work and x-rays, Dr. Blackwood told the plaintiff he likely had pneumonia. He prescribed antibiotics and ordered further tests.

5 The plaintiff returned to see Dr. Blackwood the next day, 30 March 2000. Dr. Blackwood sent the plaintiff to the hospital for another x-ray, blood work, and other tests. He also referred the plaintiff to an internist, Dr. Pluta, for a consultation. Dr. Pluta ordered an ECG. The plaintiff remained at the hospital overnight and had the ECG early the following morning. The ECG showed that the plaintiff had suffered a heart attack.

6 This chronology is not in dispute. The parties disagree over what the plaintiff reported to the ambulance crew and hospital staff, and over what the defendant did to assess the plaintiff. The disagreements are critical, because they affect the assessment of whether the defendant's conduct met the requisite standard of care.

2. The Plaintiff's Evidence

7 The plaintiff testified that on 28 March 2000, the day after he injured his shoulder at work, he was able to work and drive his manual transmission vehicle without difficulty. He is an accomplished dart player, and played in a dart tournament that evening. He had taken Tylenol-3 before the tournament for shoulder pain. The plaintiff had no difficulty sleeping that night, but awoke with severe pain in the centre of his chest at about 1:00 a.m. He said the pain was heavy and constant, and was a "10" on a scale of 0 to 10. His wife called 911. While she was on the phone telling the 911 operator about his shoulder pain, the plaintiff said he was having a heart attack. He heard his wife relay that over the phone.

8 When the ambulance crew arrived, the plaintiff told them he had severe chest and shoulder pain. The ambulance attendant thought he was having shoulder spasms. The plaintiff said "I'm having a f*&%ing heart attack. Take me to the hospital or I'll walk".

9 The plaintiff testified that after arriving at the E.R., he told everyone — the nurses, doctor, and x-ray technician — that he was having chest pain. He could not breathe, and was in so much pain that he could not move his hand from his chest when the nurse tried to give him a needle. He said the nurse became annoyed with him. He recalled the defendant examining him and palpating his shoulder when he first came in, but had no clear recollection of further examinations or conversations with him. His memory was quite foggy due to the pain and medication. When he was discharged, his pain was still severe, a 9 out of 10.

10 The plaintiff also testified that he told Dr. Blackwood later that morning that he was having chest and shoulder pain and could not breathe. He felt terrible all that day, and was still in severe pain on 30 March 2000. The following morning, when Dr. Pluta told him that the ECG showed he had suffered a heart attack, the plaintiff replied that he had told everyone about his chest pain and that he thought he was having a heart attack.

3. The Defendant's Evidence

11 The defendant relied on his memory of the incident, on notes made at the time, and on his usual practice. He said he does not record every detail, but only significant points, whether positive or negative. The details of this incident became "ingrained" in his memory because he learned of the plaintiff's heart attack shortly after it had been diagnosed by Dr. Pluta. He contacted his lawyer when he became aware of the possibility of litigation, but made no subsequent notes of the incident, an oversight he now regrets. His routine practice when taking a history would have been to ask the plaintiff about the nature, duration, and radiation of the pain.

12 The defendant commenced his examination at 1:50 a.m. He wrote on the emergency record:

> On Monday morning was lifting a pt [patient] on a gurney and was [i]n immediate pain in shoulder. Tonight pain was a lot worse and breathing was [up arrow][increased]. O/E [on examination] moaning + + [loudly]/looks a little pale. Tender over R [right] upper chest, good air entry to lung apex, vitals satisfactory.

13 The defendant recalled, but did not note on the emergency record, that the plaintiff told him he had seen his family doctor as a result of the shoulder injury. He also assessed the plaintiff's shoulder by palpating and moving it. He said that the emergency record note "tender over right upper chest" summarizes the results of the palpation. There is no record of him moving the shoulder, or of the results of this part of his assessment. The defendant concluded that the plaintiff's right shoulder and upper chest pain was related to the musculoskeletal injury to his shoulder at work. He ordered intramuscular Demerol and Gravol for the plaintiff's pain and oral Lorazepam as a muscle relaxant. The defendant also ordered shoulder and chest x-rays.

14 Both sets of x-rays were normal. The defendant reported the x-ray results to the plaintiff and reassessed him. He made no notes of the reassessment, but testified that his normal practice would have been to ask about the pain, assess the range of motion in the shoulder, and re-evaluate vital signs.

15 The defendant was aware the plaintiff was still in pain after the x-rays, and he ordered 10 mg of morphine intravenously at 3:15 a.m. The defendant saw the plaintiff on a third occasion prior to discharging him at 4:00 a.m., but made no notes of this reassessment. He concluded that the plaintiff was stable: his vital signs were reasonable, and his breathing and pain were improved. He released the plaintiff with some oral painkillers and a sling to limit his shoulder movement, and advised him to see his family physician that morning. The defendant testified that he had not come to a firm diagnosis, but remained of the opinion that the right shoulder and upper chest pain was related to the workplace injury. He noted on the emergency record "R [right] shoulder/upper chest wall pain NYD [not yet diagnosed]".

16 At no time did the defendant entertain the diagnosis of a myocardial infarction. During his direct testimony, he said several times that he was in a "trauma mindset" because of the plaintiff's known and reported shoulder injury. He also said that he "wasn't excluding other possibilities," but did not consider a differential diagnosis because he was convinced the plaintiff had a shoulder problem.

17 The defendant did not recall asking the plaintiff's wife about his pain tolerance (see para. 19 below), but said it would not be an inappropriate question under the circumstances. He did recall speaking with Dr. Blackwood the following morning (see para. 34 below). The defendant informed Dr. Blackwood that the plaintiff had required "significant analgesia" and would be following up with Dr. Blackwood regarding the shoulder injury later that morning.

4. Evidence of Other Witnesses

Christine Hewlett

18 The plaintiff's wife Christina Hewlett confirmed that he woke up between 12:45 and 1:00 a.m. in a great deal of pain. He went downstairs to the family room and asked her to call 911. When she was on the phone with emergency services, he yelled out "I'm having a heart attack". When the ambulance attendants arrived at the house, the plaintiff told them he was having "the big one". He was moaning in pain and was put on the stretcher. She followed her husband to the hospital.

19 Mrs. Hewlett said that when the plaintiff returned from the x-ray he looked terrible, was moaning and holding his chest, and was panting like a dog. She went to the nursing station where the defendant asked her if the plaintiff had a low tolerance for pain and she indicated he did not. She also testified that after they returned home, the plaintiff was still uncomfortable and could not lie down.

Don Johannessen

20 Mr. Johannessen was the ambulance attendant who looked after the plaintiff. At the time, Mr. Johannessen had emergency medical assistant level 2 training, which includes training in the recognition of myocardial infarctions. He is familiar with the symptoms and presentation of myocardial infarctions and had dealt with heart attack patients prior to 29 March 2000.

21 Mr. Johannessen had no independent recollection of the events of that evening and relied on his crew report which was prepared contemporaneously. The ambulance service dispatch form indicates that the chief complaint was chest pain. The ambulance crew report also indicates that the call was dispatched as "chest pain — MI" and "Chest Pain — other". Mr. Johannessen testified that he only considers the dispatched chief complaint until he finds out from the patient why they have actually called the ambulance.

22 After speaking with the plaintiff, Mr. Johannessen recorded shoulder pain as the "Chief Complaint" on the crew report. Under "Mechanism of Injury/History of Illness", he noted that severe shoulder pain on the right side woke the plaintiff up, and that the plaintiff injured his rotator cuff on Monday and saw his doctor on Tuesday afternoon. Under "Diagnostic and Additional Comments", he noted that on Monday the plaintiff was lifting a heavy patient up some stairs with other employees. He recorded that the plaintiff had a history of hypertension and recorded the plaintiff's existing medications, Celebrex and Diovon.

23 Mr. Johannessen said that if the plaintiff had told him he was having chest pain, he would have written that down. If it was his chief complaint he would have recorded it in the "Chief Complaint" box. He stated that he believes he would have remembered if the plaintiff had told him he was having a heart attack.

24 After taking the plaintiff's history, Mr. Johannessen found on examination that the plaintiff had right upper chest pain and right shoulder pain radiating to the chest. He also noted under "Diagnostic and Additional Comments" that the plaintiff had sharp, constant pain in the right shoulder that "radiates across chest"; the pain was 10 out of 10 and woke the plaintiff at about 1:20 a.m.

25 On cross-examination, Mr. Johannessen agreed that his notations of "right upper chest area pain", "right shoulder pain radiates to chest", and "radiates across chest" were distinct observations.

26 At no time did Mr. Johannessen form the impression that the plaintiff was suffering from a heart attack. He testified that if the crew suspected an MI, the ambulance would likely have transported the plaintiff with lights and sirens on and the crew would have notified the hospital in advance. In this case, the ambulance transported the plaintiff without lights or siren because his vital signs were stable, his skin was normal, and Mr. Johannessen's initial assessment indicated the plaintiff was suffering shoulder pain from the previous musculoskeletal injury.

27 On arrival at the hospital, the ambulance crew's usual practice is to speak with the duty nurse who assigns the patient to a bed. The crew report is either handed to the nurse or left with the patient's chart.

28 When the ambulance arrived at the hospital, Nurse Knox and Nurse Lavoie were on duty in the emergency department along with the defendant.

Nurse Knox

29 Nurse Knox made no note of the evening in question but stated she recalled the plaintiff's presentation at the E.R.

because it was very dramatic. She described him as writhing in pain, and holding onto his shoulder with his left hand. She recalled the ambulance attendants telling Nurse Lavoie and the defendant about the plaintiff's workplace shoulder injury. She stated that, based on this history, no consideration was given to placing the plaintiff in a cardiac bed.

30 Nurse Knox was not directly involved in the plaintiff's care, but observed that he was more stable and in less pain when he was discharged. She has no recollection of the plaintiff mentioning chest pain or a heart attack.

Nurse Lavoie

31 Nurse Lavoie was assigned to the plaintiff when he arrived at the E.R. She did not recall the conversation with the ambulance attendants, or any specific discussion about a cardiac bed, but said if the plaintiff had ever complained of having a heart attack, the "big one", or chest pain, she would have recorded it on the chart and given him an ECG. An ECG takes only about five minutes and is very inexpensive. She stated that the plaintiff was not put in a cardiac bed because there was nothing cardiac about his presentation.

32 Nurse Lavoie started to take history and vital signs from the plaintiff, and then the defendant took over the history. She administered the Demerol, Gravol, and Lorazepam shortly after 2:00 a.m. She noted at 2:40 a.m. that the plaintiff was still in severe pain after the x-ray. She took his vitals again and administered intravenous morphine on the defendant's orders at 3:25 a.m. She did not recall any objection from the plaintiff to either injection or to the sling being applied before he was discharged.

Ms. DeJong

33 The x-ray technician, Ms. DeJong, testified that she questioned the plaintiff about his shoulder and was told he had an altercation with a ladder. She was with the plaintiff for about 20 minutes. She took x-rays, one of which required him to inhale and hold his breath. His only complaint was pain to the right shoulder. She said that if he had reported chest pain or told her he was having a heart attack, she would have sent him back to the E.R. She had no difficulty conversing with him, and did not notice that he had any difficulty getting up or moving.

Dr. Matthew Blackwood

34 Dr. Blackwood is the plaintiff's family doctor. He spoke with the defendant on the morning of 29 March 2000. In response to the defendant's question about the plaintiff's pain threshold, Dr. Blackwood explained that the plaintiff was a stoic individual. Because he was concerned about the amount of pain the plaintiff experienced and the amount of narcotics administered to reduce the pain, Dr. Blackwood reviewed the x-rays with a hospital radiologist.

35 Dr. Blackwood saw the plaintiff in his office between 9:00 and 9:30 that morning. The plaintiff was distressed and reported shoulder pain, but did not report chest pain or a heart attack. Dr. Blackwood thought there might be a septic process in the shoulder, and ordered blood work. He increased the plaintiff's Celebrex, added a prescription for Percocet, and advised the plaintiff to ice the shoulder more frequently.

36 On hearing from Dr. Kreml, the radiologist, that the x-rays indicated early-stage pneumonia, Dr. Blackwood contacted the plaintiff who returned to his office in the afternoon. Dr. Blackwood re-examined the plaintiff, diagnosed him with lingular pneumonia, and prescribed antibiotics and more blood work.

37 The plaintiff returned the following day, 30 March 2000. Dr. Blackwood noted that the right shoulder pain was improving, but the pneumonia symptoms appeared to be getting worse. Dr. Blackwood noted in his records that the plaintiff denied any chest pain. He sent the plaintiff to the hospital for an oxygen saturation test, another chest x-ray, and further blood work. Dr. Blackwood also referred the plaintiff to Dr. Pluta, a consulting internist, because he was concerned that the plaintiff was developing a very aggressive form of pneumonia.

38 Dr. Blackwood did not order an ECG, but found out on the morning of March 31 that Dr. Pluta had ordered one and

that the results indicated that the plaintiff had suffered an acute MI.

5. Credibility

39 The evidence of the plaintiff and his wife cannot be reconciled with that of the ambulance attendants and the other health care professionals. Unfortunately, I am unable to accept the evidence of the plaintiff and his wife. The plaintiff's evidence at trial was inconsistent with some of the evidence he gave at his examination for discovery. For example, at trial, he said he was able to play darts on the evening of March 28. At discovery, he said he was not able to shoot darts. At trial, he said he planned to retire at age 65, but at discovery he said he planned to retire at age 60. Those are some of the inconsistencies.

40 What is critical, however, is the plaintiff's evidence that he repeatedly told the health care providers that he was having a heart attack or the "big one". This is not confirmed by the ambulance attendants, the two emergency room nurses, the x-ray technician, the defendant, or Dr. Blackwood. I am satisfied that if any one of those individuals had heard the plaintiff complain of chest pain, or having the "big one" or a heart attack, he would have been treated on an emergency basis and would have been given an ECG forthwith.

41 Ms. Bicejo, an entitlement officer with the Workers' Compensation Board, testified to the contents of a conversation with the plaintiff on 2 May 2000. The plaintiff had initiated a claim after the workplace incident on 27 March 2000. Ms. Bicejo called the plaintiff and took notes of their conversation. The plaintiff has no recollection of this conversation but according to Ms. Bicejo's notes, he reported that he "felt pain immediately in his shoulder and chest but didn't think it necessary to go to the hospital right away". Instead, the plaintiff:

> attended first aid and then saw his dr. the following day. Mr. Hewlett advises he told dr. he felt as though he was having a heart attack but dr. prescribed pain killers and sent him home. He then attended the MSA Hospital emergency with same complaints but was also sent home. Mr. Hewlett suffered a heart attack on March 29 . . . [H]is dr. diagnoses a torn right rotator cuff, MI and [pneumonia] sustained as a result of March 27 incident.

42 On cross-examination, the plaintiff denied telling Dr. Blackwood that he was having a heart attack on 28 March. When presented with the WCB report, he said he did not remember any conversation with Ms. Bicejo. I am satisfied that Ms. Bicejo's notes accurately record what the plaintiff reported, and I am satisfied that the plaintiff tailored his account of events to suit the party from whom he was seeking compensation. I therefore conclude that the plaintiff is not a reliable witness and I reject his evidence when it conflicts with that of the health care providers.

43 On the other hand, I also give very little weight to the defendant's evidence. I found him to be evasive and less than forthright in his testimony. Much of his testimony was patently self-serving. He appeared to have memorized a script and kept repeating answers to avoid hard questions.

44 He could not explain why he did not make notes of the early morning events of 29 March when he knew shortly thereafter that there was a potential lawsuit and he, as required, contacted counsel. To expect this court to believe that the events were, in his words, "ingrained in his mind", is to give himself too much credit. In addition, he explained the lack of notes on the E.R. chart by saying there are time constraints in the E.R. and insufficient room on the form to record all that occurred. He admitted that the E.R. was not busy that evening. Dr. McKnight, an emergency room physician, testifying for the plaintiff, testified that if there was insufficient room on the form then he would simply get another piece of paper.

45 It seems patently obvious that an accurate and detailed emergency record is a benefit to the doctor, as he then does not have to rely on his memory when he gives evidence in situations like this. In addition, it is of benefit to the patient both as a historical medical record and as a guide to other health care providers.

46 The defendant's lack of candour applied to general medical questions as well as to questions about the particular events that night. For example, at his examination for discovery he gave the following list of causes of chest wall pain:

> Q Can you please tell me, what are the possible causes of chest wall pain?

A In general terms?

Q Yes, go ahead.

A In no particular order; trauma, infection, collapsed lung, heart attack. ...

47 At trial, however, he did not mention heart attack:

Q Doctor, tell the court, please, the possible causes of chest wall pain?

A Chest wall pain would typically be from muscular, ligamentous injuries, bony injuries, conditions outside of the chest cavity.

Q Is that all you can think of?

A That would be my answer.

48 The defendant's omission of heart attack in his answer at trial is typical of the way in which he answered questions generally. He was equally evasive in response to plaintiff's counsel questioning him about atypical presentations:

Q ... [I] f you accept that this man was having a myocardial infarct, it was an atypical presentation; correct?

A I would agree with that.

Q And with atypical presentation, the pain can be anywhere in the chest; correct?

A Yes.

Q It can be in the upper chest wall?

A I have not seen a patient who only had pain in his right shoulder and the muscles immediately adjacent to that.

