
CANADA / JUDGMENT

Cassells v. Ladolcetta

2012 BCCA 27

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 27 Cassells v. Ladolcetta

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cassells v. Ladolcetta,

2012 BCCA 27

Date: 20120119

Docket: CA037506

Between:

John Franklin Cassells

Respondent

(Plaintiff)

And

Meeyoung Ladolcetta and

Adrian Tatsuki Wilding

Appellants

(Defendants)

Before:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, August 25, 2009

(J.F.C. v. Ladolcetta, 2009 BCSC 1151, New Westminster Docket M102443)

Counsel for the Appellants:

S. B. Stewart and M. D. Wilhelmson

Counsel for the Respondent:

D. N. Osborne

Place and Date of Hearing:

Vancouver, British Columbia

November 9, 2011

Place and Date of Judgment:

Vancouver, British Columbia

January 19, 2012

Written Reasons by:

The Honourable Mr. Justice Lowry

Concurred in by:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [1] In October 2005, when he was a 32-year-old plumbing apprentice, the plaintiff (respondent) was involved in a head-on collision. In November 2006, he commenced this action for damages to compensate him for the injuries he suffered. It was tried over the course of three weeks in 2009 before Mr. Justice N. Brown who, on the evidence of 19 witnesses plus 17 expert witnesses, found the named defendants solely responsible for the accident and made a substantial award against them. His 77-page judgment is indexed as 2009 BCSC 1151.
- [2] The respondent had for some time suffered from, and been treated for, skin psoriasis. He was found to have also manifested an early indication of psoriatic arthritis. After the accident, in time the psoriasis became particularly bad and the psoriatic arthritis became fully developed to the point that the respondent was no longer able to do the physical work of a journeyman plumber for which he had apprenticed. The primary issue at trial was whether, and if so the extent to which, the accident had served to aggravate the respondent's pre-existing disease.

- [3] The defendants now raise three grounds of appeal. They first contend the judge made an error of fact in finding, as he did, the accident had caused a serious life-altering aggravation of the respondent's pre-existing medical condition. They then say that, while the respondent was found to have failed to some extent to mitigate his loss by refusing recommended treatment, the judge erred in principle and in fact in not finding the respondent should have taken the treatment much earlier than the judge suggested and thereby mitigated his loss to a much greater extent. Finally, they say the award of damages is inordinately high.

The Aggravation of Psoriasis and Psoriatic Arthritis

- [4] While the focus at trial was primarily on the respondent's psoriasis and psoriatic arthritis, he was otherwise quite badly injured in the accident. In particular, he suffered extensive soft tissue injury to his neck, thoracic and lumbar spine, right shoulder, elbow, and right knee, as well as a compression fracture in his lumbar spine, all which left him with residual symptoms that it was said he would continue to experience to some degree. In addition, he sustained a minor frontal lobe brain impact injury and he developed what the judge found to be a subclinical post traumatic stress disorder. The judge compared his life before the accident with what it was afterward, as follows:
- [30] At this time in his life it is clear from the evidence that the plaintiff was functioning well, even without benefit of Willow's intensive therapy and its usual remissionary effects. He was happy, optimistic, and looking forward to becoming a journeyman plumber, to making a lot of money, and eventually to marriage and children. Apart from his psoriasis, he was in good mental and physical health.
- [31] It is equally clear that within three years after the accident, his health and psychological state had deteriorated to the extent it led Dr. M. W. Jones, a neurologist who examined him with respect to his concussion, to comment in his report, "It's rather sad and upsetting to see what has happened to this gentleman over the last 3 years in terms of his overall dramatically decreased Quality of Life."
- [5] The defendants contend the change in the respondent may be in large part attributable to the psoriasis and psoriatic arthritis from which he suffers, but say the evidence does not establish that is a consequence of the accident. They say, in particular, the judge's conclusion in this regard is based on expert opinion for which there is no empirical medical evidence. It is, they say, opinion that should have been afforded no weight - it had no evidentiary value - such that the judge made an overriding and palpable error in relying upon it to make the findings of fact he did.
- [6] The judge described psoriasis and psoriatic arthritis as follows:

- [15] The evidence of the medical experts explained that psoriasis is what is thought to be an auto-immune mediated skin disease that can fall anywhere on a graph between a minor nuisance to grave condition. It is not curable, but in most cases treatment can control it, with varying degrees of success. Most people with this condition can work and live their lives mostly unimpeded, but in some cases it can be a challenging, even debilitating, and worse, disease to live with. Dermatologists usually treat psoriasis.
- [16] Psoriatic arthritis is a form of arthritis closely connected to psoriasis. It is also thought to be auto-immune mediated. Not all people with psoriasis develop psoriatic arthritis, which typically presents itself in some form within 10 years, usually in peripheral joints. Rheumatologists treat psoriatic arthritis, so psoriatic arthritis patients consult with two specialists, one to treat the skin, the other the joints.
- [7] The respondent was diagnosed with psoriasis in 1992, when he was 19 or 20. The psoriasis would wax and wane. It had on occasion covered as much as 60% of his body. In 2002, he took a course of phototherapy treatment at the Willow Skin Clinic which was effective in substantially reducing the psoriasis on his skin. The therapy was repeated perhaps three times before the accident. It was not a cure but would retard the psoriasis coverage on his body to as little as 6%. The psoriasis would then return incrementally until he had the next treatment. He took only one treatment after the accident, in January 2006. Psoriasis can, over a period of years, lead to psoriatic arthritis, but prior to the accident the respondent had no generalized symptoms in his joints. The indication he had the disease was a discomfort in his foot (said to have been plantar fasciitis) in 2003 that he overcame using prescribed orthotics.
- [8] After the accident, the respondent's psoriasis continued to wax and wane but in time it became worse and the psoriatic arthritis took hold and became symptomatic, apparently beginning with what he described as a "flare" involving his ankles, Achilles tendon at the back of his right foot, his right toe, elbow, the small of his back, and right knee soon after the accident. The respondent convalesced for four months before returning to work. It appears that his medical concerns in 2006 were as much or more related to the other injuries he had suffered, and emotional difficulties he was having, as they were to the psoriasis and arthritis, although, as indicated, he underwent treatment at the Willow clinic in January.
- [9] Things appear to have turned for the worse in the fall of 2006 in respect of his skin condition and, although he was working, he was having great difficulty because of the arthritis in his ankles and feet in particular, and the fatigue the arthritis caused. The judge followed the course of the respondent's deterioration thereafter in great detail. All of his difficulties caused him to stop working in June of 2007 and abandon his hope of becoming a journeyman plumber. His life from the time of the accident had been one of unending medical attention from many doctors of differing disciplines, as well as seeing a psychologist, a physiotherapist, and a vocation counsellor. Consistent with the expert opinion he accepted, the judge concluded that all the plaintiff had suffered, physically,

psychologically and emotionally, had served to aggravate his psoriasis and psoriatic arthritis. He concluded as follows:

- [189] ... All of the plaintiff's injuries and associated symptoms, including those from his mild concussive frontal lobe injury, his subclinical PTSD and its symptoms, the stress and anxiety he experienced related to pain from his soft tissue injuries, his incrementally worsening psoriasis and psoriatic arthritis, and his inability to work operated over time to produce a serious depression. These factors in varying degrees punctuated the plaintiff's experiences from the time of the accident onwards, and produced the levels of psychological stress that produced the ongoing exacerbation of the plaintiff's condition that plaintiff experts identified as the cause of the worsening of the plaintiff's psoriasis and psoriatic arthritis. Given the extensive evidence heard, I find this consilient view of the evidence and medical opinions removes the need to reduce judicial findings to specific diagnostic categories; at the same time more accurately reflecting the actual subjective experiences of the plaintiff. These causative stressors were caused directly or indirectly by the accident, subject to consideration of mitigation arguments.
- [10] To reach that conclusion, the judge had to decide whether psoriasis and psoriatic arthritis could be aggravated by trauma and stress such as the respondent suffered. Opinion evidence of rheumatologists and dermatologists as well as psychiatrists and other physicians bearing on the point in varying degrees was tendered on both sides. After thoroughly reviewing all of the expert evidence adduced, the judge concluded:
- [153] Given the evidence before me from rheumatologists and dermatologists, as well as Dr. O'Shaughnessy and other experts called, there are sound and substantial reasons for concluding that emotional trauma/stress, as well as physical trauma, may exacerbate both psoriasis and psoriatic arthritis, and I so find.
- [11] The conclusion is consistent with the opinion of Dr. Dafna Gladman, recognized to be the leading rheumatologist in Canada on psoriatic arthritis, upon which the judge relied. She wrote:

With regards to the relationship between the psoriatic arthritis and the motor vehicle accident, since [the respondent] had evidence of psoriasis and possibly psoriatic arthritis (presence of plantar fasciitis a couple of years before the accident), one could not claim that the accident led to the development of psoriatic arthritis. However, it is quite possible that the accident precipitated more severe psoriasis and more aggressive psoriatic arthritis. In [the respondent's] case, although the trauma did not cause the psoriatic arthritis, it certainly made it worse. We have seen this response to trauma among our patients with psoriatic arthritis.

- [12] Dr. Gladman referenced various medical papers written on the subject that she considered supported her opinion to some extent and was cross-examined at length in that regard. She acknowledged there were shortcomings in much of what she referenced and accepted that the research on the subject of the effect of trauma and stress on psoriasis and psoriatic arthritis is limited. She explained that is because the cost and time required to undertake a

definitive study would be prohibitive. With respect to this aspect of her evidence in particular, the judge said:

- [140] As the trier of fact, I do not see this case turning completely one way or the other on the scientific literature; cases seldom do. From the literature reviewed and the considerable time spent on examination and cross-examination on it, it was obvious that the investigators themselves believe there is a connection between physical and emotional trauma and onset of psoriatic arthritis there to be empirically shown. Some of the (better) studies find supporting data, but not all; all the studies are flawed in various ways, some of the flaws discernible without expert assistance. These are, however, the best studies available.
- [141] Scientific literature in given fields may offer widely varying degrees of empirically rich probative information, and no authority is needed to justify say[ing] that even perfectly designed generously endowed ones producing relatively clear findings will not [be] pre-eminentlly conclusive in the courtroom--especially unless the results are then gathered into a clear consensus within the specialist scientific community. And there also, one would logically still expect clinical experience to play some part in the formation of that consensus. Further, while it is apparent that Dr. Gladman cited research in support of her opinion, as did Dr. Shuckett, it remained an opinion that remained foundationally formed around her knowledge of the disease and thirty years of clinical experience and study. It is obviously appropriate for a specialist to make reference to the best available scientific literature; they might be subject to criticism for not doing so in some cases; but citing it does not necessarily automatically signal that it has become the only foundation for the opinion expressed, which it evidently was not in this case.
- [13] The defendants challenged reliance on Dr. Gladman's evidence on essentially the same basis at trial as they do now. Their contention was and remains that her opinion was based on what they say is novel science: no scientific data established, beyond mere speculation, that her "theory" was valid. They say that at most the theory is an unproven hypothesis. They cite the criteria for evaluating the soundness of novel science found in *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, as drawn from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and discussed in *Taylor v. Liong*, 2007 BCSC 231, [2007] 7 W.W.R. 50.
- [14] The judge said the criteria pertain to the admissibility of expert evidence. Admissibility requires the weighing of threshold reliability. No issue had been taken with the admissibility of Dr. Gladman's opinion which it was evident is consistent with a widely held belief in the scientific community. Quoting from *R. v. Terceira* (1998), 38 O.R. (3d) 175, 123 C.C.C. (3d) 1 (C.A.), aff'd [1999] 3 S.C.R. 866, to the effect the threshold test of reliability must adapt to changing circumstances, the judge said that, in the face of studies that did reflect a wide provisional acceptance of Dr. Gladman's hypothesis, the lack of a conclusive study should not be fatal to either the admissibility or the weight of her opinion.

