

CANADA / JUDGMENT

Fanjoy v. Keller

[1974] SCR 315

COURT

Supreme Court of Canada

DECIDED

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Fanjoy v. Keller

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Date

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Report

[1974] SCR 315

Judges

Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

New Brunswick

Subjects

Torts

Decision Content

Supreme Court of Canada

Fanjoy v. Keller, [1974] S.C.R. 315

Date: 1973-05-07

Roy W. Fanjoy (Plaintiff) Appellant;

and

Ronald Keller (Defendant) Respondent.

1973: February 7, 8; 1973: May 7.

Present: Judson, Ritchie, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Damages—Personal injuries—Medical doctor suffering whiplash in collision between motor vehicles—Damages awarded to doctor reduced by appellate Court—Errors in principle—Judgment at trial restored.

The appellant, a 50-year-old medical doctor who specialized in otolaryngology, was involved in a motor vehicle accident in which the vehicle he was driving was struck from behind by a vehicle driven by the respondent. The appellant suffered personal injuries which were diagnosed as severe flexion extension injury, more commonly called whiplash. The trial judge held that the collision was solely due to the negligence of the respondent and that finding was not challenged either in the Appeal Division of the Supreme Court of New Brunswick or in this Court. The trial judge awarded to the appellant general damages in the sum of \$25,000 and special damages in the amount of \$8,015 including an amount of \$7,861 for loss of income during the period up to the time of trial. The Appeal Division reduced the award for general damages to \$12,000 and the award for loss of income to \$5,000.

Held (Judson and Ritchie JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Spence, Pigeon and Laskin JJ.: The reduction of the award of general damages to \$12,000 was unreasonable having regard to all of the evidence. Contrary to the opinion of the Court below, the symptoms disclosed by the appellant were not subjective. Also, there was no justification for the fixing of an amount of damages in this particular case which would bring it more in line with “comparable cases”, and to attempt to do so was an error in principle. This was not ordinary whiplash but was a very disabling injury which had already persisted for three years and might continue for another two or three years. The injury was suffered by a man who was engaged in a highly skilled profession and the exercise of the skills in that profession required him to engage in movements which were made most difficult and sometimes impossible by the disability which he suffered. The appellant was at the very zenith of his professional life when the accident occurred and was prevented from engaging in the most lucrative part of his professional practice for six years, so that he would have only a short time remaining in which he might reap the fruits of his skill.

As to the award of special damages for loss of income, it was the trial judge’s task to estimate this loss and make the award accordingly. He properly carried out his duties and made due allowance for the indefinite nature of the proof when he allowed the loss of income of \$7,861.

Per Judson and Ritchie JJ., dissenting: The Court below did not apply any wrong principle of law nor did it misapprehend the evidence. Therefore, applying the reasoning contained in the unanimous judgments in *Pratt v. Beaman*, [1930] S.C.R. 284, and *Widrig v. Stazer et al.*, [1964] S.C.R. 376, this appeal should be dismissed.

[*Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*, [1966] S.C.R. 13; *Stannard and Blouin v. Kidner*, [1973] S.C.R. 493; *Hood v. Hood*, [1972] S.C.R. 244, referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], allowing an appeal from a judgment of Prescott J. Appeal allowed, Judson and Ritchie JJ. dissenting.

E.N. McKelvey, Q.C., for the plaintiff, appellant.

J.T. Jones, Q.C., for the defendant, respondent.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (dissenting)—I have had the benefit of reading the reasons for judgment of Mr. Justice Spence and Mr. Justice Laskin, but in my view this appeal is governed by the reasoning contained in the unanimous judgment rendered by Anglin J., (as he then was) in *Pratt v. Beaman*[2], at p. 287.

This reasoning was approved in the unanimous judgment given by Hall J. in *Widrig v. Strazer et al.* [3], at pp. 388 and 389 where he said:

Unless there was error of principle on the part of the Court of Appeal, this Court will not interfere with an amount allowed for damages by the court of last resort in a province. I adopt what Cartwright J., speaking for himself and Taschereau J. (as he then was) said in *Lang and Joseph v. Pollard and Murphy*.

Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beaman* [1930] S.C.R. 284 at 287:

The second ground of appeal is that the damages allowed for pain and suffering by the trial judge, \$1,500, should not have been reduced, as they were on appeal, to \$500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.*, [1941] S.C.R. 384 at 387.

The principle appears to me to be equally applicable whether the first appellate Court has increased or decreased the general damages awarded at the trial.

This passage was also adopted by Spence J., speaking for the majority of the Court in *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[4], at p. 18, and in the case of *Stannard and Blouin v. Kidner*[5], to which reference has been made in the reasons for judgment of my brother Spence.

The reasons for judgment rendered by Bugold J.A., on behalf of the Appeal Division of the Supreme Court of New Brunswick in the present case, in my view, reflect a careful consideration of the evidence, and as I am unable to find that any wrong principle of law was applied or that the evidence was misapprehended, I would not interfere with the assessment reached in that Court and would therefore dismiss this appeal with costs.

The judgment of Spence and Pigeon JJ. was delivered by

SPENCE J.—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on June 9, 1972, whereby that Court allowed an appeal from the judgment of Prescott J. of the Queen's Bench Division, given after trial and pronounced on October 26, 1971. The appellant and Mary I. Fanjoy, his wife, in an action in the Supreme Court of New Brunswick, claimed damages against the respondent for personal injuries sustained by the appellant and for damages to the automobile owned by his wife, which were caused in a collision between the automobile driven by the appellant and another vehicle driven by the respondent. Prescott J., after trial, held that the collision was solely due to the negligence of the respondent and that finding has not been challenged either in the Appeal Division of the Supreme Court of New Brunswick or in this Court. Prescott J. allowed the plaintiff, Mary I. Fanjoy, damages in the amount of \$932.79 and the amount of that award has not been further questioned. The learned trial judge awarded to the plaintiff general damages in the sum of \$25,000 and special damages in the amount of \$8,015 including an amount of \$7,861 for loss of income during the period up to the time of the trial. Both the appellant and the respondent appealed from that judgment to the Appeal Division of the Supreme Court of New Brunswick and by the judgment of that Court the award in favour of the appellant for general damages was reduced from \$25,000 to \$12,000 and the award for loss of income to which I have referred above was reduced to \$5,000. Bugold J.A. would have stricken out any award for loss of income. In the appeal to this Court we are concerned only with these last two items, the amount of the award for general damages and for loss of income. The respondent cross-appealed and asked that any award for loss of income be stricken out as Bugold J.A., in his reasons given in the Appeal Division in the Supreme Court of New Brunswick, would have done.

The appellant was driving in the City of Saint John on March 6, 1968, when his vehicle was struck from behind by the vehicle driven by the respondent and he was thrown backwards by the impact. The appellant suffered personal injuries which were diagnosed as severe flexion extension injury, more commonly called whiplash. Although the appellant suffered but little pain immediately following the accident, by the next day his neck had become massively swollen and