49 After quite a bit of back and forth with plaintiff's counsel, the defendant finally testified:

Q Am I wrong in stating that in an atypical myocardial presentation you can have chest pain anywhere in the chest, sir?

A I have stated that I have never seen a patient who only had right shoulder pain as his presentation.

Q Am I wrong in that statement? Am I medically wrong?

A Can you make your statement again?

Q In an atypical myocardial infarction presentation, the patient can have pain in any part of his chest?

A He could have pain in other parts of the chest other than the classical presentation, yes.

50 At one point, the defendant said that if the ambulance crew had told him the plaintiff had pain radiating across his chest, he would have ordered an ECG. When it was suggested he could have learned this from the crew report, he said he felt he had enough information from the patient and did not feel the need to review the ambulance crew report. He admitted he

was not so rushed off his feet that he did not have an opportunity to pick it up and read it.

51 He resiled from that statement when it was put to him later:

> Q And had you picked it [the ambulance crew report] up and read it ... you would have done an ECG, wouldn't you?
>
> A No, I would have asked the patient about that.
>
> Q I am sorry, you just earlier said, if I had read that it was radiating across his chest, I would have done an ECG. Do you wish to change your answer?
>
> A Yes, I would ask the patient. The patient did not give me a history of chest pain.
>
> Q Okay.
>
> A If I had a history of chest pain from the patient, I would have done an ECG.

52 When pressed further on the same point, he testified:

> A I would have reviewed the patient — with the patient the nature of the source of his pain and any radiation. But he had already given me a good story. I didn't feel the need to do that.
>
> Q ... [I]f you had read the ambulance crew report and seen that the pain was radiating across his chest, would you have specifically gone to him and asked him, and now you would be thinking, perhaps myocardial infarct; correct?
>
> A I had already asked him about radiation of the pain before I gave him the Demerol and after the Demerol.
>
> Q Where is that recorded?
>
> A I recall it clearly.
>
> Q Where is it recorded?
>
> A It's not recorded.
>
> Q Isn't that a very important thing to have asked the patient? The radiation of the pain?
>
> A Yes.

53 During cross-examination, the defendant stated that he clearly recalled questioning the plaintiff about the pain. On direct examination, he relied on his usual practice:

> Q And what would you have done in this case then?
>
> A I would have asked him about the nature of the pain, was it a constant pain, did it come and go, was it a dull pain, sharp pain, did the pain radiate?

Further, the defendant's experts were asked to assume:

> It was Dr. Henderson's routine practice to ask if there was any pain radiating across the chest and he does not believe he would have deviated from his practice in this case. Mr. Hewlett did not describe any radiating pain when asked that question.

54 Although courts quite often accept and give a great deal of weight to routine practice, I decline to do so in this case. The defendant himself claimed the events were ingrained in his mind. In the particular circumstances, questioning the patient closely about the nature of the pain was critical. If the defendant had asked the question, he would have testified to that during his direct examination. His experts would have been asked to assume that he asked the question, not that it was his routine practice to ask the question. I do not accept the defendant's evidence on this point.

55 Mrs. Hewlett testified that the defendant asked her about the plaintiff's pain threshold after the plaintiff returned from his x-ray and prior to the administration of the second round of medication. The defendant did not recall asking Mrs. Hewlett the question, but acknowledged it would have been appropriate under the circumstances. I accept Mrs. Hewlett's evidence that the defendant did, in fact, ask the question. This finding is consistent with Dr. Blackwood's testimony that the defendant asked him about the plaintiff's pain threshold later that morning.

56 It was suggested to the defendant that one of the reasons he would ask about a patient's pain threshold was that they were not reacting in the anticipated way to the amount of narcotics they had been given. The defendant stated "I agree with you. I'm not disputing that. I'm just disputing that I don't recall asking that." I am satisfied that the very reason the defendant questioned not only the plaintiff's wife but also Dr. Blackwood later on that morning was that he was concerned about the plaintiff's failure to respond predictably to the narcotics.

6. Duty of Care

57 There is no question that the defendant owed the plaintiff a duty of care.

7. Standard of Care

58 The plaintiff claims that the defendant failed in his duty to diagnose. Specifically, the plaintiff claims that the defendant did not take a careful and thorough history; that he formed an impression too quickly; that he failed to consider alternative diagnoses; that he failed to use readily available, credible medical information from the ambulance crew report; and that he failed to administer an ECG.

59 Ellen I. Picard and Gerald B. Robertson provide a useful summary of the duty to diagnose in *Legal Liability of Doctors and Hospitals in Canada* 3d ed. (Toronto, Ont.: Carswell, 1996) at 246:

> [T]he duty to diagnose requires doctors to take a full history, use appropriate tests and consult or refer if necessary. They must take reasonable care to detect signs and symptoms and formulate a diagnosis using good judgment. They cannot act only on what they are told, nor ignore what they are told. Sophisticated tests and continuing knowledge of disease must be employed when appropriate. A doctor's skill and judgment must be in step with his colleagues but need not be in advance of theirs and if this standard of care is met in the circumstances the doctor will not be held liable to a patient injured by a misdiagnosis. As with all errors of clinical judgment a misdiagnosis is not necessarily negligent.

a) The Expert Evidence

60 Of all the experts dealing with the standard of care of a general practitioner practising in an E.R. in a community hospital, I prefer the evidence of the plaintiff's expert, Dr. McKnight. He was the most qualified emergency room physician. He gave his evidence in a fair and objective manner and presented himself as a true expert whose role was to assist the court and not to defend his opinion at any cost.

61 I give little weight to the opinion of Dr. Spelliscy, an emergency room physician testifying for the defendant, about whether the defendant met the relevant standard of care. Dr. Spelliscy wrote that he reviewed extensive reports and transcripts including the statement of defence on behalf of Dr. Chang, yet he does not know who Dr. Chang is (and, in fact, there was no defendant Dr. Chang). He also stated that he reviewed the clinical records of the defendant. There were no such

clinical records. He was vague as to what was actually provided to him, and therefore upon what he based his opinion.

62 I do accept Dr. Spelliscy's testimony, elicited on cross-examination, that if he was not confident in his diagnosis, he would look for as much information as possible including sources such as the ambulance report and patient's family. He also agreed that simply by being an overweight middle-aged male with a history of hypertension, the plaintiff was in a higher risk group for heart attack.

63 I do not accept the evidence of Dr. Huckell, a cardiologist testifying for the defendant, because I found him less than objective in his testimony, and argumentative and confrontational during his cross-examination. For example, Dr. Huckell explained on direct examination how he believes that the injuries sustained by the plaintiff at work caused arterial plaque to dislodge and form a clot. He then stated:

> I'll point out, for example, that the Workers' Compensation Board, who are I think a very conservative group, accepts the fact that a firefighter can sustain a heart attack up to 48 hours after fighting a fire and that's a compensable injury. Therefore, they must accept the evidence that severe stress can cause a heart attack several days later. Again, the patterns that were exhibited here are very consistent with the severe stress and trauma of this heavy workload, plus damage to the body triggering the coronary spasm which damaged the plaque and ultimately lead to a heart attack.

64 Under cross-examination, he admitted he was aware that the Workers' Compensation Board had concluded that the plaintiff's heart attack was not a work-related injury, but argued at length with plaintiff's counsel about the wording of the conclusions. If Dr. Huckell was giving evidence fairly and objectively, he would have mentioned in his direct examination that the plaintiff's claim was denied, instead of trying to leave the court with the impression that he might be compensated by the Workers' Compensation Board.

65 I also place very little weight on the evidence of Dr. Mizgala, a cardiologist testifying for the plaintiff, who was overtly partisan. Indeed, he conceded on cross-examination that it was not fair of him to state, as he did repeatedly in his reports and direct examination, that the plaintiff reported chest pain in addition to right shoulder pain.

66 Dr. Mizgala's reports are rife with inconsistencies. He initially stated that the plaintiff arrived at the E.R. within half an hour of the onset of symptoms, then concluded that the plaintiff was brought to the E.R. within 20 minutes of the onset of symptoms. Even under the timeline most favourable to the plaintiff, this is utterly impossible. His initial report also stated that there was a high probability the plaintiff would have suffered no infarction if thrombolytic ("clot-busting") therapy had been administered in a timely fashion; on cross-examination he admitted that irreversible tissue death begins one-half hour to an hour after the onset of the occlusion.

67 A typical example of the persistent bias in his reports is that, after reading a radiological report that stated there was "moderate impairment of the left ventricular systolic function", he concluded that the left ventricular function was "severely impaired". Similarly, he stated in his first report that the normal ejection fraction (roughly speaking, a measure which represents the heart's pumping ability) is greater than 55%; in a later report, he stated the normal figure is 60 to 75%.

b) The Relevant Standard of Care

68 The parties agree that the relevant standard of care the defendant had to meet is that of the reasonable general practitioner or family physician practising emergency medicine in a community hospital in 2000. Most of the experts agreed that the standard of care requires the administration of an ECG when a middle-aged man with a history of hypertension presents with chest pain. I have found as a fact, however, that the plaintiff presented without chest pain.

69 The experts, with the possible exception of Dr. Mizgala, agreed that a presentation with no chest pain is atypical for myocardial infarction. No expert testified that the standard of care requires an immediate diagnosis of heart attack from an atypical presentation. Nor does the standard of care require diagnosis from an atypical presentation where the initial symptoms are completely and satisfactorily explained by a known condition. In this case, the plaintiff's symptoms were wholly explained by his pre-existing shoulder injury. I find that the defendant was not negligent in making a preliminary diagnosis of shoulder pain subsequent to shoulder injury.

70 After being notified by Nurse Lavoie that the plaintiff was still in severe pain despite a hefty dose of Demerol, the defendant reassessed the plaintiff. On his own testimony, however, he did not actively engage in a differential diagnosis. I accept the opinion of Dr. McKnight that a "reasonably prudent physician would reassess the patient seeking an alternate explanation for the severe pain". As he explained more fully in his direct testimony:

> Any patient who presents to the emergency department with severe pain ... between the nose and the navel, that is not simply explained or relieved by common analgesic, requires deeper consideration as to the causes of the pain.

71 On cross-examination, Dr. McKnight agreed that the defendant's initial assessment of the plaintiff was reasonable. This is consistent with the opinion in his report:

> The fact that Mr. Hewlett was a middle-aged male, hypertensive and overweight would have placed him in a higher risk category for suffering from a heart attack and should have raised the suspicion of Dr. Henderson at some point during Mr. Hewlett's stay in the ED [Emergency Department] to consider the possibility of a heart attack.
>
> [Emphasis added]

72 In Dr. McKnight's opinion, the deficiency in the defendant's conduct arose after the plaintiff's severe pain did not respond as expected to the Demerol. In his view, an adequate reassessment would have included the taking of a "more detailed history including a risk factor assessment for coronary artery disease". It would also have included another physical examination, and an ECG in addition to the chest x-ray.

c) Conclusion on Negligence

73 I am satisfied that the heart attack began when the plaintiff awoke with pain at 1:00 a.m. on 29 March 2000. This is the evidence given by the plaintiff and his wife, and it is the most credible evidence of pain that could be associated with a heart attack. None of the experts were able to firmly conclude when the heart attack took place from reviewing the ECG and cardiac enzyme test results, but none of them found the test results inconsistent with the time I have indicated.

74 I am satisfied that the defendant was not negligent in failing to diagnose the plaintiff's MI immediately on his arrival at the E.R. The plaintiff did not report chest pain; the expert consensus was that presentation without chest pain is atypical; and the standard of care of a reasonably competent family physician practicing emergency medicine does not require diagnosis of a condition from atypical symptoms, especially where a known condition explains all of the symptoms satisfactorily. The symptoms reported by the plaintiff, and the physical findings during the initial assessment, were consistent with the existing shoulder injury.

75 I find, however, that the defendant was negligent when he failed to reconsider his diagnosis after the plaintiff did not respond predictably to the Demerol. He failed to consider MI as a differential diagnosis; failed to assess the plaintiff for risk factors; and failed to use all available sources of information including the ambulance crew report and a more probing discussion of the plaintiff's history and symptoms with the plaintiff and his wife. I am satisfied that the defendant's questions to the plaintiff's wife and to Dr. Blackwood the following morning indicate that the defendant was well aware that the Demerol had failed to resolve pain attributable to the shoulder injury.

8. Causation

76 I do not propose to discuss causation at length. I am satisfied that had the defendant appropriately reassessed the plaintiff after the Demerol failed to have the expected effect, he would have found that there was either chest pain or pain radiating into the chest. He would also have reconsidered the significance of the plaintiff's known risk factors for heart attack. A reasonably competent family physician in the defendant's position would then have considered a differential diagnosis and would have administered an ECG to either confirm or rule a heart attack out. I am also satisfied, on the

preponderance of the expert evidence, that an ECG would have revealed that the plaintiff had suffered a heart attack. Finally, I am satisfied that, on such a diagnosis, a reasonably competent physician in the defendant's position would have administered thrombolytic therapy as soon as possible. Thrombolytic therapy is administered by injection and is readily available in all E.R.s in the province. In the result, I am satisfied that the defendant's negligence materially contributed to the heart damage suffered by the plaintiff.

77 Under similar circumstances, our Court of Appeal characterized the harm as "aggravated damages" because the defendant's negligence increased damage to the plaintiff's heart that was already underway prior to the plaintiff coming under the defendant's care: *Dillon v. LeRoux* (1994), 89 B.C.L.R. (2d) 376, [1994] 6 W.W.R. 280 (B.C. C.A.). I do not think the characterization — material contribution as opposed to aggravation of damages already occurring — is particularly critical.

9. General Damages

78 In assessing general damages, I have been mindful of the fact that the plaintiff would have had a heart attack in any event, and of my conclusion that the defendant was not negligent in his initial assessment of the plaintiff. Using the time line most favourable to the plaintiff, I find that thrombolytic therapy could have begun, at the earliest, about two hours after the onset of his symptoms.

79 The plaintiff claims that since the MI, he has limited energy, has difficulty breathing, and has severe headaches. He takes various medications and his heart attack has affected his quality of life. Before the heart attack, he sailed and played darts and tennis. All of these activities have been affected by the heart attack. He sold his sailboat and purchased a cottage.

80 Mrs. Hewlett confirmed that the plaintiff's physical activities decreased substantially after his heart attack. She described him as being short-tempered, and said she has to do all the heavy work.

81 On cross-examination, the plaintiff admitted that most of his day-to-day limitations are caused by his shoulder injury, and that his doctors have told him that losing approximately 30 pounds would be the best way to improve his fatigue and shortness of breath.

82 In my view, an overweight male with several distinct physical ailments in addition to the heart attack (that is, an unresolved shoulder injury, previous ankle and knee injuries, ankle arthritis, a history of low back pain, hypertension) who has undergone four unrelated surgeries since the heart attack could well find that his accustomed level of physical activity diminishes in later middle age. In the circumstances of this case, only a small proportion of the plaintiff's current physical limitations can be attributed to the after-effects of the heart attack. Further, most of the other conditions, particularly the shoulder condition, are getting worse, while the measurable consequences of the heart attack have actually improved.

83 I have reviewed the parties' authorities on general damages. I have also kept in mind the fundamental principle of damages in negligence: the defendant is liable for any injuries caused or contributed to by his or her negligence: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 (S.C.C.) at para. 13. I have found, and indeed the plaintiff submits, that the heart attack had occurred and was actively disabling the plaintiff prior to the defendant's negligence. The plaintiff has, quite correctly, claimed general damages only for the difference between his current condition and the position he would be in had the defendant diagnosed the heart attack and administered thrombolytic therapy.

84 In addition to *Dillon*, the parties have provided *Briffett v. Gander & District Hospital Board* (1996), 137 Nfld. & P.E.I.R. 271, [1996] N.J. No. 34 (Nfld. C.A.) and *Gros v. Victoria General Hospital* (2000), 151 Man. R. (2d) 111, 2000 MBQB 172 (Man. Q.B.), aff'd (2001), 160 Man. R. (2d) 7, 2001 MBCA 134 (Man. C.A.). The Court of Appeal in *Dillon* upheld the trial judge's award of general damages of $100,000, discounted by 20% for the amount of damage that would have occurred in any event. In *Briffett*, the trial judge's award of $40,000 for non-pecuniary damages was upheld on appeal. In *Gros*, the trial judge found no liability, but assessed general damages at $85,000. I note also the award of $115,000 in *Kielley v. General Hospital Corp.* (1995), 136 Nfld. & P.E.I.R. 189, [1995] N.J. No. 384 (Nfld. T.D.), varied (but not on this point) (1999), 183 Nfld. & P.E.I.R. 1, [1999] N.J. No. 355 (Nfld. C.A.).

85 In all of these cases, the plaintiff was unusually young to suffer a heart attack, the oldest being 41 years old. Where

ejection fractions were used to gauge the plaintiff's current ability to carry out accustomed physical activities, all were substantially lower than the plaintiff's current ejection fraction. In *Kielley*, the heart attack occurred after the plaintiff had been admitted to the hospital for cardiac observation and the trial judge found him to be essentially a "cardiac invalid" after the event. In *Gros*, the plaintiff suffered brain damage, personality change, and cognitive impairment.

86 In the present case, I find that the plaintiff suffered a severe heart attack which necessitated surgery. He was hospitalized for six days. There is no doubt he experienced significant pain and suffering. In addition, the plaintiff has to live with the knowledge of significantly reduced life expectancy as a result of the heart attack. After reviewing the authorities and adjusting for inflation, I award general damages of $100,000, subject to the appropriate discount for the portion of heart damage that would have occurred in any event.