- [15] Unlike instances where, as in Taylor, the opinion of an expert which is shown to be no more than uncertain theory has been ruled inadmissible, here, as the judge said, Dr. Gladman expressed her opinion on the basis of what she said she had seen in response to trauma among her patients with psoriatic arthritis. What is said to be the inconclusive literature she referenced was, as the judge said, not the only foundation for the opinion she held. It was an opinion based on thirty years of her experience.
- [16] The judge reached the ultimate conclusion he did concerning the aggravation of the respondent's psoriasis and psoriatic arthritis relying on the evidence of the various physicians whose opinions he had to consider. Dr. Gladman's opinion on the effect of trauma on psoriatic arthritis is consistent with the other opinion evidence which the judge found acceptable, as well as with the evidence of the respondent's medical condition and, for that matter, the deterioration in his life after the accident. I do not consider there to be any sound basis on which it can now be said the judge made an overriding and palpable error in concluding the respondent's psoriasis and psoriatic arthritis were aggravated by trauma and stress attributable to the accident by relying on Dr. Gladman's opinion.

Mitigation

- [17] The judge reduced the amounts he assessed for the respondent's non-pecuniary loss and his past income loss by 20% and 30% respectively because he had failed to mitigate those losses by taking medication recommended to him in the spring of 2007. The judge did so, at least in part, on the basis of what he described as a "modified subjective" approach to determining whether and to what extent a plaintiff has failed to mitigate loss. The defendants contend the failure to mitigate must be assessed on an objective basis, citing Janiak v. Ippolito, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1. They say the reductions in the judge's awards should have been substantially greater.
- [18] The respondent commenced a regime of medication (methotrexate) in 2009 not very long before the trial. He did so on the advice of Dr. Gladman after she explained to him, apparently in no uncertain terms, the risks he faced with respect to the progression of his disease and the benefit he may well derive from taking the medication. The medication is not a cure but it has a 40% to 50% success rate in controlling psoriasis as well as reducing joint inflammation caused by psoriatic arthritis to some degree. As the judge noted, Dr. Gladman said the medication may not prevent the progression of joint damage; anti-inflammatory drugs are more effective at controlling joint inflammation and damage. In assessing the amount he awarded the respondent for his loss in future earning capacity, the judge assumed the treatment would to some extent be successful and be continued.
- [19] However, the medication was recommended to the respondent by another physician, Dr. Hong, a dermatologist, in January 2005 and, after the accident, in December 2005. In April of 2007, with the respondent suffering to the point he had to stop working in June, Dr. Hong is said to have again recommended he take the medication. On my review of Dr. Hong's testimony, it is less than clear why it is said he recommended the medication in April 2007.

He said he saw the respondent then but did no more than refer him to the Willow clinic and the respondent was unable to be clear as to when Dr. Hong's advice regarding medication was given. In the course of submissions, counsel stated the medication was recommended in April 2007, but it is not evident on what basis that statement was made. In any event, the respondent refused the medication. He did not want to take it. He apparently had done his own Internet research and wrongly assessed the risks associated with methotrexate to be substantially greater than they are. He said Dr. Hong did not explain the risks and benefits of the medication to him in the way that Dr. Gladman did.

- [20] In October 2007, Dr. Hong mentioned the opportunity of an alternative treatment (biologics) which is said to have a success rate of 70% controlling psoriasis and the progression of joint damage. That treatment was prohibitively expensive, but it would have been administered on a trial basis at no cost. The respondent did not pursue it.
- [21] The judge took the view that, given the deterioration in his condition by the spring of 2007, the respondent should within perhaps six months have commenced the treatment Dr. Hong recommended rather than waiting as he did another year and a half to do so. He also found the respondent's failure to address his worsening skin condition in the fall of 2006 with further treatment at the Willow clinic (having had no treatment since January of that year) made a "significant contribution to the mix of stressors that was exacerbating both his skin and joint condition".
- [22] With respect to the first year and a half following the accident, to April 2007, the judge said:
- [203] Since his condition responded to light therapy in January of 2006 and did improve to some extent in the summer of 2006, I find it was certainly reasonable for the plaintiff to refuse to undergo the medications for at least a year and a half. In making this finding I note that phototherapy was still being presented to him as a treatment option (albeit his physicians considered methotrexate/biologics the best choice), and also note his increasingly fragile psychological state. Until that point, I cannot find that the risk-benefit equation obligated him to take medications, especially if his physicians did not fully and clearly explain the risk/benefit equation to him in the way that the plaintiff says (and I accept) Dr. Gladman did in January 2009.
- [23] With respect to the next six months, to October 2007, the judge considered the plaintiff's accident-induced psychological state substantially inhibited his capacity to make a rational decision. He said:

There came an earlier point [earlier than January 2009] however, when it should have been sufficiently obvious to the plaintiff that his disease was changing, and that the risk-benefit equation he was facing was now very different from what it had been before the accident; he could no longer just cope with his symptoms and expect them to improve. This should have at least begun to be apparent to him by [October] 2007, when Dr. Hong offered the plaintiff an opportunity to participate in the free trial of a new form of biologics. The plaintiff declined then, citing having to cope with too many other problems then, and I note again his fragile

psychological state.

[204] I accept witnesses' testimony about the plaintiff's state of mind and also the fact that Dr. Gladman's forceful advice left a strong impression on him. But I remain unable to find that he was justified in waiting that long to commence treatment, especially considering that his increasingly fragile psychological state was in considerable measure related to his failure to follow earlier treatment advice. In my view, Janiak and Elalloway [Elalloway v. Boomars (1968), 69 D.L.R. (2d) 605 (B.C.S.C.)] lends support to making some allowance for the plaintiff's accident-induced psychological state where it substantially inhibited his capacity to make the rational decision, as was the case here; only to the extent the evidence justifies, and bearing in mind that his duty to mitigate is a positive one owed to the defendant. In this case, I find that allowance can be made for the effect of the plaintiff's accident-induced psychological state on his capacity only to the extent that it excuses some further delays in coming to the decision he ultimately made - a decision that in itself demonstrated that Dr. Gladman was able to reason with the plaintiff; he was ultimately capable of weighing the risks and benefits even though he was in a fragile psychological state then too. Dr. Hong may have explained the risks and benefits in a less forceful way, but he impressed me as a caring and insightful dermatologist who was genuinely concerned about the plaintiff's well being. I find the principles laid out in Janiak, and the evidence, support a finding that within six months or so of the plaintiff's April 2007 discussion with Dr. Hong, he should have commenced a medication treatment regimen. This will enter accordingly into my assessment of what is a fair reduction in damages.

[24] The judge reasoned he could make the six-month allowance he did in the respondent's favour following Dr. Hong's recommendation in April 2007 based on the legal analysis he undertook, quoting from Janiak. He said:

[193] The difficulty in this case lies in the fact the plaintiff sincerely held strong negative views about taking medications in general and methotrexate in particular. His negative views about the potential ill-effects of methotrexate were fuelled in part by his own misleading internet research. In the circumstances of this case, there is no question that based on a pure objective test, the plaintiff ought to have followed his doctors' advice. Likewise, if that were all that needed to be considered, the correct result again is obvious because in Canada the law does not excuse objectively unreasonable choices, so long as the plaintiff has the requisite capacity to make them. Janiak v. Ippolito, [1985] 1 S.C.R. 146, is the foundational case for the law of mitigation in Canada. Wilson J., speaking for the court explains:

24 Non-pathological but distinctive subjective attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision.

[194] Wilson J. refers to Morgan v. T. Wallis Ltd., [1974] 1 Lloyd's rep. 165 at p. 170 to explain the overarching test regarding mitigation:

...I must apply the objective test, in this sense, would a reasonable man in all the circumstances, receiving the advice which the plaintiff did receive, have refused the operation? I think this question must be considered as at the times when his decision was made and on the basis of the advice he then received...

[195] Another way of putting this is whether the reasonable person would refuse the treatment when faced with the risk-benefit equation before them at the time they are making the decision? The Court in Janiak summarizes the relevant consideration at paragraph 31:

31. In making his finding as to the reasonableness or otherwise of a refusal of medical treatment, the trier of fact will also, of course, take into consideration the degree of risk to the plaintiff from the surgery ..., the gravity of the consequences of refusing it ..., and the potential benefits to be derived from it ...