was very painful. The appellant was a medical doctor specializing in otolaryngology and at the time of the accident was fifty years of age. A colleague of the appellant, Dr. G.W.A. Keddy, advised the appellant in a telephone conversation to remain at home and apply hot compresses and the next day the appellant attended the hospital and was examined by Dr. Keddy, who caused x-rays to be taken. These x-rays revealed no bony damage whatsoever so the appellant remained at home for about a week to permit the swelling to subside. The appellant then returned to carrying out his ordinary professional duties wearing a cervical collar, also on Dr. Keddy's recommendation. The appellant found that the recurrence of pain to a very considerable degree prevented his continuance at his work and after two weeks was forced to again rest at home for a period of three weeks. During the whole of this time and in fact until November of 1968, the appellant found it necessary to wear the cervical collar, even when he was sleeping and during the whole of that period the appellant also took physiotherapy treatments for the first three weeks in the Saint John General Hospital and thereafter at least once a day and often twice a day in his own home. Upon returning to professional duties, the appellant curtailed the amount of work which he attempted to do because of the pain caused by the movements necessary for such work. It must be remembered that the appellant as an otolaryngologist was required to examine patients by placing himself in a position which entailed the twisting of his head, neck and shoulder in such a fashion as would inevitably aggravate the whiplash injury. The appellant had during the period prior to the accident developed a facility for the performance of certain operations and described these operations as being a sub-specialty of his. They were chiefly three in number, the first, an operation to treat a condition marked by a paralyzed face entailing the decompression or grafting of the facial nerve. The second was an operation for cancer of the larynx in which the voice box was removed. The third was the treatment of fractures of the facial bones. These three operative procedures were amongst the most lucrative carried out in the practice of otolaryngology and the appellant testified that he was being called upon to perform them upon patients referred to him from many other municipalities throughout New Brunswick. The appellant further testified that since the accident and up to the time of the trial he had not been able to perform any of those three operations because the particular movements required in the work to be done on any one of the three caused such pain as prevented his performing them. There is no doubt that for the whole of the first year following the accident, the appellant suffered gross discomfort and limitation of action and that as a result, his income was very considerably reduced. I shall refer later to that factor and am now chiefly concerned with the question of general damages. By the end of the first year after the accident, that is about March 1, 1969, the appellant's income from his profession had returned to the same level as that prior to the accident. It must however, be understood that this fact does not indicate that at the end of that year after the accident the appellant had recovered from the effects thereof. The appellant's evidence was that he continued to suffer throughout the time. As I have pointed out, there were three types of operations which the appellant could not perform and his performance of the other parts of his professional duties was accompanied by well-nigh continuous pain since they required movements which aggravated the whiplash injury. His testimony was that it took him twice as long to do the same number of cases in his office as had been required before and remarked:

It really aches and pains if you put in a long day where you are bending over. Now this applies to even writing where you have a lot of forms to sign and so on; you do a whole lot at once and you have to bend over. This bothers me.

and further:

Q. What effect do your injuries now have with respect to your medical practice, Doctor?

A. I feel that this injury is definitely limiting me in my practice today for this reason—I am trying to cut down my work so I am not going to be overloaded and more particularly so as not to be sore in the neck and arm afterwards. In this case the guide line for the amount of work I do—this applies to both office and operating—is how much can I do without getting pain in my neck and in my shoulder? For this reason I limit my practice down and also I limit the time that I spend because I haven't—if I take a long day, some days you are kind of forced into making a little longer day—and most of those days I am much more sore than usual and the next day maybe I will cut down so as to have a period of rest.

Q. Are the limitations you now suffer the same limitations you describe with respect to the early part of the period?

A. I would say my limitations now are about the same as before with one exception, in August of '69 I had a coronary and looking back on this myself I am distinctly worse following that as far as the shoulder and neck is concerned than I was before after I went home from the hospital and in the latter part of November, I would say.

The carrying on of his work with these difficulties continued until August 31, 1969, when the appellant suffered a massive coronary to which he referred in the evidence I have quoted. That illness completely incapacitated the appellant until about May of 1970. The appellant has submitted both in the Courts below and in this Court that the coronary attack was a result of the injury which he received in the collision and that the damages awarded should include those damages which resulted from the coronary attack. Both Courts below have held that the causal connection between the coronary attack and the accident had not been proved and refused to allow either general damages or special damages including loss of income for this period from September 1, 1969, to May of 1970.

Despite the able argument of counsel for the appellant, I have not been convinced that this view as taken by the Courts below was in any error and I am not ready to allow either special or general damages to cover the period when the appellant had suffered and was recovering from the coronary attack. That period, however, ended as I have said by May 1970 and from that date until the trial which took place on June 8, 1971, the appellant had continued to practise his profession but had done so in a fashion limited by two factors, firstly, the continuing disability resulting from the whiplash; and secondly, the necessity of a post-coronary patient conserving his strength and avoiding over-exertion. It is of course most difficult to assign any percentage to the one cause or the other. They have both affected the appellant. The appellant consulted, in addition to Dr. Keddy, orthopaedic specialist to whom I have referred above, Dr. Keith B.

Seamans, a neurologist, who also testified on the appellant's behalf. At the time of the trial, Dr. Seamans testified:

Q. As a result of the examinations of Dr. Fanjoy, Dr. Seamans, could you express an opinion as to any disability Dr. Fanjoy has suffered or is suffering at the present time?

A. I think he is suffering moderate disability for head movements and for shoulder movements, which in turn causes some disability peripherally in the way of coordination of movements and so on.