87 The *Athey* principle that a pre-existing condition must be taken into account in reducing the overall award is so well-established that it needs no discussion. In *Dillon*, the Court of Appeal upheld the trial judge's 20% discount for the heart damage that would have occurred in any event, noting that none of the experts were asked for an opinion on the portion of the damage attributable to the defendant.

88 Here, in contrast, much evidence was led on the benefits and timing of thrombolytic therapy. All of the experts agreed that the plaintiff suffered a large heart attack. I accept the evidence of the defendant's expert cardiologist, Dr. MacKenzie, who concluded that the plaintiff's life expectancy has been reduced by about 14.6 years. He states that thrombolytic therapy, administered within the first three hours, could have resulted in the plaintiff experiencing a moderate-to-large heart attack, with a reduced life expectancy of 10 years. To put that figure another way, thrombolytic therapy could have reduced the life-shortening effect of the heart attack by just over 30%. That is, of course, only an estimate. It is a factor to consider when discounting from the award of damages the amount of damage to the plaintiff's heart that would likely have occurred absent the defendant's negligence.

89 The plaintiff's expert cardiologist, Dr. Mizgala, testified that thrombolytic therapy administered within three hours can reduce heart damage by 20%. In his opinion, if an ECG had been administered within the hour, the damage could have been reduced by 30 to 40%. As noted earlier, I find the facts on which he based his opinion incorrect, and I find it is simply not possible that thrombolytic therapy could have been administered within the first hour. It follows, therefore, that I do not accept his opinion that the plaintiff might have suffered a minor-to-moderate heart attack but for the defendant's negligence. Finally, Dr. Mizgala agreed on cross-examination that 30% of patients show no benefit from thrombolytic therapy. This is consistent with the evidence of Dr. Epstein, a cardiologist testifying for the defendant, and is a contingency that I must take into account.

90 As a result, I find that the best outcome for the plaintiff under the circumstances would have been a 30% improvement compared to his current condition. The award for general damages will be reduced by 70% for the portion of heart damage that would likely have occurred in the absence of any negligence on the defendant's part.

10. Lost Earning Capacity

91 The plaintiff remained off work after the heart attack until 8 August 2000. He returned to work full-time as an electrician, but was unable to meet the heavy physical demands of the job and switched to working as a power systems operator, essentially a desk job, because it was less strenuous. He worked full-time until March 2003, and was off work until October 2004, during which time he had shoulder surgery, elbow surgery, and a hernia operation. He was on a graduated return-to-work program from October 2004 until April 2005. He then worked full-time, but was restricted to working 8-hour day shifts rather than 12-hour shifts. He has not worked since 5 July 2005.

92 The plaintiff acknowledged that he changed jobs because of the shoulder injury. There is no question that the time off work in 2003 and 2004 was due to surgeries unrelated to the heart attack. Dr. Blackwood testified that prior to the heart attack, the plaintiff had a severe ankle fracture resulting in arthritis, a knee injury, and ongoing low back pain. Dr. Blackwood also acknowledged during cross-examination that the plaintiff had reported shoulder pain in 1999, prior to the known injury.

93 The plaintiff earns $34.66 per hour. His income was approximately $58,000 in 1998 and $65,000 in 1999. In 2000, the year of his heart attack, it was approximately $59,000. In 2001, he earned $75,000; in 2002, $83,564. That seems to work out

to just over $63,000 per year at straight time. He thus increased his base salary in 2002 by roughly one-third through overtime. That is a lot of overtime. It is far more than he earned in the two years prior to his heart attack.

94 In 2003, the plaintiff earned approximately $28,000 and received $15,000 in WCB benefits; in 2004, he earned just under $30,000 and received over $40,000 in wage replacement benefits. The plaintiff's own work history shows he was able to work a substantial amount of overtime less than two years after the MI. According to his own testimony, very few of his work absences to the date of trial were attributable to his heart attack.

95 The plaintiff claims $350,000 for "future lost income" on the basis that he is unlikely ever to return to work, that he has no residual earning capacity, and that the defendant's negligence caused 75% of this loss. None of these contentions were established by the evidence. The only evidence that he is permanently disabled from working comes from the plaintiff himself. My review of his post-heart attack work history leads me to conclude that any ongoing disability is caused primarily by his unresolved shoulder injury, obesity, and other physical ailments, all of which are unrelated to the heart attack. I note in this regard that Dr. Blackwood's reports to the plaintiff's disability insurer attribute his current limitations to the unresolved shoulder injury.

96 The plaintiff has had several treadmill tests since the heart attack where he exercised for 9 minutes with no chest pain. There is no medical evidence that his cardiac condition is unstable; in fact, his ejection fraction has improved markedly since his heart attack and is currently about two-thirds of the normal percentage. His own cardiologist reports that despite the plaintiff's "chronic complaints of fatigue and shortness of breath", he "actually remains active and does fairly well when he does a treadmill." In Dr. Epstein's opinion, the plaintiff's exercise tolerance is in the normal range for a man in his fifties, thirty pounds overweight, with normal cardiac function.

97 There is no question that the plaintiff's other medical problems, most particularly his unresolved shoulder injury and weight problem, limit his future earning capacity. None of this loss can be laid at the feet of the defendant. I do accept, however, that the heart attack has left him with permanent heart damage that has impaired his capacity to earn in the future. He has a reduced capital asset insofar as he is less capable of performing all types of work and less capable overall.

98 In *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, [1985] B.C.J. No. 31 (B.C. S.C.), Finch J. (as he then was) gave a non-exhaustive list of considerations to assist in assessing what he called "loss of capacity to earn income in the future" (at paras. 1, 8):

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

99 The recent authorities emphasize that an award under this head is an assessment of the lost asset, not an arithmetical calculation of projected earnings, deductions for contingencies, and so on: *Rowe v. Bobell Express Ltd.* (2005), 39 B.C.L.R. (4th) 185, 2005 BCCA 141 (B.C. C.A.). The distinction for hourly wage earners appears esoteric, and the practical difference in result of the two approaches may be negligible; see *e.g. B. (M.) v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53 (S.C.C.) at para. 50, McLachlin C.J.C.:

> [T]he value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time, had the tort not been committed.

100 The plaintiff testified that he intends to retire at age 65, but on his examination for discovery he indicated he was going to retire at age 60. I find as a fact that the plaintiff would have retired at age 60, although there is a possibility that once he reaches the age of 60, he may continue to work, either part-time or full-time.

101 I have considered the expert reports of the plaintiff's economic expert, Mr. Hildebrand. They are helpful, but this is a matter of assessment, not calculation, of damages. I am therefore faced with the familiar judicial task of applying the prospectoscope to the plaintiff's situation. I award the amount of $100,000 for the plaintiff's lost earning capacity, subject to a 70% reduction for the portion of the loss that would have occurred in any event.

11. Summary

102 I find that the defendant was negligent in failing to meet the relevant standard of care in diagnosing and treating the plaintiff's heart attack. I award the plaintiff $30,000 for general damages and $30,000 for lost earning capacity. The plaintiff is entitled to his costs.

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2010 ONSC 1796
Ontario Superior Court of Justice

Marchand v. Jackiewicz

2010 CarswellOnt 1723, 2010 ONSC 1796, 186 A.C.W.S. (3d) 841

SHARMAINE MARCHAND, JEAN MARCHAND and JEAN MARCHAND III, an infant under the age of 18 years by his Litigation Guardian SHARMAINE MARCHAND (Plaintiffs) and ALLAN W. JACKIEWICZ, MARGARET MURPHY AS LITIGATION ADMINISTRATOR FOR THE ESTATE OF DENIS J. MURPHY, DECEASED, EVERARD M. PHALA and GREATER NIAGARA GENERAL HOSPITAL (Defendants)

L.M. Walters J.

Heard: December 8, 2009 - January 6, 2010
Judgment: March 25, 2010
Docket: St. Catharines 43071/01

Counsel: J. Gardner Hodder for Plaintiffs / Defendants by Counterclaim, Sanofi-Aventis Canada Inc., Sanofi-Aventis Deutschland GmbH
Mark Veneziano, Jamie Spotswood for Defendants, Allan W. Jackiewicz, Denis J. Murphy, Everard M. Phala

Subject: Public; Torts; Civil Practice and Procedure

Related Abridgment Classifications

Health law
V Malpractice
V.2 Negligence
V.2.c Standard of care

Health law
V Malpractice
V.2 Negligence
V.2.d Causation

Health law
V Malpractice
V.2 Negligence
V.2.f Miscellaneous

Remedies
I Damages
I.2 Special damages [pre-trial pecuniary loss]
I.2.b Past loss of income
I.2.b.vi Miscellaneous

Remedies
I Damages
I.3 General damages

I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.A Future loss of income

Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.iii Cost of future care
I.3.a.iii.F Miscellaneous

Remedies
I Damages
I.3 General damages
I.3.b Non-pecuniary loss
I.3.b.vi Miscellaneous

Headnote

Health law --- Malpractice — Negligence — Miscellaneous
Plaintiff was scheduled for elective laparoscopic surgery at hospital — Plaintiff had sore throat several days prior to operation — Plaintiff progressively became ill following surgery — Plaintiff underwent emergency surgery, which left significant and disfiguring scarring — Plaintiff brought action against family doctor, hospital and other doctors, alleging that undiagnosed strep throat led to invasive infection — Action dismissed — As against hospital, action was dismissed before trial and parties agreed at trial that action should be dismissed as against other doctors — Plaintiff did not establish that she made phone call to family doctor days prior to operation to report sore throat and seek appointment — Doctor and his secretary did not recall such phone call, and gave evidence that any such patient complaint would have been recorded in chart — No adverse inference was drawn against doctor for failure to call nurse at trial, given that plaintiff could also have called her — There were certain reservations regarding accuracy of plaintiff's testimony, given discrepancies including statement of trial but not at examination for discovery that she reported sore throat to nurse at hospital — Secretary was independent witness whose testimony went largely unchallenged — Plaintiff's former lawyer's affidavit to having viewed telephone bill with call highlighted as to doctor did not establish existence of call, since he did not independently confirm that phone number in question was doctor's.

Health law --- Malpractice — Negligence — Standard of care — Miscellaneous
Plaintiff was scheduled for elective laparoscopic surgery at hospital — Plaintiff had sore throat several days prior to operation — Plaintiff progressively became ill following surgery — Plaintiff underwent emergency surgery, which left significant and disfiguring scarring — Plaintiff brought action against family doctor, hospital and other doctors, alleging that undiagnosed strep throat led to invasive infection — Action dismissed — As against hospital, action was dismissed before trial and parties agreed at trial that action should be dismissed as against other doctors — Plaintiff did not establish that she made phone call to family doctor days prior to operation to report sore throat and seek appointment — In any event, if plaintiff did contact doctor complaining of sore throat, doctor met standard of care for family physicians by advising self-medication and not notifying surgical team of change in conditions — Even plaintiff's expert agreed that performing throat swab was judgment call rather than required by standard of care — Plaintiff's expert's opinion that family physicians should communicate complaint of sore throat and mild cough to surgical team was contrary to collective experiences of five other doctors testifying at trial.

Health law --- Malpractice — Negligence — Causation
Plaintiff was scheduled for elective laparoscopic surgery at hospital — Plaintiff had sore throat several days prior to operation — Plaintiff progressively became ill following surgery — Plaintiff underwent emergency surgery, which left significant and disfiguring scarring — Plaintiff brought action against family doctor, hospital and other doctors, alleging that undiagnosed strep throat led to invasive infection — Action dismissed — As against hospital, action was dismissed before trial and parties agreed at trial that action should be dismissed as against other doctors — Plaintiff did not establish that she made phone call to family doctor days prior to operation to report sore throat and seek appointment — In any event, if

plaintiff did contact doctor complaining of sore throat, doctor met standard of care for family physicians — It was unlikely that plaintiff had strep throat, given evidence including absence of any indication of abnormal throat condition at time of surgery and negative blood culture at height of infection — Plaintiff did not establish on balance of probabilities that infection could be spread from throat to stomach by coughing or speaking, and it was more likely that source of infection was site of surgical incision or instrumentation.

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to awards of general damages — Negligence — Medical malpractice

Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Past loss of income — Miscellaneous

Remedies --- Damages — Damages in tort — Personal injury — Prospective pecuniary loss — Diminution of earning capacity

Remedies --- Damages — Damages in tort — Personal injury — Cost of future care — Miscellaneous

Table of Authorities

Cases considered by *L.M. Walters J.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 203 N.R. 36, [1996] 3 S.C.R. 458, 31 C.C.L.T. (2d) 113, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — followed

Kassabian (Litigation Guardian of) v. Attersley (1994), 1994 CarswellOnt 3497 (Ont. Gen. Div.) — referred to

ter Neuzen v. Korn (1995), 1995 CarswellBC 593, 1995 CarswellBC 1146, [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, 11 B.C.L.R. (3d) 201, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.) — followed

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

ACTION by plaintiff for medical malpractice against family doctor, hospital and other doctors.

***L.M. Walters J.*:**

Overview

1 On February 3, 2000, the plaintiff, Sharmaine Marchand, underwent elective laparoscopic surgery at the Greater Niagara General Hospital for lysis of adhesions. The procedure was performed by Dr. Jackiewicz. Ms. Marchand was discharged from the hospital the same day, but progressively became ill. On February 5, 2000, she was readmitted to hospital and underwent emergency surgery on February 6, 2000 in an effort to locate the source of the infection. The infection turned out to be peritonitis caused by an invasive Group A Streptococcal ("GAS") infection. This led to multiple organ failure, toxic shock-like syndrome, heart failure and 30 days in a coma. She nearly died.

2 The emergency surgery on February 6, 2000 performed by Dr. Jackiewicz and Dr. Milencoff necessitated cutting Ms. Marchand from pubis to sternum resulting in significant and disfiguring scarring.

3 The position of the plaintiffs is that Ms. Marchand, more likely than not, had an undiagnosed and untreated strep throat and this pharyngeal streptococcal infection seeded the surgical site and led to the invasive GAS infection.

4 Ms. Marchand alleges that on February 1, 2000, two days prior to her scheduled surgery, she called the office of her family doctor, Dr. Denis Murphy, complaining of a sore throat and mild cough seeking an appointment. According to Ms. Marchand, she was advised that it was not possible to schedule an appointment prior to her surgery and that she should self-medicate with throat lozenges and spray.

5 In failing to make an appointment or to make some other arrangement to examine her sore throat, the plaintiffs allege that Dr. Murphy breached the standard of care expected from a family physician in Ontario. It was this breach of duty which exposed Ms. Marchand to an unreasonable risk of injury, namely, the surgical complications from the throat infection. This undiagnosed and untreated sore throat, which was more likely than not strep throat, caused the multiple injuries she suffered.

6 The defendants deny that Ms. Marchand called Dr. Murphy on February 1, 2000. However, even if she did, she was adequately served by a recommendation that she self-medicate with spray and lozenges without an examination and further inquiry as to her condition. Dr. Murphy did not fall below the standard of care expected from a family physician.

7 Further, it is common for surgeries to proceed in such circumstances. Even if Ms. Marchand had a throat infection, this infection did not seed the surgical site or in any way cause the peritonitis which was the manifestation of her invasive GAS infection.

8 Instead, it is more likely than not that the abdominal infection sustained by Ms. Marchand was as a result of a rare complication caused by GAS bacteria entering the surgical site directly from her skin.

Issues

9 At the outset of trial, counsel advised that the action against the Greater Niagara General Hospital had been dismissed.

10 In written submissions, the defendants asked that the action be dismissed as against Dr. Phala and Dr. Jackiewicz as the plaintiffs led no expert evidence supporting the allegations that these two doctors did not meet the required standard of care. In his written reply submissions, Mr. Hodder, on behalf of the plaintiffs, agreed that the action should be dismissed against the defendants, Dr. Phala and Dr. Jackiewicz.

11 Accordingly, the issues remaining to be determined by the court relate only to Dr. Denis Murphy and are identified as follows:

> (1) Did Dr. Murphy fall below the standard of care expected of him in not giving Ms. Marchand an appointment, examining her, and not notifying the surgical team following her complaints?
>
> (2) If the answer to question (1) is yes, did that failure cause or materially contribute to any or all of Ms. Marchand's injuries?
>
> (3) If the answer to question (2) is yes, what is the quantum of general damages that should be awarded to Ms. Marchand, her husband and son?
>
> (4) If the answer to question (2) is yes, what, if any, past or future loss of income should be awarded?

The Law

12 In *ter Neuzen v. Korn* (1995), 127 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada set out the concise test to be applied in determining if a doctor has met the duty of care imposed on him. At para. 33 of the decision, Sopinka J. on behalf of the court stated:

> [33] It is well-settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who

> possess a reasonable level of knowledge, competence and skill expected of professionals in Canada in that field. A specialist, such as the respondent, who holds himself out as possessing a special degree of skill and knowledge, must exercise the degree and skill of an average specialist in his field: see *Wilson v. Swanson* (1956), 5 D.L.R. (2d) 113 at pp. 124-5, [1956] S.C.R. 804, *Lapointe v. Hôpital Le Gardeur* (1992), 90 D.L.R. (4th) 7 at p. 13 [1992] 1 S.C.R. 351, 10 C.C.L.T. (2d) 101, and *McCormick v. Marcotte* (1971), 20 D.L.R. (3d) 345, [1972] S.C.R. 18.