[196] However, the case becomes less obvious when accident-induced injuries take away the capacity to make the objectively rational decision. If the plaintiff's capacity is reduced completely, that is a straightforward case - but less so when accident-induced injuries have substantially inhibited, though not completely removed the plaintiff's capacity to think through rationally the risks and benefits of recommended treatment.

[25] The judge then quoted further from Janiak to support the proposition that where it is the accident itself that impairs a plaintiff's ability to make a reasonable decision about treatment, it would appear unjust to limit his recovery because he failed to mitigate the loss claimed. The judge then said:

[199] Canadian law rejects the wholly subjective analytical approach of U.S. law. Janiak however leaves the door open to a modified subjective approach where the plaintiff's decision-making capacity has been less than wholly incapacitated by accident-induced injuries. Where it is found on the evidence that the effect of accident induced injuries has been to inhibit substantially the plaintiff's capacity to make the objectively reasonable choice, Janiak, in my view, leaves it open to the trier of fact to take that commensurately into account in assessing the degree to which damages should be reduced.

[26] I agree that if, by virtue of the injury sustained in an accident, a plaintiff is unable to make a reasonable decision about treatment, the plaintiff is in no different position with respect to mitigating the loss suffered than would be the case if, for other reasons unrelated to the accident, the plaintiff's capacity to make reasonable decisions about treatment was lacking. But I cannot accept that means the law prescribes a subjective test, modified or otherwise. Janiak is clear; the test is objective. I consider that if a plaintiff had the capacity to make the decision about treatment it is said ought to have been made, and the advice was sound, the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment. If, through no fault of his own, the plaintiff did not have the capacity to make the decision, or the advice was not sound, the question would not arise.

- [27] It is not simply a matter of a plaintiff having to follow the advice given in order to mitigate the loss claimed, as the judge appears to suggest at the outset of his legal analysis; rather, it is a matter of considering what a reasonable recipient of such advice would be expected to do in the circumstances having regard for the nature of the advice and any explanation of the risks and benefits given.
- [28] That said, I see no basis to interfere with the judge's finding that the respondent could not reasonably have been expected to commence the recommended course of treatment before the spring of 2007 following the deterioration in his condition in the fall of 2006. No question of any subjective consideration arises. It was for the judge to assess what was reasonable - what would be expected of a reasonable person in the circumstances - and it is not plain that he made any factual error in that regard such as would warrant the intervention of an appellate court.
- [29] If, as appears to me, the judge found the respondent did not have the capacity to make a rational decision with respect to commencing the recommended treatment during the following six months, there is no basis to interfere with his conclusion. If, however, it could be said the respondent had the capacity to make the necessary decision that a reasonable person would in the circumstances have made to take the recommended medication, there would be no justification for him not having done so. But even if that were the case, it would not, in my view, work any real difference in the mitigation percentages the judge applied to his awards for non-pecuniary loss and past wage loss, particularly when the treatment was said to carry no more than a 50% rate of success.

Damages Assessment

- [30] The judge awarded the respondent \$120,000 for his non-pecuniary loss, \$108,500 (less some income he earned to be calculated by counsel) for past wage loss, \$275,000 for loss of earning capacity, special damages to be calculated, and \$2,000 for future counselling costs.
- [31] The defendants contend the awards are to some extent inordinately high but, for the most part, their contention rests on one or both of the first two grounds of their appeal succeeding. They do contend the judge failed to take into account the possibility that the respondent's psoriasis would have worsened and his psoriatic arthritis would have become symptomatic in any event. They also contend that the judge failed to consider the respondent's condition may be expected to improve with the treatment he commenced shortly before the trial. But, as noted, the judge specifically said he was taking the treatment into account in his award for the respondent's lost earning capacity and there is no reason to consider he did not do the same in respect of his award for non-pecuniary loss. Further, there is nothing in the amount of the awards to suggest the judge did not take into account what the respondent's life may have been had he not been injured in the accident in a way that aggravated the disease he had to the extent it did.

[32] On the view I take of the first two grounds of appeal, I see no basis on which to interfere with the judge's award of damages.

Disposition

[33] I would dismiss the appeal.

"The Honourable Mr. Justice Lowry'

I agree:

"The Honourable Madam Justice Levine'

I agree:

"The Honourable Mr. Justice Frankel'

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