Q. What particular note did you take with respect to his left arm or shoulder?

A. At the present time?

Q. Yes, and through the examination.

A. As I pointed out, he had no reflex change, no sensory deficit and no striking muscle waste. He does have some apparent weakness in the left deltoid muscle between the shoulder and the arm, but I thought this was more due to problem in the joint itself rather than anything neurological.

Q. The symptoms that you noticed from examining Dr. Fanjoy last week, Doctor, are they essentially unchanged from what you noticed when you first examined him in March 1968?

A. Correct.

Q. What effect would this disability have on Dr. Fanjoy's medical practice?

A. I think in his particular type of work the limitation of movement both of head and left shoulder would make it difficult to do such procedure as bronchoscopic examination in his particular type of work.

Q. Are you talking about specialized type of operations?

A. Yes, and examinations.

Dr. Keddy, giving evidence as to the condition of the appellant on the morning of the trial, testified:

THE COURT: When did you last examine him, Doctor?

A. Well, actually this morning, here.

Q. Would you please describe what you found in this examination this morning?

A. Yes. His general symptoms today are limited movements of his neck in rotation and flexion and extension. He is unable to look up without difficulty and without pain. The swelling in his neck and muscles has of course subsided. The shoulder movements are still limited. He is unable to abduct his shoulder above the horizontal without—

Q. Excuse me, what do you mean by "abduct"?

A. Bringing his arm out from the side of his body, that is the left arm, although he has a trick movement he can pull it forward and then get it above his head, but his shoulder muscles are very weak. The forearm muscles and hand muscles are all right. The right shoulder is normal. That clinically is as far as I can say.

Q. In what posture did you notice Dr. Fanjoy carried himself?

A. The head is bent forward slightly as he moves and when he rotates his neck, his shoulder and neck moves in one piece.

Q. Is this the result of the whiplash?

A. I would say so.

Q. From your examinations of Dr. Fanjoy and the description you gave was of the flexion extension injury, could you express an opinion at this time as to any disability that Dr. Fanjoy suffered or is now suffering as a result of this flexion extension injury?

A. Well, I would just say that his condition is certainly prolonged and there are one or two factors which have entered into the case that might be accountable for the prolongation. They are so-called hearsay so I can't mention them. In my opinion he has really had a very severe type of injury. In my experience men and women both have whiplash injuries. The musculature of a man is usually stronger than the musculature of a woman, and the muscles take the brunt of this type of injury. Usually a woman's symptoms last twice as long as a man's symptoms, but with men they can last for years and sometimes can remain without any subsequent troubles developing.

Q. Could you be more definitive, Doctor, as to the word you used—prolonged—what would you say of Dr. Fanjoy's present condition—how long will that continue?

A. I do not know how long it will continue but as things are going I would expect it to be another two or three years. It has already been approximately two years since his injury. The subsequent history of course is also to be taken into account but he does not get younger and as time goes on he may have later little further developments. Again, I know but I must not say what the present x-ray report shows.

Q. We will cover that with subsequent evidence, Doctor. What effect would you say, Doctor, that this injury that Dr. Fanjoy has, this disability he now has, would have on his practice as a medical practitioner?

A. Oh, definite limitation. Oh, no, he is unable to do the type of work he was doing before the accident. His type of work requires use of hands, fingers and shoulders, neck muscles, and movement of his head—all these are definitely limited.

It is noted that Dr. Keddy expected the appellant's condition to continue for two or three years after the trial. That trial took place three years and three months after the accident, so it was Dr. Keddy's opinion that the appellant would continue to suffer disability as a result of the accident for about six years after it had occurred. Dr. Keddy described the injury as a very severe type of

injury and so any inclination to regard the appellant's injuries as merely an ordinary kind of whiplash must be avoided. As I have said, the appellant was 50 years of age at the time of the accident. He will therefore be about 56 years of age when, according to Dr. Keddy's expectation, he will have recovered fully from his injury. A surgeon will normally expect to do but little surgery after he is 60 years of age; moreover, the appellant will have not had an opportunity to practise what he referred to as his sub-specialty, these three difficult and lucrative operations, for six years. In the meantime, those physicians throughout New Brunswick who had become accustomed to referring patients to the appellant for any of these three operations, will have turned elsewhere. The appellant, even when he has fully recovered from his injuries, will have difficulty in doing that part of his practice, both from the point of view of the lack of patients referred and from the point of view of the re-acquiring of the necessary skills. These are elements which require that the compensation awarded for the appellant's injuries should be adequate.