Further, Sopinka J. cautioned that it is important that the conduct of any physician not be judged in hindsight.

> [34] It is also particularly important to emphasize, in the context of this case, that the conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence. As Denning L.J. eloquently stated in *Roe v. Ministry of Health*, [1954] 2 All E.R. 131 (C.A.) at p.137, "[w]e must not look at the 1947 accident with 1954 spectacles". That is, courts must not, with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge...

13 If the plaintiffs are successful in proving that Dr. Murphy has breached the standard of care established by law, then the plaintiffs must also establish that it is more likely than not that Dr. Murphy's failure to provide Ms. Marchand with an appointment, examine her, or convey any of this information to the surgical team, caused or materially contributed to the injuries Ms. Marchand suffered.

14 In *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.), the Supreme Court of Canada set out the test to be applied in determining this issue:

> [13] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 (S.C.C.); *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> [14] The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441, 22 D.L.R. (3d) 545 (S.C.C.).
>
> [15] The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21, 123 D.L.R. (3d) 1 S.C.C.); *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.); aff'd. [1989] 2 S.C.R. 979 (S.C.C.).
>
> [16] In *Snell v. Farell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

Analysis

Did Dr. Murphy fall below the standard of care expected of him in not giving Ms. Marchand an appointment, examining her, and not notifying the surgical team following her complaints?

15 In order to answer this question, the court must first determine whether or not Ms. Marchand contacted Dr. Murphy's office on February 1, 2000 to report a sore throat.

16 Ms. Marchand testified that on February 1, 2000, she placed a telephone call to Dr. Murphy's office to get an appointment with the doctor regarding a sore throat, trouble swallowing and a mild cough that she developed that morning. She did not have any other symptoms - no fever, chills or aches and pains.[1]

17 Her evidence was corroborated by her husband, Jean Marchand.

18 Ms. Marchand testified that she spoke with Dr. Murphy's secretary (she did not recall her name) asking if it was possible to see the doctor as she had a sore throat and cough. She was put on hold and when the secretary returned to the phone, she told Ms. Marchand that an appointment was not necessary, there was nothing to worry about and that she should take some Cepacol and Cholorseptic Spray.

19 Ms. Marchand alleges that this telephone call to Dr. Murphy's office was made on her cell phone. She was in possession of a cell phone bill which confirmed this telephone call. However, her previous lawyer, Mr. Gord Wiggins, who is now deceased, misplaced the subject phone bill and it was not available for trial. Mr. Wiggins swore an affidavit on September 11, 2006, which affidavit was filed as Exhibit 3 at trial. Mr. Wiggins indicated that he remembered looking at the bill produced by Ms. Marchand and one of the numbers was highlighted in a yellow highlight. He explained that the telephone bill was misplaced. He also acknowledged that he did not personally check the number highlighted to make sure that it was Dr. Murphy's phone number.

20 Sandra Marshall, Dr. Murphy's secretary in February 2000, testified that she does not recall Ms. Marchand calling Dr. Murphy's office on February 1, 2000; she did not provide patient care over the telephone; Dr. Murphy's office was generally not busy in 2000; and, that if a patient called for an appointment, she would find time for the patient to see Dr. Murphy. She also testified that she does not ever recall not being able to accommodate a patient with an appointment.

21 Ms. Marshall testified that at this time, the doctor also had a registered nurse, Phern Vetere, who worked in the office and answered the telephone at times. Ms. Vetere was not called as a witness by either party.

22 Dr. Murphy is now deceased. His evidence at discovery on September 22, 2003 was filed as an Exhibit at trial. Dr. Murphy's evidence is that there is no record of Ms. Marchand's alleged telephone call on her chart. His evidence is that if a patient called with a complaint, he would always make a note of the complaint in the patient's chart. Dr. Murphy denied that Ms. Marchand contacted his office on February 1, 2000.

23 The plaintiffs request that an adverse inference be drawn by the failure of the defendant to call Nurse Vetere or to provide copies of Dr. Murphy's appointment book or other documentation to show how busy the doctor's office was in 2000.

24 I reject this submission. Firstly, there is no property in a witness and the plaintiffs certainly were in a position, if they chose or requested, to call Phern Vetere in reply. Further, the plaintiffs had an opportunity to cross-examine Dr. Murphy prior to his death and at no time did they request to see any appointment book or request any other documentation from the doctor's office.

25 In light of the contradictory evidence on this issue, I am unable, on a balance of probabilities, to find that Ms. Marchand made the telephone call she alleges on February 1, 2000. The lack of documentary proof is very problematic, but more importantly, the court has certain reservations regarding the accuracy of Ms. Marchand's testimony. A few examples will illustrate the court's concern:

(a) Ms. Marchand insisted that her pre-operative assessment and laboratory testing with Dr. Murphy was completed mid-January when all documentation filed with the court indicates that the assessment and lab testing was completed on January 31, 2000. Dr. Murphy testified that a history and physical examination report was dictated on the day the examination took place, January 31, 2000.

(b) Ms. Marchand, in my view, attempted to minimize or downplay the severity of her dyspareunia (painful intercourse) during the course of her testimony. She stated that it affected her occasionally and only in one position during sexual

intercourse. Ms. Marchand's medical history, however, reflected a much more serious situation than described by Ms. Marchand. The dyspareunia was significant enough that Ms. Marchand was prepared to proceed to surgery even knowing there was a risk that the surgery might be converted to a laparotomy which would result in scarring and could have an adverse impact on her career as a model and exotic dancer.

(c) Ms. Marchand acknowledged that she did not report all income she earned on her tax returns.

(d) At trial for the first time, she testified that on February 3, 2000, when she attended the hospital, she informed a nurse that she had a sore throat. This is the first time she made this disclosure. She did not give this answer at her examination for discovery. Her medical chart has no such notation. In cross-examination, she advised the court that her memory was refreshed by her husband. Mr. Marchand corroborated his wife's testimony. I reject their testimony as completely self-serving. I do not accept that Ms. Marchand informed anyone at the hospital that she had a sore throat on February 3, 2000. She herself acknowledges that she did not tell either Dr. Phala or Dr. Jackiewicz of the sore throat.

(e) I find that Ms. Marchand exaggerated some of her symptoms during the course of her testimony. I find it incredible that she said she fainted every day for the first five years. Even now, she advises that she faints every five weeks or so and she blacks right out. Despite this, she testifies that she continues to drive a motor vehicle.

26 In light of these discrepancies in her testimony, I am unable to prefer her evidence to that of Dr. Murphy and Ms. Marshall. Ms. Marshall is an independent witness, whose testimony went largely unchallenged. There is no notation of a telephone call on the patient's chart. Even the affidavit from Mr. Wiggins can only confirm that he viewed a telephone bill. He was unable to confirm that Dr. Murphy's phone number was on that bill.

27 Accordingly, I am unable to find as a fact that Ms. Marchand made this telephone call on February 1, 2000. In light of this decision, the plaintiffs' claim must be dismissed.

28 However, in the event that I am wrong, I will go on to consider whether Dr. Murphy's treatment of Ms. Marchand met the standard of care, assuming that Ms. Marchand telephoned his office on February 1, 2000 complaining of a sore throat, trouble swallowing and a mild cough.

29 In order to establish the standard of care to which Dr. Murphy will be held, the court had the benefit of hearing from Dr. Geoffery Morris and Dr. Rudner who were qualified as experts to give an opinion on the standard of care of a family physician practicing family medicine in Ontario in 2000.

30 The plaintiffs allege that there are two areas where Dr. Murphy's conduct was negligent. Firstly, Dr. Murphy did not provide an appointment to Ms. Marchand or examine her with respect to her complaints of sore throat and cough. Secondly, Dr. Murphy was negligent in not contacting the surgical team and advising them of this change in her condition.

31 Dr. Rudner also alleged the failure of Dr. Murphy to record the telephone call and his advice to the patient was also negligent, however, there is no suggestion that this failure to chart could in any way be causally connected to the injuries suffered by Ms. Marchand.

32 Dr. Rudner opined that it was incumbent on a family physician who had already completed and submitted a pre-operative assessment to respond to a patient's request for an appointment concerning a sore throat, to examine the sore throat and to err on the side of caution in terms of testing the throat with either a swab or a rapid antigen test to see whether or not GAS was present. He testified that it would be incumbent on a family practitioner, having discovered the existence of strep throat in a patient pre-operatively, to bring this condition to the attention of the surgical team.

33 A general practitioner, at minimum, should notify the surgeon of the existence of a sore throat pre-operatively. He also opined that it would be permissive to give a note to the patient to communicate to the surgeon, or alternatively, to tell the patient to tell the surgeon. This is especially so where the general practitioner had completed the pre-operative assessment upon which the surgical team would rely.

34 Dr. Geoffery Morris testified that in his opinion, it was perfectly acceptable for a patient in Ms. Marchand's

circumstances to be told no appointment was necessary and that she need only take lozenges and throat spray. He opined that it was not the standard of care to communicate with the surgical team. Dr. Morris testified that it is a common occurrence for a patient to call a family doctor's office complaining of a sore throat, especially in February, in Ontario. It does not fall below the standard of care if no appointment is made for such a patient if the complaint is a sore throat and mild cough and no other symptoms. Dr. Morris also testified that if a patient presented with a sore throat, a throat swab would not represent the standard of care.

35 With respect to advising the surgical team, Dr. Morris testified that this would not represent the standard of care. In his 28 year career, he could only recall one occasion when he contacted a surgeon about a change in a patient's conditions prior to surgery and, in that case, the patient was severely anemic and was ultimately diagnosed with a tumour.

36 The court heard from Dr. Rolbin, Dr. Phala and Dr. Jackiewicz, who each testified that they have never received a telephone call from a family physician pre-operatively advising them that a patient had a sore throat and mild cough.

37 I am satisfied that if Ms. Marchand contacted Dr. Murphy's office complaining of a sore throat, trouble swallowing and a mild cough, Dr. Murphy did not fall below the standard of care in not providing her with an appointment or relaying her complaints to the surgical team.

38 In preferring the evidence of Dr. Morris to that of Dr. Rudner, I have taken into account several factors. Firstly, Dr. Fong, Dr. Rau and Dr. Morrison testified that a throat swab does not represent the standard of care if a patient presents with a sore throat and mild cough. Even in cross-examination, when pressed, Dr. Rudner ultimately agreed that the decision to perform a throat swab is a judgment call and not performing a swab does not constitute a breach of the standard of care. Further, Dr. Rudner's opinion that the family physician should communicate findings of a sore throat and mild cough to the surgical team was contrary to the collective experiences of Dr. Rau, Dr. Morrison, Dr. Rolbin, Dr. Phala and Dr. Jackiewicz. Dr. Phala, Dr. Jackiewicz and Dr. Rolbin also testified that the determination of whether a patient is a suitable candidate for surgery is made by the anesthetist. This would suggest that it is unnecessary for a family doctor to alert the surgical team of such complaints as it would be expected that the surgical team would make their own inquiries on the date of surgery and make the ultimate determination as to whether or not the surgery should proceed. Lastly, in another case where Dr. Rudner was qualified as an expert to give opinion evidence on the standard of care of a family physician, he "insisted that it was not standard" for a family physician to communicate with the emergency room when referring a patient there for further assessment.[2] Although the facts of that case are not on all fours, Dr. Rudner, in cross-examination, agreed with Mr. Veneziano that it was a good analogy to the case at bar.

39 Having concluded that Dr. Murphy met the standard of care even if Ms. Marchand did contact the office to complain, the action against him must be dismissed. However, in the event I am wrong, I will go on to consider the second issue.

If the answer to question (1) is yes, did that failure cause or materially contribute to any or all of Ms. Marchand's injuries?

40 To succeed, the plaintiffs must establish that it is more likely than not that if Ms. Marchand contacted Dr. Murphy's office on February 1, 2000, Dr. Murphy would have assessed her, diagnosed strep throat and alerted the surgical team who would have cancelled the surgery. The plaintiffs must also establish that the strep throat seeded Ms. Marchand's abdominal infection.

41 The first question for the court to determine is whether or not Ms. Marchand had strep throat.

42 On the totality of the evidence before me, I am unable on a balance of probabilities to make this finding of fact for the following reasons:

(1) Ms. Marchand's evidence is that on February 1, 2000, she complained of a sore throat, difficulty swallowing and a mild cough. She had no other symptoms.

(2) The day before, on January 31, 2000, she had no symptoms when she was examined by Dr. Murphy.

(3) The blood work taken on January 31, 2000 showed the presence of no infection.

(4) On admission to hospital on February 3, 2000, Ms. Marchand acknowledged she did not disclose a sore throat or any other ailment to either Dr. Phala or to Dr. Jackiewicz. I have already rejected Ms. Marchand's allegation that she advised the admitting nurse of these complaints.

(5) The anesthetists who examined her for surgery on February 3, 2000 and February 6, 2000, made no record of any abnormal throat condition.

(6) Dr. Phala testified that in preparing Ms. Marchand for surgery on February 3, 2000, he had a clear view of Ms. Marchand's throat and there was no redness or indication of any problem which would have not permitted the surgery to proceed.

(7) The inter-operative anesthetic records, dated February 6, 2000, found at Exhibit 1, Volume 2, Tab C-70, at page 312, show that Ms. Marchand's throat was normal. This is an unlikely finding given the evidence of Dr. Morris who testified that he would have anticipated that if Ms. Marchand had strep throat, her symptoms would have gradually worsened from February 1 to February 3 and then to February 6, 2000.

(8) According to the Centor Criteria, a recognized method used to diagnose strep throat, Ms. Marchand's complaints would have scored a zero on the algorithm, and would therefore not have required any treatment.[3]

(9) Ms. Marchand's negative blood culture, taken on February 5, 2000 at the height of her infection, is inconsistent with the theory that her throat was the source of the abdominal infection from which she suffered.[4]

(10) Dr. Rau testified that it is extremely unlikely that Ms. Marchand had strep throat given her symptoms, age and the low percentage of the adult population that actually contracts strep throat. He also added that the presence of a cough is contra-indication of strep throat.

43 Although it is clear that not all patients with strep throat exhibit all of the symptoms often associated with the condition, on the evidence before the court, I am unable to find that it is more likely than not that Ms. Marchand suffered from strep throat. Without this finding, the plaintiff is unable to satisfy the court that her abdominal infection was caused by the strep throat, and, therefore, the action against Dr. Murphy must be dismissed.

44 However, even if Ms. Marchand had strep throat, to be successful, the plaintiff must establish that Ms. Marchand's invasive GAS infection was caused by the strep throat condition.

45 The plaintiffs' position in this regard is twofold. Firstly, if Ms. Marchand was seen by Dr. Murphy and examined and found to have strep throat, in all likelihood, the surgery would have been cancelled. Secondly, if the surgery proceeded, it was more likely than not that the streptococcus sore throat was the source of the GAS invasive infection in the abdomen.

46 I will deal first with whether or not the surgery would have been postponed if Dr. Phala and Dr. Jackiewicz were aware Ms. Marchand had a sore throat.

47 The evidence of Dr. Phala was that even if Ms. Marchand had a sore throat and mild cough, the surgery on February 3 would have proceeded. In the medical report of Dr. McRitchie filed as Exhibit 19, she opined that it was quite common to proceed with surgery if a patient is otherwise well and the infection is perceived to be mild. She also confirmed that the decision to proceed with surgery is one made in consultation with the surgeon, anesthetist and the patient.

48 Here, there is no dispute that Ms. Marchand did not discuss any of her ailments with either Dr. Phala or Dr. Jackiewicz prior to the surgery.

49 Ms. Marchand testified that she would not have undergone her elective surgery if she had known there was a risk to her as a result of the sore throat. In cross-examination, she conceded that she generally relied on the advice of her doctors and if her doctors recommended surgery, it would have some influence on her decision. She also acknowledged that she agreed to undergo the procedure on February 3 knowing there was a possibility the procedure would have to be converted to a

laparotomy or that it could cause injury to her bladder. She was prepared to undertake this risk to get rid of the pain she had been suffering from for the past several years.

50 All doctors agreed that the risk of GAS invasive infection in the abdomen was extremely rare. I find it difficult to accept that Ms. Marchand would not have agreed to continue with the surgery if she had been aware of this very rare risk, in light of the fact that she was prepared to proceed knowing of the risk of a possible laparotomy or injury to the bladder.

51 The plaintiffs contend that Ms. Marchand's throat infection was likely the source of the GAS invasive infection. The plaintiffs rely on the evidence of Dr. Fong, who was qualified by the court as a specialist in the area of infectious diseases. It was Dr. Fong's opinion that Ms. Marchand's sore throat was the most likely source of the invasive GAS. Dr. Fong stated that the infection could spread from the throat to the surgical site in two ways: by the blood stream, or, transiently via the skin. Dr. Fong testified that it was possible that the skin itself becomes colonized from a patient who has a sore throat from speaking and coughing, but the skin is not the primary source for the bacteria. He said there were two possibilities whereby the bacteria could have entered Ms. Marchand's abdomen. One would be the throat via the skin, or alternatively, from a trauma during intubation of the patient and putting the tube in the patient's throat. He said that the source of the bacteria would most likely be the throat. He said if there was a primary skin infection, skin carriage of streptococcus is easily recognizable. An example would be impetigo. However, there is no evidence of Ms. Marchand having impetigo or skin lesions of that kind.