As Prescott J. pointed out, there has also been interference with the appellant's ordinary enjoyment of life, not only due to the pain which, even at the time of the trial, would seem to have still been a very considerable element, but also in preventing him being able to indulge in forms of recreation which he had previously enjoyed. The appellant was unable to curl, was unable to drive or even harness his own horses, which he kept for racing, was unable to hunt and even found driving an automobile a considerable distance to be so uncomfortable that it no longer provided recreation. On considering all of this evidence, Prescott J. at trial, awarded general damages in the amount of \$25,000. In the Appeal Division the chief reasons as to general damages were given by Bugold J.A. The learned Justice of Appeal quoted Dr. Keddy as saying he did not honestly know but would judge that muscular damage would heal around a month or a month and a half. Despite that, Dr. Keddy's evidence was that he would expect the appellant's disability to continue for two or three years. Bugold J. A. continued: He expected Dr. Fanjoy's symptoms which were subjective would continue another two or three years.

(the italics are my own)

and concluded:

In the circumstances I think the award of \$25,000 to the plaintiff, Dr. Fanjoy, for general damages is inordinately high. I would reduce the award to \$12,000.

Hughes J.A. (as he then was) in his reasons concurred with that of Bugold J.A. in so far as general damages were concerned and remarked:

I have had the privilege of reading the reasons for judgment prepared by my brother Bugold and concur in his conclusion that the award of \$25,000 for general damages is inordinately high for a whiplash injury of the kind suffered by Dr. Fanjoy and should be reduced to \$12,000 to bring it more nearly in line with awards made in comparable cases.

It was said in *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[6], at p. 18:

To summarize the jurisprudence established by this Court, this Court will not vary damages adjudged by the Court of Appeal of a province which had varied those assessed by the trial judge “except in the most exceptional circumstances” and it would further appear that the so-called exceptional circumstances are those where this Court is of the opinion that the Court of Appeal had committed an error in principle.

In a very late judgment delivered only on January 31, 1973, Ritchie J.A. said in *Stannard and Blouin v. Kidner*[7]:

In my view these cases clearly indicate that when the appeal is from a judgment of a provincial appellate court which has the effect of either increasing or decreasing the assessment of damages made by a trial judge, this Court will only interfere if it is satisfied that the Court appealed from has acted on some wrong principle of law or that its award is unreasonable, having regard to the evidence and then it will be slow to act on the latter ground and will do so only under exceptional circumstances.

I am of the opinion that in this appeal the reasons for judgment delivered by the learned judges in the Appeal Division of the Supreme Court of New Brunswick indicate errors in principle and that the reduction of the award to \$12,000 was unreasonable having regard to all of the evidence. Firstly, Bugold J.A. regarded the symptoms disclosed by the appellant as being subjective. Those symptoms were not subjective in that their existence was fully verified in the expert testimony given by Dr. Keddy, the orthopaedic surgeon, and Dr. Seamans, the neurologist. Secondly, Hughes J.A. (as he then was) agreed with a reduction to \$12,000 “to bring it more nearly in line with awards made in comparable cases.” No comparable cases were cited in the judgment and it is my reluctant conclusion that the learned Justices of Appeal simply regarded the appellant’s injury as an ordinary kind of whiplash. There can be no exact alignment of the awards necessary to compensate plaintiffs in these personal injury cases. Each case must stand on its own feet and be determined upon the evidence given in the particular case. The evidence in this case showed that this was not ordinary whiplash but was a very disabling injury which had already persisted for three years and which the orthopaedic surgeon thought might continue for another two or three years. The injury was suffered by a man who was engaged in a highly skilled profession and the exercise of the skills in that profession required him to engage in movements which were made most difficult and sometimes impossible by the disability which he suffered. The appellant, as I have pointed out, was at the very zenith of his professional life when the accident occurred and will have been prevented from engaging in the most lucrative part of his professional practice for six years, so that he will only have a short time remaining in which he may reap the fruits of his skill. Therefore, there can be no justification for the fixing of an amount of damages in this particular case which will bring it more in line with “comparable cases”, and to attempt to do so is an error in principle. It must also be remembered that although the trial took place on June 8, 1971, no award for loss of income had been made for the period between March 1, 1969, and that date. During part of that time it is true that the appellant was suffering the after effects of the coronary attack, but during a part of it he was earning the income which he had earned prior to the accident but with very considerable difficulty and pain and during part of it he was unable to