52 The position of the defendant is that the source of Ms. Marchand's abdominal infection was most likely the site of the surgical incision or the surgical instrumentation. Dr. Rau, also an expert in the area of infectious diseases, testified that GAS colonizes on the skin as a transient inhabitant. On some individuals, GAS is a friendly inhabitant and on others it causes infection.

53 Dr. Rau testified that he could randomly swab five people and one would carry the GAS on their skin. Dr. Rau dismissed Dr. Fong's theory that Ms. Marchand's abdominal infection was caused by her coughing or speaking which resulted in GAS becoming airborne and landing on her abdomen. He came to this conclusion because in his view, there was no evidence that Ms. Marchand had strep throat. At best, it would appear that Ms. Marchand had a viral infection. Dr. Rau was not familiar of any occurrence where a person contacts invasive streptococcal toxic shock-like syndrome that originated in the throat and was transmitted through the air to the site of the surgical incision. Further, the pharynx as a portal of entry for invasive GAS is extremely rare and, in most cases, the spread of GAS between respiratory and skin sites is largely unidirectional. Organisms from skin lesions are capable of causing secondary respiratory infections, but the reverse transmission from throat to skin is much less common. Dr. Rau opined that a straw-coloured fluid was discovered in Ms. Marchand's peritoneum, directly beneath the site of the surgical incision and, accordingly, it is not necessary to look to the throat for any source of infection. It is more likely than not that the infection came directly from the surgical incision. The complete absence of an associated bloodstream infection further supports his position that the infection originated at the surgical site. If in fact the strep throat caused the abdominal infection, then the GAS would have travelled through her bloodstream. Ms. Marchand's blood contained no traces of GAS.

54 I prefer the evidence of Dr. Rau to that of Dr. Fong. Firstly, both Dr. Rau and Dr. Fong agree that streptococcal infection in the abdominal cavity is rarely seeded or secondary to a strep throat. In *Principles and Practice of Infectious Diseases*,[5] a text which both Dr. Rau and Dr. Fong agreed is an authoritative text on infectious diseases, the sources of streptococcal toxic shock-like syndrome are described:

> The portals of entry for streptococci are the pharynx, skin, and vagina in 50% of cases. Surgical procedures such as suction lipectomy, hysterectomy, vaginal delivery, bunionectomy, reduction mammoplasty, hernia repair, bone pinning, and vasectomy have provided portals in such cases. Rarely, infection occurs secondary to streptococcal pharyngitis.

55 In attempting to support his position, Dr. Fong expressed a text writing convention whereby authors write the most common occurrence of something first. He insisted that in this example, the pharynx would be the most common portal of entry. When challenged on cross-examination that there was no such convention, Dr. Fong insisted that it was a well-known and common occurrence. Both Dr. Morris and Dr. Rau testified they had never heard of such a convention.

56 Dr. Fong could not point to any textbook or medical literature to support his theory that GAS could spread from the

throat to the stomach by either coughing or speaking.

57 A study in North Carolina published in *The Journal of Infectious Diseases* (hereinafter referred to as "the 1997 Kiska study") and filed as Exhibit 30 at trial, referred to reports which indicated that "GAS isolates can be transmitted from throat to skin and are able to cause TSS and necrotizing fasciitis in the recipient."[6]

58 However, invasive GAS leading to streptococcal toxic shock-like syndrome is rare. It is even rarer that pharyngeal GAS is transmitted to the skin rather than the other way around. It is not more likely than not that the infection would come from this very rare source than the more obvious choice of the surgical site itself. Both experts agreed that although a surgical site is cleansed prior to surgery, it is not sterile.

59 Accordingly, I am unable to conclude that Ms. Marchand's abdominal infection was more likely than not caused by a throat infection, and the action against Dr. Murphy must be dismissed.

60 Again, in the event that I am wrong, I will go on to consider the issue of damages.

What is the quantum of general damages that should be awarded to Ms. Marchand, her husband and son?

61 There is no question that the complications which followed Ms. Marchand's surgery were serious. She experienced multiple organ failure, suffered a heart attack, suffered renal failure and nearly died. She went into septic shock. She required a second emergency surgery on February 6, 2000. The incision runs from her pubis to sternum and has resulted in dramatic scarring. By the time she was discharged from the Hamilton General Hospital on March 17, 2000, she weighed 83 pounds, had a large bandage on her abdomen and was unable to move. She required assistance with all activities of daily living. She had homecare and needed to use assisted devices. She could not tolerate eating solids. She underwent an extensive program of rehabilitation and has experienced a long, slow period of recovery. There is no suggestion that her scars can be ameliorated surgically or otherwise. Her injuries and scarring preclude her from returning to her pre-surgery occupation as a dancer or model.

62 Although it is true that Ms. Marchand had several pre-existing conditions prior to her surgery, I am satisfied that those conditions were exacerbated by the horrendous assault on her body caused by the abdominal infection. She now suffers chronic pain.

63 On the totality of the evidence before me, I am satisfied that $150,000 is an appropriate award for Ms. Marchand's non pecuniary general damages.

64 The plaintiffs, Jean Marchand, and his son, seek damages for loss of care, guidance and companionship. I have no doubt that Ms. Marchand's injuries have impacted Ms. Marchand's relationship with both her husband and son. However, in my view, they should be assessed in the mid range of *Family Law Act* awards. I would assess Mr. Marchand's *Family Law Act* claim at $30,000 and Jean Marchand III's claim at $15,000.

What, if any, past or future loss of income should be awarded?

Past Loss of Income

65 The court heard evidence from Dr. Eli Katz, the economist, who assessed Ms. Marchand's past loss of income at $1,255,481 and the present value of her future loss of income at $1,043,805.

66 In my view, his reports are of limited assistance. A number of the income figures and information he relied on were provided by Ms. Marchand and not verified. For example, Ms. Marchand did not provide Dr. Katz with copies of her income tax returns despite requests for same. As well, he made certain assumptions that were fundamentally incorrect, such as assuming Ms. Marchand would work for Helmet Source Inc. until 2004, even though the uncontradicted evidence is that the company was inactive as of August 2001. He did not have up-to-date information about Ms. Marchand's employment and income since the surgery.

67 With respect to her past income loss, I accept that at the time of Ms. Marchand's surgery, she was under contract with Helmet Source Inc., being paid $4,000 U.S. per week, to work as a product model and company spokesperson. There is no reason to suggest that she would not have continued with this lucrative contract but for the consequences of her infection and surgery. However, Helmet Source Inc. was dissolved in August 2001.

68 Accordingly, any income loss with respect to the contract would have stopped at that time.

69 Thereafter, I am unable to accept, as Dr. Katz did, that within three months, Ms. Marchand would have secured another similar type contract at the same level of pay. The evidence discloses that prior to obtaining this Helmet Source contract, Ms. Marchand had never had another modeling contract. She had no photo shoots, portfolio or catalogue material. She was 33 at the time she signed this contract and in her testimony agreed that the modeling industry is highly competitive and that the prime age for a model was between 16 to 24 years of age.

70 Between 1992 and 1995, Ms. Marchand was out of the work force due to her marriage and birth of her son. In November 1995 to April 1998, she worked as an exotic dancer and, according to her testimony, which is completely unsubstantiated, she earned $1,500 to $2,000 a week. We have no income tax returns prior to 1998 to confirm this level of income, and even the income tax returns which have been filed do not accurately reflect all of the income she received. Ms. Marchand acknowledged she received her payments in cash. In 1998, she left her employment and did not work again until she secured the contract with Helmet Source Inc. in October 1999. In my view, her age alone, along with her decision to leave the work as an exotic dancer in 1998, suggests an unlikely return to this type of work regardless of the outcome of the surgery.

71 I do accept that the significant consequences of her surgery and resultant complications made her unemployable for approximately a two-year period of time. Calculating her lost income during the course of the Helmet Source Inc. is relatively easy. Dr. Katz calculated the loss from the date of surgery to December 31, 2000 as $136,104. This reflects the $4,000 per week income, less expenses of approximately $58,572 a year or $1,126 per week. From January 1, 2001 to August 31, 2001, when the corporation ceased to carry on business, I calculate the past loss of income to be $100,590.[7]

72 The more difficult determination is what, if any, loss of income did Ms. Marchand incur from August 31, 2001 to the date of trial.

73 Dr. Kumbhare determined that Ms. Marchand suffers from chronic pain syndrome which is significantly entrenched. He found that in the future it will be difficult for her to perform activities which are physical in nature including repetitive bending, heavy lifting or carrying, prolonged standing, walking and sitting, pushing and pulling.

74 Dr. Fulton found that Ms. Marchand is likely to have difficulties not with "obtaining employment", but rather "maintaining employment." At page 28 of his report, he concluded that she would "be doing well if she could work on a part time casual basis."

75 Dr. Travis testified that Ms. Marchand should have no difficulty maintaining employment given her current level of functioning.

76 Dr. Devlon, whose report was filed as Exhibit 23, confirmed that Ms. Marchand does suffer from a chronic pain syndrome which is likely to continue, however, he also found that there was no medical reason why she could not return to some type of sedentary work.

77 Ms. Marchand herself acknowledged in cross-examination that she is capable of working. In fact, to her credit, she has attempted several different types of employment and self-employment endeavours.

78 In 2002, she sold jewelry her husband made at a kiosk in Niagara Falls. The business was not profitable and they did not continue with it.

79 In 2003, Ms. Marchand testified that she had a hysterectomy and did not attempt to get back to work that year. Clearly, the time that she was unable to work due to that surgery is not compensable by this defendant.

80 Thereafter, Ms. Marchand and her husband tried to develop the idea of a festival market with the City of Niagara Falls however this idea was ultimately rejected by City council in August 2005.

81 Ms. Marchand then contacted Chris Rudan in the hopes of obtaining some employment. He originally offered her a position as a main dancer which would have earned her $2,000 to $3,000 a week however she had to refuse that position because of her scarring. She then was offered and accepted a position as manager of the bar at a pay of $1,000 per week cash. She was there approximately 10 months but had to leave that employment because she did not have the stamina to continue. Chris Rudan confirmed that her employment was marred by taking time off because of illness and that they mutually agreed that the position should terminate.

82 In 2006, Ms. Marchand and her husband started up an alternative lifestyle business which was unsuccessful.

83 In 2007, she began selling lingerie to exotic dancers. She continues this business to the present day.

84 Her income tax returns found at Exhibit 1, Volume 5, Tab 11-1, disclosed no income in 1998. Ms. Marchand testified that she only danced for three months and had nothing to declare. However, if in fact she earned the $2,000 a week she testified to, then for three months that would have been a minimum of some $24,000. No income was reported.

85 In 1999, Ms. Marchand declared zero income despite working three months at Helmet Source Inc. In 2000, the year of her surgery, her income was zero. She did not file an income tax return in 2001. Her declared net income in 2002 to and including 2008 is as follows:

Year	Income
2002	$ 914
2003	$12,072
2004	$ 7,657
2005	$19,567
2006	$12,377
2007	$15,601
2008	$16,376

86 The difficulty the court has is in determining the difference between what she might have earned but for the surgery and what in fact she did earn. We have no pre-surgery confirmed income to compare to her after-surgery income. There were also several years of non-work and unreported income.

87 The court must also consider the issue of mitigation. Aside for the employment with Mr. Rudan at Crystal's Night Club, Ms. Marchand has chosen self-employment endeavours instead of attempting to seek employment. Certainly, the success or failure of any of these endeavours is not something for which this defendant is in any way responsible. Ms. Marchand made it perfectly clear that she was not willing to seek minimum wage employment, nor has she made any effort to be retrained in another field. At the same time, I accept that her ability to earn income has been compromised as a result of the complications which arose from her surgery and in particular the current chronic pain that she now suffers from.

88 For the 2000 and 2001 years, I have found Ms. Marchand's past loss of income to be $236,694. Taking into account all the above-mentioned factors, I assess her total past income loss to the date of trial at $300,000.

Future Loss of Income

89 With respect to this loss of income claim, the plaintiff is not required to prove on the balance of probabilities the extent of her damages. Instead, she must only show that there is a real and substantial risk of future pecuniary loss. For the reasons set out above, I do not accept that Ms. Marchand would have continued to work as a top-end model or return to exotic dancing irrespective of the results of the surgery. Again, with the inaccurate reporting of her actual income both before and since the surgery, it is difficult to predict with any degree of certainty the type of work or remuneration Ms. Marchand would receive. I accept the submissions of the defendant that it is more appropriate in this circumstance to look at any future wage

loss as a loss of competitive advantage in the marketplace due to the complications from the surgery, in particular, the severe scarring.

90 In all the circumstances, I would assess the value of that loss of competitive advantage at $100,000.

Future Care

91 I am not prepared to accept the future care costs claimed by Ms. Marchand, which consist primarily of housekeeping expenses and hair appointments.

92 The medical evidence before the court does not suggest that Ms. Marchand's current condition is such that she is unable to perform any items of personal hygiene. With respect to housekeeping expenses, the evidence of Ms. Marchand is that while she was often working out of the home, Mr. Marchand was responsible for maintaining the home. It is not unreasonable to expect that he would continue to do this if in fact Ms. Marchand is unable to perform any of these duties. From his evidence, it is clear that Mr. Marchand is not spending significant amounts of time earning income outside of the home. Ms. Marchand's income tax returns disclose that his net income for the past several years has not exceeded $7,000 in any given year. The court heard no evidence about his inability to perform any of these household tasks.

93 Accordingly, the claims for these future care costs are disallowed.

Order

94 The action against Dr. Murphy is dismissed.

95 If the parties are unable to agree on costs, they may provide me with written submissions within 30 days of today's date.

Action dismissed.

Footnotes

[1] Cross-examination of Ms. Marchand.

[2] *Kassabian (Litigation Guardian of) v. Attersley* (1994), 51 A.C.W.S. (3d) 1370 (Ont. Gen. Div.) [1994 CarswellOnt 3497 (Ont. Gen. Div.)] , para. 72.

[3] Cross-examination of Dr. Fong.

[4] Blood Culture Report, Exhibit 1, Volume 2, Tab C-79, page 351.

[5] Exhibit 13, filed at trial.

[6] Exhibit 30, the 1997 Kiska study, page 999.

[7] 35 weeks at $4,000 per week, less expenses of $1,126 per week, as per the report of Dr. Katz.

2010 ONSC 1796, 2010 CarswellOnt 1723, 186 A.C.W.S. (3d) 841

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hart v. Hansma | 2014 BCSC 518, 2014 CarswellBC 818, [2014] B.C.W.L.D. 3669, [2014] B.C.W.L.D. 3675, [2014] B.C.W.L.D. 3677, [2014] B.C.W.L.D. 3679, [2014] B.C.W.L.D. 3680, 238 A.C.W.S. (3d) 885 | (B.C. S.C., Mar 27, 2014)

1996 CarswellBC 339
British Columbia Supreme Court

Potrie v. Langdown

1996 CarswellBC 339, [1996] B.C.W.L.D. 765, [1996] B.C.J. No. 318, 61 A.C.W.S. (3d) 94

Heidi Potrie, Plaintiff v. Geraldine Langdown, Paula Osha and Frederick Osha, Defendants

Lander, J.

Judgment: February 6, 1996
Docket: Doc. Vernon 7873192

Counsel: Counsel for the plaintiff, *Gary P. Weatherill*.
Counsel for the defendant, *Robert M. Moffat* and *Robin W. Adolphe*.

Related Abridgment Classifications

Remedies
I Damages
I.3 General damages
I.3.b Non-pecuniary loss
I.3.b.vi Miscellaneous

Headnote

Personal injuries — Multiple injuries — Fibromyalgia.

The plaintiff, aged 46, sued for damages for personal injuries suffered as a passenger in a motor vehicle accident. The plaintiff operated a facility for special needs children and worked with such children in the school system. She was initially diagnosed as having cuts, bruises and extensive soft tissue injuries. However, it eventually transpired that she had suffered a cervical injury to C6-7 requiring fusion, a dissection of the left anterior coronary artery resulting in a heart attack and subsequent coronary bypass surgery, bilateral thoracic outlet syndrome requiring further major surgery in the future and fibromyalgia. With respect to the fibromyalgia, the plaintiff's expert, an internationally recognized researcher, testified that fibromyalgia was an objective medical condition and that the plaintiff was experiencing pain as a result of that condition. The defendant's expert testified that fibromyalgia was a psychological phenomenon. On an assessment of damages,

Held:

Judgment for plaintiff for $464,375. The plaintiff was entitled to non-pecuniary damages of $140,000, damages for past wage loss as agreed of $72,000, for loss of future earnings of $156,500, for loss of pension entitlement of $15,700, for the cost of future care of $47,335 and special damages, including the cost of home care, of $32,840. The plaintiff had been most severely injured, requiring major surgery in the past and in the future. The evidence of the plaintiff's expert establishing the objective existence of fibromyalgia was preferred. The present value of the plaintiff's loss of future earnings to age 65 was assessed at

$285,000. That amount had to be discounted by 20 per cent for contingencies and for possible future earnings. The plaintiff would probably be able to do some form of vocation, but nothing compared to her pre-accident ability.

REASONS FOR JUDGMENT

***The Honourable Mr. Justice Lander*:**

1 On July 5, 1990, Mrs. Potrie was the front seat passenger in a Hyundai automobile driven by her sister-in-law, Paula Osha, when it was struck broadside at the corner of 232nd Street and Fraser Highway, Langley, B.C.

2 A separate trial was held before Mr. Justice Brenner in which he determined that the defendant Geraldine Langdown was 100% responsible for the accident.

3 At the time of the accident, the plaintiff was wearing a lap belt and shoulder belt.

4 The defendant Langdown's car struck the right front passenger door of the Osha vehicle. At the time, the plaintiff was bent over, taking a tissue from her purse. She had no warning of the impending collision. As a result of the impact, Mrs. Potrie struck her head. She is not certain whether she lost consciousness.

5 Soon after the accident, the plaintiff began to experience pain and tightness in her neck, shoulders and upper back regions. She then developed generalized pain throughout her body. She attended at Langley Memorial Hospital.

6 Just prior to July 5, 1990, Mrs. Potrie, who resided near Enderby, B.C. with her husband and family, had driven to Langley with one of her foster children, a mentally-challenged boy named Ken. When the accident occurred, she and her sister-in-law were on their way to Children's Hospital in Vancouver to visit a pediatrician who was to examine Ken.

7 Because of her injuries, she was unable to drive back to Enderby. It was necessary for her husband to fly down to Vancouver and drive her and Ken back home on July 9, 1990. During the trip, Mrs. Potrie was experiencing a burning sensation in her arms with pain in her neck and upper back area. Along with this, she was experiencing a severe stabbing pain between her shoulder blades.

8 During the drive to Enderby, Mrs. Potrie said she was in such pain that the Tylenol 3's that had been given to her at the Langley Hospital were ineffective. She said the worst part was her upper body and neck and that "my arms didn't want to work."

9 Mrs. Potrie said that over the next month she was getting used to the pain. She was wearing a neck brace, and was taking physiotherapy. She said that seemed to aggravate her symptoms.

10 Upon her return to Enderby, Mrs. Potrie attended upon her family physician, Dr. Wendland. His initial diagnosis was that she had suffered soft tissue injuries. He prescribed physiotherapy.

11 The plaintiff has lived in the Enderby area since 1968. She married in 1970. After she married, she and her husband continued to live in Enderby. Mrs. Potrie has been a tree planter, and has done volunteer work in the public schools. She did volunteer work at a one-room school containing five grades. She said, "I just had an interest and I did that until 1973 when I was pregnant."

12 In 1977, she went back to volunteer work at the school when her daughter commenced grade one. She was assisting with mentally-challenged children. She was then hired as an assistant. She stated, "I was mainly there to keep these children in control and to prevent disruptive behaviour." She said she did anything that was required of her, but with major cutbacks in education funding, teachers' aides were laid off. She testified she became employable again in 1980 when the government realized they could not do without special aides and assistants because more children were being taken out of institutions.

13 Mrs. Potrie described the majority of the children she dealt with as severely handicapped — no social skills, no

self-safety skills and, as she expressed it, “no skills at all.” Her job was trying to develop in these persons skills such as motor control. For example, it was necessary to attempt to teach these children to shape their hands in order that they could develop sign language to communicate. Also, she said it was very physical work in that some of the children were 15 and 16 years of age and had recently come out of institutions and they would panic, causing them to lash out and fight with each other.

14 Mrs. Potrie testified that some children were self-abusive. She said it was necessary that she be strong enough to deal with these outbursts.

15 In the fall of 1986, she and her husband and family moved to Ashton Creek, which is east of Enderby. There was an elementary school next door and immediately in front of their home was a school bus stop.

16 In 1988, Mrs. Potrie was working at the Ashton Creek school with these mentally-challenged children who were being integrated into grades one through seven.

17 Mrs. Potrie stated that she had a lot of responsibility for the behaviour of these challenged students and that she was accountable to the teachers and parents. She said they required continual attention. The teaching assistants had to be on guard for anything. However, notwithstanding the nature of this employment, she said, “I love the job.”

18 Mrs. Potrie said that in 1986 they took two mentally-challenged children into their home. She said that these two children have been with her and her husband ever since. She said her own children took to the situation really well; better than expected. She said that Ken and Sandra, the two children, are now aged 23 and 21 respectively. To illustrate how severely challenged these children are, Mrs. Potrie said that Ken is deaf and mute and paralyzed on the right side. The other, Sandra, had three words in her vocabulary when she came to the Potrie home, but now is able to communicate by 100 signs and 100 words.

19 Between 1986 and 1990, the Potries took on three more children. Two of those were taken in an emergency situation. At that time, they were living in the Ashton Creek area and she and her husband made renovations to their home to accommodate these persons. Also, because of the very nature of the disabilities of these children, the Potries were required to increase their staff. Mrs. Potrie said that at one time, she had 12 to 15 people on her payroll to care for these handicapped persons.

20 The Potries were paid by the Ministry of Human Resources. They received a sum per child each month to care for and instruct these children in the fundamental skills of daily living.

21 Defence counsel referred to this as a business, and while I accept that the Potries were in the business of care and guidance of these persons, they also had a strong element of compassion for their wards.

22 While carrying on this care vocation, Mrs. Potrie continued as a special needs assistant in the school system.

23 Mrs. Potrie said that in Ashton Creek, they lived immediately next to the school at which she worked and the children who were resident in her home were put on the school bus which came to the home. She would then walk to the school and would be home an hour before the foster children arrived back.

24 After the accident, the Potries sold the Ashton Creek property and purchased a farm. This property consisted of 7 acres, located on the Shuswap River. Mrs. Potrie said she could not do very much to assist in this endeavour. The acreage on the Shuswap River needed a lot of work, Mrs. Potrie said, and she and her husband intended to do it together but that was not possible because of Mrs. Potrie’s condition as a result of the motor vehicle accident. At Christmas of 1993, the Potries moved to Enderby.

25 At this point I wish to deal with a defence contention that there has been an aggravation to Mrs. Potrie’s injuries not related to the defendant. Mrs. Potrie testified about a referral she had to Dr. David Craig, a neurologist in Kelowna. She saw Dr. Craig on October 9, 1990. In his letter dated October 9, 1990, Dr. Craig referred to an incident he says Mrs. Potrie related to him when her husband took steps to avoid a deer on the roadway. In her testimony, Mrs. Potrie said she only referred to the deer incident as a potential incident that might cause her injury. She said her husband saw the deer and told her he was

going to slow down, which he did, and a collision with the deer was avoided. It is apparent from Dr. Craig's report that he concluded that her husband stopped quickly and this exacerbated the pain she was suffering. This does not appear to have been the case. I find there was no exacerbation or additional injury sustained by Mrs. Potrie as a result of her husband's avoidance of the deer on the highway.

26 In January of 1991, she saw Dr. A. Richardson, a Vernon orthopaedic surgeon. He found she has neck pain stemming from the accident. He found what he described as "exquisite tenderness" over the C7 spine and that she had acute pain in attempting to extend the cervical spine.

27 In February of 1991, Mrs. Potrie saw Dr. Daniel McLeod, a Vernon rheumatologist and specialist in internal medicine. He diagnosed fibrositis or what is also referred to now in medical terminology as fibromyalgia.

28 As to the injury to the C6-7 cervical spine, Dr. Richardson referred her to Dr. P.K. Van Peteghem, an orthopaedic surgeon, with the intention that possibly surgery might be undertaken.

29 Subsequent to the motor vehicle accident, Mrs. Potrie had complained to the numerous physicians she was attending of the stabbing pain in her chest and between her shoulder blades. None of the physicians could locate the problem and it was apparent that the physicians believed it was due to a soft tissue injury and they treated her accordingly.

30 On July 23, 1993, Mrs. Potrie suffered a heart attack. The cause of this heart attack was a blood clot which formed at the site of a dissection of the left anterior coronary artery. Physicians both for the plaintiff and the defendant agree that this heart attack was brought on as a direct result of the accident.

31 Mrs. Potrie was admitted to the Vernon Jubilee Hospital but was transferred to the Kelowna General Hospital for further investigation. Ultimately, she was transferred to St. Paul's Hospital in Vancouver on August 6, 1993 where she underwent coronary artery by-pass surgery. She remained in hospital until August 13, 1993, 21 days after being first admitted to Vernon Jubilee Hospital. Dr. Marla Keiss, the cardiologist who performed the operation on Mrs. Potrie, concluded that the dissection of the left anterior artery had "undoubtedly occurred at the time of the motor vehicle accident."

32 In her report of October 4, 1993, Dr. Keiss stated:

> This patient had a dissection of the left anterior coronary artery. This undoubtedly occurred at the time of her motor vehicle accident. The patient's heart attack, on July 22nd, 1993, was probably caused by a clot forming at the site of the dissection. This heart attack has resulted in mild, permanent damage to the heart. Dissection of the coronary arteries is extraordinarily unusual and is virtually only seen with trauma to the coronary artery.
>
> The patient's prognosis is very good. Dr. Floyd Loop from the Cleveland Clinic, who has followed the largest number of patients with left internal mammary anastomosed to the left anterior descending coronary artery, recently presented his long-term follow-up at the Canadian Cardiovascular Society meetings which were held in Vancouver. He said that 93% of the arteries are patent at 10 years. Beyond that, the prognosis is unknown. It is possible that this patient will have to have repeat coronary artery bypass surgery at some point in the future. It should be noted that Dr. Loop's series was a series of patients who had coronary artery disease caused by atherosclerosis. The long-term prognosis in a patient who has had an internal mammary artery anastomosed to the left anterior descending coronary artery as a result of coronary artery dissection is unknown.

33 As a result of the surgery, the stabbing pain which Mrs. Potrie was suffering, disappeared. However, she continued to have the neck pain and the burning sensation in her arms and the generalized pain and fatigue continued.

34 Dr. Van Peteghem reported to Dr. Wendland on November 6, 1992 that as a result of studies done upon Mrs. Potrie, he concluded that the area creating the neck pain was at the C6-7 level. Dr. Van Peteghem was of the view that because of the third party claims in the action commenced by Mrs. Potrie this contraindicated surgery. Dr. Van Peteghem believed that a surgical decision should not be made before third party claims are settled. However, by the spring and summer of 1994, Mrs. Potrie's pain became so severe that Dr. Van Peteghem, contrary to his original decision, agreed to operate. Mrs. Potrie was placed on the urgent surgery list.

35 On October 21, 1994, Dr. Van Peteghem performed an anterior C6-7 discectomy and fusion. This operation was a success. Mrs. Potrie was discharged from hospital on October 25, 1994. She was required to wear a Somi brace until January, 1995. Mrs. Potrie testified that the neck pain has not gone away, but it has been reduced by about 50%.

36 The only real point of contention between the plaintiff and the defendants in this action revolves around the diagnosis made by Dr. McLeod and Dr. Glenn McCain of Charlotte, North Carolina, relating to the cause of the fibromyalgia from which she now suffers. These two rheumatologists independently diagnosed that the plaintiff was suffering from fibromyalgia. Dr. McCain is a rheumatologist of international stature. Dr. McCain flew to Vernon from North Carolina on September 28, 1992 to examine Mrs. Potrie. In his letter reporting to counsel for the plaintiff on October 13, 1992, Dr. McCain referred to his qualifications as follows:

> ... I am presently the Director of the Fibromyalgia Treatment Program at Demas Neurology and Medical Rehabilitation, a community clinic in Charlotte, North Carolina. I practice as a rheumatologist and see numerous patients with musculoskeletal diseases. My academic qualifications show that I have published extensively in the area of fibromyalgia and myofascial pain. I have contributed to the medical literature with original articles, book chapters, and symposia over the last 12 years. In addition, I hold a Fellowship in Rheumatology from the Royal College of Physicians & Surgeons of Canada and am licensed to practice medicine in the Province of Ontario and the State of North Carolina.

37 Besides the report of Dr. McCain, the Court viewed a videotape of direct and cross-examination of Dr. McCain done in Charlotte, North Carolina on October 24, 1995. Mr. Weatherill on behalf of the plaintiff and Mr. Adolphe on behalf of the defence attended and conducted the examination. This was a far-reaching examination in that Dr. McCain was asked about various studies that had been done throughout the world relative to the diagnosis of fibromyalgia. The direct and cross-examination takes some 129 pages of transcript and is, to say the least, a comprehensive report on the complaint of fibromyalgia.

38 Dr. McCain's medical legal report of October 13, states:

> She reported that she had been quite disabled because of her chronic pain and fibromyalgia. She had a great deal of difficulty doing things around the house and was not involved in any manual labour whatsoever. She had become depressed about this and emotionally labile. She reported feeling guilty about not holding up her end of the bargain. She felt quite frustrated that she had not been better after such a long time.
>
> Her past health shows that she had had no previous history of chronic pain. She had had a hysterectomy in 1976 and bladder repair in 1979 without incident.
>
> My physical examination of the musculoskeletal system revealed no evidence of arthritis. I found no restricted range of motion in the joints. However, she did have 15 of the 18 fibrositic tender points outlined in the 1990 criteria for fibromyalgia. I also made note of the right Baker's cyst. This was nontender and in no way inhibited right knee movement or motion.
>
> My clinical impression at the end of my assessment and examination was that this woman had objective evidence for fibromyalgia syndrome. The objective evidence was the presence of the fibrositic tender points which have been described in the criteria set forth for fibromyalgia by the American College of Rheumatology.
>
> These criteria are quite objective and cannot be simulated by the patient. The elicitation of these tender points is quite reproducible when done by trained personnel.
>
> *It would be my medical opinion that her present painful state is the direct result of the injuries she sustained in the motor vehicle accident on July 5, 1990*. That is, if she had not been in this accident it is unlikely that she would have developed this condition.
>
> [underlining mine]
>
> Because she has had pain for so long and because it is so severe with marked functional limitation it is likely she will

> continue to have pain lifelong. Available medical evidence indicates that patients who have fibromyalgia continue to complain of pain for at least 20 years and perhaps longer. It is therefore likely that she will not return to gainful employment. If she does so it would be at much reduced capacity. She certainly will be embarrassed with respect to her ability to compete with other workers who are able bodied in the work place. She will also require medical treatment during that time and this will include visitations to various physicians and physiotherapy of different types. It will also include medications.

39 Dr. McCain had been provided with a copy of a two-page paper written by Dr. Stephen Vallentyne of Kelowna, B.C. entitled: "Trauma in Fibromyalgia — Medical Legal Considerations." Dr. Vallentyne is a physiatrist also referred to as a specialist in physical medicine and rehabilitation. At trial, Dr. Vallentyne was called for cross-examination by the plaintiff. Dr. Vallentyne conceded that Mrs. Potrie suffers from fibromyalgia. However, he stated, "I feel fibromyalgia is a somatoform pain disorder." Counsel for the plaintiff asked Dr. McCain the following questions about Dr. Vallentyne's paper:

> Q. Okay, now, it goes on, 'It is my opinion that fibromyalgia represents a somatoform of pain disorder or conversion of emotional symptoms into somatic complaints. That is, I believe that fibromyalgia is a masked depression with symptoms of insomnia, pain and fatigue.'
>
> A. There is just no evidence in the medical literature for that. In fact, the studies that have been done actually support the opposite, that there is just no evidence that fibromyalgia is primarily a somatoform or psychiatric disorder, and I don't think any researcher in this area would agree with that today.
>
> Q. Agree with Dr. Vallentyne's comment?
>
> A. I don't think that is very tenable. I would like to see -- does it make a reference for that? I don't see what the evidence is.
>
> Q. No.
>
> A. I think I know the literature pretty well, and I am pretty sure that there is no primary database to suggest that patients with somataform disorder.
>
> Q. And he goes on to say, 'I don't feel that the fibromyalgia is a direct consequence of the MVA.' You have covered that?
>
> A. Yes, I think so. We would disagree on that.

40 Dr. McCain also was referred to the report done on behalf of the defendant by Dr. Allen Yorke. Counsel asked the following question:

> Q. Doctor, I want to refer you very briefly to a couple of reports that have been authored by two doctors. One is Dr. Allen Yorke's report dated May 22nd, 1994, and on page 10 of that report he states, 'The 1990 criteria for fibromyalgia were developed purely for research purposes. They were not in fact intended for use as a major diagnostic tool, although they have become used as such, and furthermore they have never been tested in a setting of third party litigation.'
>
> A. I think there is some error when he says the -- they are called classification criteria, and what they are meant to do is to make sure that if a person is diagnosed with fibromyalgia for a study, that the researchers understand what is meant by fibromyalgia, so that it is all above board and clear and everybody can agree that this person has fibromyalgia and nothing else. Obviously you want a homogenous patient population base to do your study. Now, rheumatologists have been instrumental in developing criteria for lupus, for rheumatoid arthritis, for ankylosis spondylitis, for scleroderma and a whole host of other immunologic problems. And what happens to classification criteria is they are inevitably used for diagnosis, because the test of understanding, of course, is that if this person is good enough to put into a study, then they are good enough to treat as fibromyalgia for the average physician who isn't involved in a research project.
>
> So if the patient fulfils the criteria, one can be pretty much assured that everybody is going -- every reputable

rheumatologist is going to say, ‘That is pretty much what I see, too.’ That is pretty much fibromyalgia. So they tend to be used as diagnostic criteria, even though they weren’t identified for that.

Now, the second part of what he says is these criteria have never been tested in third party litigation type environments. Now, we are all worried about that. We are all worried that somehow patients are going to be able -- somehow litigation patients are going to be different or patients with workmen’s compensation problems are going to be different. They are going to have different physical findings. They are going to have different criteria. There is no reason to believe a priori, that they would be any different. There are no data on this. So I think it is a question which at the present time is unanswerable. I would be very interested in doing a study to see if in fact the criteria would hold up in third party litigation.