carry on his duties fully and particularly unable to perform the operations to which I have referred. Under these circumstances I am of the opinion that the award made by the learned trial judge, which took into account these factors, was not so inordinately high as would justify the appellate Court reducing it, and that to do so was unreasonable. I would therefore restore the award of \$25,000 for general damages made by the learned trial judge.

I turn now to the consideration of the question of the award of special damages for loss of income. That award as I have said was made by the trial judge in the amount of \$7,861; the majority of the Appeal Division reduced it to \$5,000 and Bugold J.A. would have stricken out any such award. There was criticism throughout by the trial and appeal judges of the method used by the appellant to prove this loss of income. The appellant called in the aid of one G.A. Oulton, a chartered accountant practising with the firm of Thorne, Gunn, Helliwell & Christenson, and a partner in that firm. Oulton testified that he went over the diaries kept by the appellant for the years 1966 and following and that he prepared therefrom a schedule of the professional services performed by the appellant in each of the years from 1966 through to 1970. Mr. Oulton testified that after consulting Dr. Fanjoy he applied to this listing of work the fee schedule approved by the Provincial Medical Association in the year 1970 and thereby determined what would have been the appellant's income in each of the years 1966 to 1970. As the Courts below have pointed out, this was an unusual method of proving loss of income. In the first place, it made no allowance whatsoever for services performed for which no account was rendered. In the second place, it made no allowance whatsoever for failure to collect accounts for work which had been performed and billed but not paid, and thirdly, it applied to work performed in the years 1966 to 1969 inclusive, a schedule of fees created in the year 1970, which was higher, although not much higher, than the schedule of fees applicable for those years. Mr. Oulton quite frankly admitted that one of the reasons he had used the 1970 schedule was an attempt to make allowance for what he felt was the inevitable inflation. I am of the opinion, as were the members of the Courts below, that such a course was not within the province of an expert witness to adopt. Mr. Oulton gave evidence explaining the reason why he chose what would appear to have been an unusual method of proving loss of income. He pointed out that all of the appellant's records were on a straight cash basis, that income tax returns simply showed the gross receipt during the period covered by such return and that those receipts might have been applicable to services performed and billed in the preceding year while many of the services performed during the year to which the return applied would not be paid during that year and would therefore not appear in the income tax return and would only be reflected in the next one. It was Mr. Oulton's opinion that it would be difficult if not impossible to put a claim forward based on cash receipts. Bugold J.A. giving reasons in the Appeal Division of the Supreme Court of New Brunswick said: This amount [\$7,861] would be in excess of the actual loss for this period. An allowance would have to be made for the increased fees structure which was used and a further allowance for bad debts. The plaintiff led no evidence to show what these allowances would in fact have been.

Although it is true that the plaintiff could give no sum to cover the increase in the fee structure or an allowance for bad debts, Mr. Oulton did give evidence that the difference between the 1970 schedule and the schedule which had been in effect in the previous years was small and that he had glanced at the income tax reports and measured totals for income shown on those reports against the figures which he had set up "and they were very close." The Court addressed a question to Mr. Oulton:

Q. So then the doctor got paid for practically all the services that he performed?

A. Yes, not too far off, but it is hard to judge exactly because as I say, receipts come in at different times than the money is earned. I approached the assignment from the point of view of when it was earned rather than when it was received.

Because of the defects in the method used by Mr. Oulton, the learned trial judge said in his reasons:

The method used by the plaintiff to show his loss of income was, to me, not a very satisfactory one. However, I am going to accept it, in spite of the fact that no consideration was given concerning the percentage of fees collected nor with respect to the change in fee schedule.