Q. It has never been tested?

A. Never been tested, so I don’t know. You know, there is this old idea that somehow litigation patients are different than real patients, and the old story is, as soon as the litigation goes away, the patient gets better, and I think there is a lot of evidence, for example, for low back pain, that that is an old myth that nobody really believes anymore. You usually get laughed at at most meetings if you stood up and said that.

Q. Page 21 of this report states, and we have covered this already, ‘Testing for fibromyalgia elicited positive responses at fourteen out of eighteen points where five out of seven control points were also positive. It is my opinion that the presence of positive responses at control points negates the diagnosis of fibromyalgia.’ And it quotes studies by Dr. Campbell, Dr. Smythe and Dr. Littlejohn.

A. Well, I think if you ask Dr. Smythe and Campbell -- I don’t know what Jeff Littlejohn would respond to that, but I just don’t think that that is true. There is just no evidence at all, no where is it written that if patients have positive control points, that they do not fulfil criteria. In fact, if you look at the multi-center criteria, I can show you the table and demonstrate to you that there is a statistically significant difference in the control points between disease controls, normal controls and fibromyalgia patients.

Q. In your opinion is Dr. Yorke correct when he says this?

A. I don’t think he has any evidence for that, and I would take issue and show him the table and ask him to explain that. I don’t think he is right.

41 As to the respective expertise of the rheumatologists — I am now referring to Dr. McCain, Dr. McLeod and Dr. Yorke — I accept the opinions of Dr. McCain based upon his training and his experience and involvement with the Rheumatologists’ Association in determining criteria for the diagnosis of fibromyalgia. I also accept Dr. McLeod’s opinion over that of Dr. Yorke. As to Dr. Vallentyne’s opinion, I do not accept or give weight to his opinion that fibromyalgia is solely a somatic illness. Therefore, I have concluded that Mrs. Potrie is suffering from fibromyalgia caused by the motor vehicle accident of July 5, 1990, and which will, in all likelihood, prevent her from again being employed as a special needs assistant in the Salmon Arm School District.

42 In the defendant’s final submissions, Mr. Moffat suggested that this is a *Pryor v. Bains* (1986), 690 B.C.L.R. 395 situation in that the problems that Mrs. Potrie had with reference to her knee and the bunions on her feet would have prevented her from doing her job. I find that the operations she underwent both for the knee and for the bunions in no way affected her ability to work nor did they in any way cause or have an affect upon the fibromyalgia. I decline to apply the principle enunciated in *Pryor v. Bains*.

43 Mrs. Potrie also suffers at this date from bilateral thoracic outlet syndrome. Mrs. Potrie is to undergo surgery in Kelowna to be performed by Dr. Andrew Luoma, a thoracic surgeon. He states:

Ms. Potrie has bilateral thoracic outlet syndrome and will require bilateral staged operations. My preference for this would be to do the procedures four to six weeks apart to allow some recovery between the procedures.

44 Dr. Peter D. Fry, a specialist in vascular surgery retained by the defence, states as follows in his report of August 2, 1995:

> There was clearcut evidence of thoracic outlet syndrome with neurological disturbances on both the right and left upper extremities with evidence of vascular compromise at a degree of abduction that one would not expect to find in a normal individual. Shoulder girdle exercises have been done, massage therapy and physiotherapy appear to make her worse, which is typical of some patients with thoracic outlet syndrome.
>
> ... It is my belief that Heidi has thoracic outlet syndrome bilaterally. I think she also has musculo-ligamentous problems, but I believe that she will require surgery, i.e. first rib resection, in order to relieve some of the symptoms in her upper extremities. I would hasten to add that I would anticipate perhaps a 70% improvement in her symptoms in reference to this particular condition. ...
>
> ... There is evidence of thoracic outlet syndrome bilaterally and I believe the syndrome has been incurred as a result of the motor vehicle accident.

45 In his report dated September 20, 1995, Dr. Fry states:

> Finally, Heidi, as I have mentioned before, I believe is a very well motivated, hard working individual who has had very significant injuries which, however, have somewhat unfortunately been poorly understood in the past. I believe there is sufficient evidence of thoracic outlet syndrome that has been refractory to conservative treatment that she should have definitive treatment for this condition as soon as possible.
>
> This is not going to alleviate all of her symptoms of course, but I think with the good result of her cervical spine fusion, the anticipated significant improvement if she does have thoracic outlet surgery and that fact that her prognosis for cardiac problems is good, that once the thoracic outlet syndrome is relieved, she will make a much better recovery than she has up to this point in time.

46 In summary, the injuries sustained by Mrs. Potrie in the motor vehicle accident of July 5, 1990, can be listed as follows:

1. Cuts, bruises, abrasions, injury to head, arms, knees, ankle and elbow.

2. Cervical injury to C6-7 requiring fusion.

3. Bilateral thoracic outlet syndrome which will require two major operations in the future.

4. Dissection of the left anterior coronary artery resulting in a heart attack and coronary artery bypass operation.

5. Fibromyalgia.

6. Emotional stress.

7. Possible bilateral carpal tunnel syndrome.

47 In her testimony, Mrs. Potrie said she has tried to continue on with her life and to do the things that she normally did. She said, “I tried to go back to work but that was not possible.” For example, in April of 1993, she “subbed for a girl who asked for me.” She said “I tried it for one half day but I couldn’t do it physically.” In June of 1993, she tried again but the pain was so severe, she had to cease.

48 As to Mrs. Potrie’s pre-accident physical condition, she stated “I had none of these symptoms before the accident. Pre-accident, I was healthy, organized, fit and active.”

49 Mrs. Potrie said that now it feels like she has "the flu all the time." As to fibromyalgia, she said "I didn't know anything about it." She now knows it can cause fatigue and loss of sleep which she now suffers from.

50 In late 1993, because of her emotional condition, she consulted Dr. Swain, a clinical psychologist. She said Dr. Swain helped her but subsequently he left the Vernon area and moved to Vancouver. Mrs. Potrie at the time of trial said she is now seeing Dr. Pat Nielson, also a clinical psychologist.

51 Mrs. Potrie said she has been doing an exercise program. I find that she is a highly motivated person and wishes to regain her health back at least close to pre-accident level.

52 I find that pre-accident, Mrs. Potrie was active with her husband connected with his softball team. She and her husband and family travelled and camped. These social and outdoor activities for Mrs. Potrie have been largely affected by this accident.

53 As to her condition at trial, she said she still takes Tylenol 3's, and undergoes physiotherapy. She bought a "TENS machine" for $250 and she uses it regularly. She says she is taking an anti-depressant as well as blood pressure pills. As to her sleeping problems, she says she doesn't sleep well. In fact, she said at trial that she slept only two hours the night before she testified.

54 As to her work, she still has in the home the two foster children who are like her own family. Also, in the fall of 1995, she attempted to do office work at a credit union, but she said she could not do it. I am satisfied that Mrs. Potrie will, in the future, attempt to work and will probably be able to do some form of vocation but nothing compared to her pre-accident ability.

55 As to the non-pecuniary award, I have considered that this woman has been most severely injured, albeit with the possibility of a degree of recovery. However, I find that she will not be pain-free for the rest of her life and as she advances in *age*, there will only be further complications as a result of this tragic occurrence. Her whole life has been changed, her vocation has ben affected, her enjoyment of life with her husband and family has been severely compromised. Further, she must face two major operations to correct the thoracic outlet syndrome injury. I assess the general damages at $140,000.

56 As to past wage loss, the parties have agreed that the sum is $72,000. That amount is awarded.

57 The next concern is the future loss of income that has now been incurred by the plaintiff. The defence filed Exhibit 8, a compilation of the plaintiff's sources of income since August 30, 1990. This a combination of long-term disability paid by Sun Life and the Minister of Social Services for the care of the two foster children presently at the Potrie home. This sum to the end of November, 1995 totalled $455,059.42. While this sum seems large, it does not take in the expenses incurred for the care of these foster children. The plaintiff advanced no claim for the loss of income relative to these two foster children. I did hear from Mr. Potrie that he assists her in this business which I find is separate and apart from her work as a special needs assistant for the School District. There is no evidence of the costs related to this business and therefore, I am not able to say whether there is a profit or loss situation. Since there is no claim for loss, I am not prepared to consider defence's position that this service is providing a profit to the plaintiff. From all the evidence, I would conclude that it is not.

58 As to future loss of income, it is necessary to consider the contract between the Salmon Arm District and Local 523 of the Canadian Union of Public Employees. The plaintiff is a member of this union. The plaintiff called Mr. David Eastmead, a representative of the union, with reference to the benefits accruing to a union member under the contract. Mr. Eastmead filed the contract itself as Exhibit 19. Mr. Eastmead said that the benefits prior to July, 1995 were paid 75% by the employer and 25% by the employee. Since the most recent contract, the ratio is now 85% employer and 15% employee.

59 Mr. Eastmead said that Mrs. Potrie maintains a status as an employee if and when she returns and, if she is capable, there will be a job available for her, however, there are "no bumping rights" contained in the contract.

60 I find that the benefits contained in the contract were negotiated on behalf of the members and there cannot be considered "double compensation" in this instance. I am referring in particular to the Sun Life long-term disability benefits that Mrs. Potrie has been receiving.

61 Mrs. Potrie was also on a pension plan and filed as Exhibit 2 in these proceedings was an evaluation of the loss of future employment and pension earnings filed by Associate Economic Consultants Limited of Vancouver. I accept Table 2, income loss multipliers at $15,498.00. Using this multiplier to calculate the present value of future losses of earnings based on a constant annual sum of $1,000 from the trial date to Mrs. Potrie's age of 65, the sum arrived at is $285,628. This sum does not include contingencies other than mortality, nor does it include the value of an employer's contribution to non-wage benefit programs.

62 I am considering contingencies such as layoffs due to cutbacks, work stoppages and unforeseen matters. Therefore, I am reducing the sum in this instance by 20%. I find that her future loss of earnings will be $228,500. However, I have concluded that Mrs. Potrie will find some form of employment, but not as a special needs assistant. It is therefore necessary to consider the possibility that she will earn income and to deduct it from the gross figure of future loss earnings. For her working life until the age of 60 is 13.43 years. I have selected age 60 because I find that it is possible her health will not be such that she will be able to work beyond that age. I am also subtracting from the 13.43 years two years which I am allowing for recovery to a point where her health will allow some form of work. I find her future work period to be 12 years. Based upon Mrs. Potrie's expressed wish to have some vocation, I believe that she could possibly earn up to $500 per month or $6,000 per year. Therefore, her future loss is $156,500 net.

63 As to Mrs. Potrie's pension, I accept Mr. Carson's determination of pension entitlement at $19,644 less 20%. The sum awarded is $15,716.

64 There is a trust claim by Mr. Potrie for his assistance for the plaintiff in the home since the date of the accident. The defendant agrees that the sum of $10,000 should be awarded to Mr. Potrie for this assistance and it is so awarded.

65 Filed in Exhibit 4 was an index of special damages. The defence took issue with items 11 and 15. Item 11 was School District No. 89 benefit expenses of $4,406.54 and item 15 was home care expenses.

66 As to item 11, it is necessary for Mrs. Potrie to sustain those benefits and I find that this expense is incurred as a direct result of the accident.

67 As to item 15, the plaintiff called evidence from several of the persons she used to assist her when she was required to attend for doctors' appointments. This amounted to a sum of $585.62. The plaintiff concedes that these were the exigencies in the home at the time that some of that work done by these persons may have been charged later to the maintenance of the two foster children. I am therefore discounting the award by 10%. The sum for homecare expenses is $31,589.30 less 10%.

68 As to costs of future care, the plaintiff submits that she should have provided to her, the services of the Columbia Health Care Center for Rehabilitation in Vancouver. The program provided by the Center is in Exhibit 2 at tab 15, and the total cost is $12,715.00 without food and lodging. However, because Mrs. Potrie lives in Enderby it will be necessary that food and lodging be provided and therefore the total cost is $17,335.00. I am of the opinion that this is a program that will be of great assistance to Mrs. Potrie and that sum is awarded for her to attend the Columbia Health Care Center for Rehabilitation.

69 The plaintiff filed the opinion of Diana R. Robertson, B.Sc., Registered Occupational Therapist. She analyzed Mrs. Potrie's needs relative to her rehabilitation. She provided Exhibit 7, a summary of costs she believes necessary to assist Mrs. Potrie in her rehabilitation and her day-to-day activities in the future. I have considered the items relating to the initial costs set out by Mrs. Robertson and I am not prepared to allow an award for the motorized scooter. In her evidence, Mrs. Potrie did not say that she is now or will be in the future non-ambulatory. Therefore, the sum of $30,000 is awarded.

70 As to the claim for yearly future care costs, this matter was not dealt with adequately at trial. I make no award at this time but I ask counsel to file written submissions. I leave it to counsel how they wish to exchange their submissions before delivering them to the Court.

71 As to tax gross-up, I also leave that to counsel to settle as between them. However, if that is not possible, I will hear counsel *viva voce* or written submissions, at the option of counsel.

72 There will be costs to the plaintiff.

Class Proceedings Act

CHAPTER 28

OF THE

ACTS OF 2007

An Act Respecting Class Proceedings

Short title

1 This Act may be cited as the Class Proceedings Act. *2007, c. 28, s. 1.*

Interpretation

2 In this Act,

(a) "certification order" means an order certifying a proceeding as a class proceeding;

(b) "class or subclass" means two or more persons with common issues respecting a cause of action or potential cause of action;

(c) "class or subclass member" means a person who is or becomes a member of a class or subclass in accordance with a certification order, and who has not opted out of the class or subclass;

(d) "class proceeding" means a proceeding under this Act, even if an application for certification of the proceeding as a class proceeding has not yet been determined by the court;

(e) "common issues" means

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

(f) "court" means the Supreme Court of Nova Scotia, and includes any judge of that court;

(g) "decertification order" means an order decertifying a proceeding as a class proceeding;

(h) "defendant" includes a respondent;

(i) "party" means a representative plaintiff, a plaintiff, a representative defendant, a defendant or a person that the court adds as a party, but does not include any other individual class or subclass members;

(j) "plaintiff" includes an applicant;

(k) "representative defendant" means a person who is appointed under this Act as the representative defendant for a class or subclass in respect of a class proceeding and, where the context requires, includes a person who is seeking to be appointed as a representative defendant;

(l) "representative party" means a representative plaintiff or representative defendant;

(m) "representative plaintiff" means a person who is appointed under this Act as the representative plaintiff for a class or subclass in respect of a class proceeding and, where the context requires, includes a person who is seeking to be appointed as a representative plaintiff;

(n) "settlement class" means those persons who constitute a settlement class under Section 6. *2007, c. 28, s. 2.*

Application of Act

3 (1) Subject to the Proceedings against the Crown Act, this Act binds Her Majesty in right of the Province.

(2) For greater certainty,

(a) notice required to be given to the Crown under the Proceedings against the Crown Act must be given by the proposed representative plaintiff; and

(b) the notice referred to in clause (a) must clearly state that the action is a class proceeding and provide particulars regarding the intended class.

(3) Subject to subsection (4), this Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act;

(b) a proceeding required by law to be brought by a plaintiff in a representative capacity; or

(c) a proceeding brought in a representative capacity that was commenced before the coming into force of this Section.

(4) Where a proceeding is commenced under Rule 5.09 of the Civil Procedure Rules before the coming into force of this Section, the court may, on the application of a party to the proceeding, order that the proceeding be continued under this Act, subject to the terms or conditions the court considers appropriate. *2007, c. 28, s. 3.*

CERTIFICATION

Application for certification of proceeding

4 (1) One member of a class of persons may commence a proceeding in the court on behalf of the members of that class.

(2) In a proceeding referred to in subsection (1), the originating process must indicate that the proceeding is brought under this Act.

(3) The person who commences a proceeding under subsection (1) shall make an application to the court for an order certifying the proceeding as a class proceeding and, subject to subsection (5), appointing the person as representative plaintiff for the class.

(4) An application under subsection (3) must be made

(a) within one hundred and twenty days of the date upon which the proceeding is commenced; or

(b) at any other time with leave of the court.

(5) The court may appoint a person who is not a member of the class as the representative plaintiff for the class only if, in the opinion of the court, it is necessary to do so in order to avoid a substantial injustice to the class.

(6) A defence to a class proceeding does not need to be filed until forty-five days after a certification order is issued in respect to the proceeding. *2007, c. 28, s. 4.*

Application by defendant for certification

5 (1) A defendant in two or more proceedings may, at any stage of one of the proceedings, make an application to the court for an order certifying some or all of the proceedings as a class proceeding and appointing a representative plaintiff for the class that will be involved in the class proceeding.

(2) Any party to a proceeding against two or more defendants may, at any stage of the proceedings, make an application to the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant. *2007, c. 28, s. 5.*

Settlement class

6 Where as a condition of settlement between a plaintiff and a defendant certification of a proceeding as a class proceeding is being sought in order that the settlement will bind the class members, the class members constitute a settlement class. *2007, c. 28, s. 6.*

Certification by the court

7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

(a) the pleadings disclose or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by a representative party;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and

(e) there is a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

(f) any other matter the court considers relevant.

(3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement. *2007, c. 28, s. 7.*

Adjournment of application and effect of certification

8 (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding. *2007, c. 28, s. 8.*

Subclasses

9 Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that the subclass members be separately represented, the court may, in addition to appointing the representative party for the class, appoint for each subclass a representative party who, in the opinion of the court,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the subclass and of notifying subclass members of the class proceeding; and

(c) does not have, with respect to the common issues for the subclass, an interest that is in conflict with the interests of other subclass members. *2007, c. 28, s. 9.*

Certain matters not bar to certification

10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. *2007, c. 28, s. 10.*

Contents of certification order

11 (1) A certification order shall

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics;

(b) appoint the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by the class;

(e) set out the common issues for the class;

(f) state the manner in which and the time within which a class member may opt out of the class proceeding; and

(g) include any other provisions the court considers appropriate.

(2) Where a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that the subclass members be separately represented, the certification order shall include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) Where the certification order is made in respect of a settlement class, the court may, as the court considers appropriate, modify the contents of the order to reflect the existence of the settlement and its terms.

(4) The court may, at any time, amend a certification order on an application of a party or class member or on its own motion. *2007, c. 28, s. 11.*

Refusal to certify

12 Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or the notice of application; and

(c) make any other order it considers appropriate. *2007, c. 28, s. 12.*

Where conditions for certification not satisfied after certification

13 (1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings. *2007, c. 28, s. 13.*

CONDUCT OF CLASS PROCEEDINGS

Stages of class proceedings

14 (1) Unless the court otherwise orders under Section 15, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of class members shall be determined in accordance with Sections 30 and 31.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue. *2007, c. 28, s. 14.*

Court may determine conduct of class proceeding

15 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms or conditions the court considers appropriate. *2007, c. 28, s. 15.*

Court may stay other proceeding

16 The court may at any time stay or sever any proceeding related to the class proceeding on the terms or conditions the court considers appropriate. *2007, c. 28, s. 16.*

Hearing of applications

17 (1) All applications, whether contested or not, in the class proceeding that are made before the trial of the common issues shall be heard by the same judge but, where that judge becomes unavailable for any reason to hear an application in the class proceeding, the Chief Justice of the court may assign another judge of the court to hear the application.

(2) A judge who hears an application under subsection (1) may, but need not, preside at the trial of the common issues. *2007, c. 28, s. 17.*

Participation of class members

18 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time, in a class proceeding permit one or more class members to participate in the class proceeding.

(2) Participation under subsection (1) must be in the manner and on the terms or conditions, including terms or conditions as to costs, that the court considers appropriate. *2007, c. 28, s. 18.*

Opting out of class proceeding and determination by Court

19 (1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order; or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Notwithstanding anything contained in this Section, the court may at any time determine whether or not a person is a class or subclass member, subject to any terms or conditions the court considers appropriate. *2007, c. 28, s. 19.*

Discovery

20 (1) Except as otherwise provided in this Act or the regulations, parties to a class proceeding are subject to discovery in the same manner as parties to any other proceeding, but only after the proceeding has been certified, unless leave of the court has been obtained.

(2) Except as otherwise provided in this Act or the regulations, parties may discover a class member only with leave of the court and after all representative parties have been discovered or their discoveries have been waived.

(3) In deciding whether to grant a party leave to conduct discovery under subsection (1) or (2), the court shall consider

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Civil Procedure Rules as a party for failure to submit to discovery and, for greater certainty, the court may dismiss the claims of or allow a claim against any individual class member who fails to submit to discovery. *2007, c. 28, s. 20.*

Examination of other parties

21 (1) Before the certification hearing, parties to a class proceeding may examine any other party to the proceeding, or any deponent of an affidavit filed with respect to the certification application, or, with leave of the court, any other person, and such examination is limited to issues arising from the certification application.

(2) With respect to any other application, including an interlocutory application, a party shall not examine a person before the hearing of the application or interlocutory application, except with leave of the court.

(3) In deciding whether to grant a party leave to conduct an examination under subsection (1) or (2), the court shall consider the factors set out in subsection 20(3). *2007, c. 28, s. 21.*

Notice of certification

22 (1) Subject to subsection (2), notice that a proceeding has been certified as a class proceeding must be given by the representative party for the class to the class members in accordance with this Section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) Subject to subsection (2), the court shall make an order setting out when and by what means notice is to be given under this Section and in doing so shall have regard to

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the presence of subclasses;

(f) the places of residence of class members; and

(g) any other matter the court considers relevant.

(4) The court may order that notice be given by

(a) personal delivery;

(b) mail;

(c) posting, advertising or publishing;

(d) individually notifying a sample group within the class;

(e) creating and maintaining an Internet site; or

(f) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, a notice under this Section must

(a) describe the class proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner in which and the time within which a class member may opt out of the class proceeding;

(c) describe any counterclaim or third party claim being asserted in the class proceeding, including the relief sought;

(d) summarize any agreements respecting fees and disbursements between the representative parties and their solicitors;

(e) describe the possible financial consequences of the class proceeding to class and subclass members;

(f) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the class proceeding;

(g) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the class proceeding;

(h) describe the rights, if any, of class members to participate in the class proceeding;

(i) give an address to which class members may direct inquiries about the class proceeding; and

(j) give any other information the court considers appropriate.

(7) Where the application to certify a proceeding as a class proceeding was made in respect of a settlement class, a notice under this Section must refer to the existence of the settlement and describe its terms, and must be modified otherwise as the court considers appropriate.

(8) With leave of the court, an application under this Section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements. *2007, c. 28, s. 22.*

Notice of determination of common issues

23 (1) Where the court determines common issues in favour of a class or subclass and considers that the participation of individual class or subclass members is required to determine individual issues, the representative party for that class or subclass shall give notice to those members in accordance with this Section.

(2) Subsections 22(3) to (5) apply with the necessary modifications to a notice given under this Section.

(3) A notice under this Section must

(a) state that common issues have been determined;

(b) identify the common issues that have been determined and explain the determinations made;

(c) state that class or subclass members may be entitled to individual relief;

(d) describe the steps that must be taken to establish an individual claim;

(e) state that failure on the part of a class or subclass member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(f) give an address to which class or subclass members may direct inquiries about the class proceeding; and

(g) give any other information the court considers appropriate. *2007, c. 28, s. 23.*

Notice to protect interests of affected persons

24 (1) At any time in a class proceeding, the court may order any party to give any notice that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the class proceeding.

(2) Subsections 22(3) to (5) apply with the necessary modifications to a notice given under this Section. *2007, c. 28, s. 24.*

Approval of notice by court

25 A notice under Sections 22 to 24 must be approved by the court before it is given. *2007, c. 28, s. 25.*

Another party may be ordered to give notice

26 Where a party is required to give notice under this Act, the court may order another party to give the notice in addition to or instead of the party that was required to give the notice. *2007, c. 28, s. 26.*

Costs of notice

27 (1) The court may make any order it considers appropriate as to the costs of any notice under Sections 22 to 24, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. *2007, c. 28, s. 27.*

ORDERS, AWARDS AND RELATED PROCEDURES

Contents of order respecting judgment on common issues

28 An order made in respect of a judgment on common issues of a class or subclass must

(a) set out the common issues;

(b) name or describe the class or subclass members to the extent possible;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted. *2007, c. 28, s. 28.*

Judgment on common issues is binding

29 (1) A judgment on common issues of a class or subclass binds every class or subclass member, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that

(a) are set out in the certification order;

(b) relate to claims described in the certification order; and

(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceeding. *2007, c. 28, s. 29.*

Determination of issues affecting certain individuals

30 (1) Where the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under Section 35, that are applicable only to certain individual

class or subclass members, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons, including, without limiting the generality of the foregoing, one or more independent experts, to conduct a reference into those individual issues under the Civil Procedure Rules and report back to the court; or

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that shall be followed in conducting hearings, references and determinations under subsection (1).

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the individual issues that, in the opinion of the court, is consistent with justice to the class or subclass members and the parties and, in doing so, the court may

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court shall set a reasonable time within which individual class or subclass members may make claims under this Section in respect of the individual issues.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) shall not later make a claim under this Section in respect of the individual issues applicable to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if, in the opinion of the court,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under clause (1)(c), a determination of issues made in accordance with that clause is deemed to be an order of the court. *2007, c. 28, s. 30.*

Individual assessment of liability

31 Without limiting the generality of Section 30, where, after determining common issues in favour of a class or subclass, the court determines that a defendant's liability to individual class or subclass members cannot reasonably be determined without proof by those individual class or subclass members, Section 30 applies with the necessary modifications to the determination of the defendant's liability to those class or subclass members. *2007, c. 28, s. 31.*

Aggregate monetary awards

32 (1) Once a defendant has been found liable, the court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class or subclass members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class or subclass members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class or subclass members can, in the opinion of the court, reasonably be determined without proof by individual class or subclass members.

(2) Before making an order under subsection (1), the court shall provide the defendant with an opportunity to make submissions to the court in respect of any matter relating to the proposed order including, without limiting the generality of the foregoing,

(a) submissions that contest the merits or amount of an award under that subsection; and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

(3) Before making an order under subsection (1), the court may permit the admission of additional evidence that, in the opinion of the court, is relevant in the circumstances. *2007, c. 28, s. 32.*

Statistical evidence may be admitted

33 (1) For the purpose of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of an Act of the Parliament of Canada or of the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this Section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least sixty days before that information is to be introduced as evidence;

(b) has complied with subsections (4) and (5); and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) A notice under this Section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of an Act of the Parliament of Canada or of the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), a notice under this Section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this Section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this Section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. *2007, c. 28, s. 33.*

Average or proportional share of aggregate awards

34 (1) Where the court makes an order under Section 32, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if, in the opinion of the court,

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members; and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) Where an order is made under subsection (1), any class or subclass member in respect of whom the order was made may, within the time specified in the order, make an application to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average or proportional distribution, the court shall consider

(a) the extent to which the class or subclass member's individual claim varies from the amount that the person would receive on an average or proportional basis;

(b) the number of class or subclass members seeking to be excluded from an average or proportional distribution; and

(c) whether excluding the class or subclass members referred to in clause (b) would unreasonably deplete the amount to be distributed on an average or proportional basis.

(4) An amount recovered by a class or subclass member who proves the person's claim on an individual basis must be deducted from the amount to be distributed on an average or proportional basis before the distribution. *2007, c. 28, s. 34.*

Individual share of aggregate

35 (1) Where the court orders that all or a part of an aggregate monetary award under subsection 32(1) be divided among individual class or subclass members on an individual basis, the court shall also determine whether individual claims need to be made to give effect to the order.

(2) Where the court determines under subsection (1) that individual claims need to be made, the court shall specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court shall minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms;

(b) the submission of affidavit or other documentary evidence;

(c) the auditing of claims on a sampling or other basis; and

(d) any other procedure the court considers appropriate.

(4) When specifying the procedures under subsection (2), the court shall set a reasonable time within which individual class or subclass members may make claims under this Section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) may not later make a claim under this Section except with leave of the court.

(6) Subsection 30(6) applies with the necessary modifications to a decision whether to grant leave under subsection (5).

(7) The court may amend a judgment given under subsection 32(1) to give effect to a claim made with leave under subsection (5) if the court considers it appropriate to do so. *2007, c. 28, s. 35.*

Distribution

36 (1) The court may direct any means of distribution of amounts awarded under Sections 32 to 35 that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement or credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the monetary relief to which all of the class or subclass members are entitled until further order of the court; or

(c) any person other than the defendant distribute directly to each of the class or subclass members, by any means authorized by the court, the amount of monetary relief to which that class or subclass member is entitled.

(3) In deciding whether to make an order under clause (2)(a), the court

(a) shall consider whether distribution by the defendant is the most practical way of distributing the award; and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court shall supervise the execution of judgments and the distribution of awards under Sections 32 to 35 and may stay the whole or any part of an execution or distribution for a reasonable period on the terms or conditions it considers appropriate.

(5) The court may order that an award made under Sections 32 to 35 be paid

(a) in a lump sum, promptly or within a time set by the court; or

(b) in instalments, on the terms or conditions the court considers appropriate.

(6) The court may

(a) order that the costs of distributing an award under Sections 32 to 35, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment; and

(b) make any other order it considers appropriate. *2007, c. 28, s. 36.*

Undistributed award

37 (1) The court may order that all or any part of an award under Sections 32 to 35 that has not been distributed within a time set by the court

(a) be applied in any manner that, in the opinion of the court, may reasonably be expected to benefit class or subclass members;

(b) be applied against the cost of the class proceeding;

(c) be forfeited to Her Majesty in right of the Province; or

(d) be returned to the party against whom the award was made.

(2) In deciding whether to make an order under clause (1)(a), the court shall consider

(a) whether the distribution would result in unreasonable benefits to persons who are not class or subclass members; and

(b) any other matter the court considers relevant.

(3) The court may make an order under clause (1)(a) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under clause (1)(a) even if the order would benefit

(a) persons who are not class or subclass members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. *2007, c. 28, s. 37.*

Settlement, discontinuance and dismissal

38 (1) A class proceeding may be settled or discontinued only

(a) with the approval of the court; and

(b) on the terms or conditions the court considers appropriate.

(2) A settlement in relation to the common issues affecting a subclass may be concluded only

(a) with the approval of the court; and

(b) on the terms or conditions the court considers appropriate.

(3) A settlement under this Section is not binding unless approved by the court.

(4) Where a proceeding has been certified as a class proceeding, a settlement of the class proceeding or of common issues affecting a subclass that is approved by the court binds every class or subclass member who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement or discontinuance, the court shall consider whether notice should be given and whether the notice should include any of the following:

(a) an account of the conduct of the class proceeding;

(b) a statement of the result of the class proceeding;

(c) a description of any plan for distributing any settlement funds.

(6) Subsections 22(3) to (5) apply with the necessary modifications to a notice referred to in subsection (5). *2007, c. 28, s. 38.*

Appeals

39 (1) Any party may appeal, without leave, to the Nova Scotia Court of Appeal from

(a) a judgment on common issues; or

(b) an order under Sections 32 to 37, other than an order that determines individual claims made by class or subclass members.

(2) With leave of a judge of the Nova Scotia Court of Appeal, a class or subclass member or any party may appeal to that court any order

(a) determining an individual claim made by a class or subclass member; or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

(3) With leave of a judge of the Nova Scotia Court of Appeal, any party may appeal to that court from

(a) a certification order or an order refusing to certify a proceeding as a class proceeding; or

(b) a decertification order.

(4) Where a representative party for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Civil Procedure Rules or where a representative party abandons an appeal under subsection (1) or (3), any member of the class or subclass may make an application to a judge of the Nova Scotia Court of Appeal for leave to act as the representative party for the purposes of subsection (1) or (3).

(5) Where a representative party intends to abandon an appeal under subsection (1) or (3), the representative party shall apply to a judge of the Nova Scotia Court of Appeal for approval to abandon the appeal and, where approval is granted, the judge of the Nova Scotia Court of Appeal shall consider whether the appellant should be ordered to provide notice to class or subclass members that the appeal has been abandoned.

(6) An application by a class or subclass member for leave to act as the representative party under subsection (4) must be made within thirty days after the expiry of the appeal period available to the representative party or by such other date as the judge of the Nova Scotia Court of Appeal may order.

(7) For greater certainty, an application for leave to appeal pursuant to this Section must be made before a single judge of the Nova Scotia Court of Appeal. *2007, c. 28, s. 39.*

COSTS, FEES AND DISBURSEMENTS

Costs

40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.

(2) When awarding costs pursuant to subsection (1), the court may consider whether

(a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and

(b) a cost award would further judicial economy, access to justice or behaviour modification.

(3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.

(4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims. *2007, c. 28, s. 40.*

Agreements respecting fees and disbursements

41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall

(a) state the terms or conditions under which fees and disbursements are to be paid;

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding;

(c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and

(d) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may

(a) unless the court otherwise orders, be made without notice to any other party; or

(b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements.

(4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(5) Where an agreement is not approved by the court, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct that a taxation be conducted in accordance with the Civil Procedure Rules; or

(c) direct that the amount owing be determined in any other manner.

(6) Sections 65 to 70 of the Legal Profession Act do not apply in respect of an agreement referred to in this Section. *2007, c. 28, s. 41.*

GENERAL

Limitation periods

42 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

(a) a ruling is made by the court refusing to certify the proceeding as a class proceeding;

(b) the class member opts out of the class proceeding;

(c) an amendment is made to the certification order that has the effect of excluding the class member from the class proceeding;

(d) a decertification order is made under Section 13;

(e) the class proceeding is dismissed without an adjudication on the merits;

(f) the class proceeding is discontinued with the approval of the court; or

(g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1)(a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

(3) Where the running of a limitation period is suspended under this Section and the period has less than six months to run when the suspension ends, the limitation period, notwithstanding anything contained in this Section, is extended to the day that is six months after the day on which the suspension ends. *2007, c. 28, s. 42.*

Civil Procedure Rules

43 The Civil Procedure Rules apply to class proceedings to the extent that those rules are not in conflict with this Act. *2007, c. 28, s. 43.*

Certain provisions subject to regulations

44 Any provision of this Act with respect to discovery, damages, expert evidence or any procedural or substantive matter relating to a class proceeding is subject to the regulations. *2007, c. 28, s. 44.*

Regulations

45 (1) The Governor in Council may make regulations

(a) respecting discovery, damages, expert evidence or any procedural or substantive matter relating to a class proceeding;

(b) defining any word or expression used but not defined in this Act;

(c) the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the Regulations Act. *2007, c. 28, s. 45.*

Proclamation

46 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. *2007, c. 28, s. 46.*

Proclaimed - June 3, 2008
In force - June 3, 2008