The evidence of Mr. Oulton was that the appellant's income from March 1, 1966, to February 28, 1967, was on his calculation, \$52,202 and from March 1, 1967, to February 28, 1968, was \$47,519. The total income therefore for the two years was \$99,721, an average of \$49,860 per year. If the pre-injury income were to be considered in order to determine the difference between the annual income before and after the accident, it would seemingly be proper that the income for the year immediately preceding the accident should not alone be regarded. It might be that a professional man would have a very profitable year or a very unprofitable year immediately preceding the accident and the income for that year would not be a true gauge of the loss of income occurring in the year following the accident were the latter a normal year. So if the two years before the accident were considered as I have pointed out they give an average annual income of \$49,860 and the income from March 1, 1968, to February 28, 1969, that is the year following the accident, was only \$39,658. So on that basis of figuring, the appellant would have lost income in that year due to the accident in the amount of \$10,202. The learned trial judge however only considered the difference in income between the \$47,519 as stated by the witness, Mr. Oulton, for the period March 1, 1967, to February 28, 1968, and deducted from that the income earned in the year after the accident to arrive at an income loss of only \$7,861 which is \$2,341 less than he would have arrived at had he accepted Oulton's use of the two years prior to the accident as being the comparable figure. This is a discount of \$2,341 and in view of Oulton's evidence that the income tax figures were very close to the result of his calculation, and that the difference between the 1970 schedule and that in effect in previous years was small, I am of the opinion that such a discount was a proper allowance for the uncertainties in proof which the learned trial judge had in his view and which I have mentioned above. The majority of the Court of Appeal would reduce the loss of income award to \$5,000 which would make a further discount of \$2,861 and would discount the income as calculated by Mr. Oulton averaging the two years

before the accident by a total of \$5,202, a little over 50 per cent of the difference in income which his calculations indicated was due to the injury. In my opinion that is much too high a discount to cover uncollected accounts and the difference between the 1970 fee schedule and its predecessor. I am of the opinion that the learned trial judge properly carried out his duties and made due allowance for the indefinite nature of the proof when he allowed the loss of income of only \$7,861. Kemp and Kemp in *The Quantum of Damages*, 3rd ed., vol. 1, p. 21 notes:

In the case of a self-employed or professional man, [and this appellant is in such class] whose earnings fluctuate, the court will have to estimate this loss and make an award of damages in respect of it.

The learned trial judge assumed and discharged this task.

I therefore am, with respect, of the opinion that the learned Justices of Appeal did not apprehend the factors which had moved the learned trial judge to fix the special damages for loss of income at only \$7,861. It must be remembered that the trial took place in June of 1971 and that the appellant, through the witness, Mr. Oulton, was then attempting to persuade the Court that loss of income up to that time amounted to \$55,025 so certainly the learned trial judge was far from accepting any calculation used by Mr. Oulton, and used that calculation only in a limited fashion to make allowance for the factors which in the Appeal Division were considered to have been forgotten. I therefore would allow the appeal as to special damages also and restore the trial judgment fixing the amount for such special damages due to loss of income at \$7,861. The appellant should be entitled to his costs throughout.

LASKIN J.—On damages, as on findings of fact, where the appellate Court has interfered with the decision of the trial judge, I would follow the principle which I expressed in my reasons in *Hood v. Hood*[8]; and hence, I would begin with an inquiry into whether there was any proper ground upon which the appellate Court was justified in interfering with the trial judge's conclusions. I agree with my brother Spence that in the present case the reasons for the appellate Court disclosed no proper ground for setting aside the trial judge's awards of general and special damages. I would accordingly dispose of the appeal as he proposes.

Appeal allowed with costs, JUDSON and RITCHIE JJ. dissenting.

Solicitors for the plaintiff, appellant: McKelvey, Macaulay, Machum & Fairweather, Saint John.

Solicitors for the defendant, respondent: Gilbert, McGloan, Gillis, Jones & Church, Saint John.

[1] (1972), 5 N.B.R. (2d) 46.

[2] [1930] S.C.R. 284.

[3] [1964] S.C.R. 376.

[4] [1966] S.C.R. 13.

[5] [1973] S.C.R. 493.

[6] [1966] S.C.R. 13.

[7] [1973] S.C.R. 493.

[8] [1972] S.C.R. 244.

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