

CANADA / JUDGMENT

Fitzgerald v. Tin

2003 BCSC 151

COURT

Supreme Court of British Columbia

DECIDED

29 January 2003

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Source record

2003BCSC0151

Citation:	Fitzgerald v. Tin and Yellow Cab
Date:	20030129 2003 BCSC 151
Docket:	S016557 Registry: VANCOUVER IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	GEORGINA SUSAN FITZGERALD PLAINTIFF
AND:	STEVEN TIN AND YELLOW CAB COMPANY LTD. DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BURNYEAT

Counsel for the Plaintiff

C.A. McTavish

Counsel for the Defendants

H.S. Grewal

Date and Place of Trial:

November 20 - 22, 2002

Vancouver, BC

- [1] Ms. Fitzgerald claims damages arising out of an incident on July 21, 2000 where she alleges she was pricked by a hypodermic needle when she was in the back seat of a taxicab owned by Yellow Cab Company Ltd. ("Yellow Cab") and driven by Mr. Steven Tin. Ms. Fitzgerald alleges that Mr. Tin failed to conduct a full inspection of the passenger portion of the taxicab to ensure that no hazardous materials were present and failed to take care for her safety while she was a passenger in the taxicab. Ms. Fitzgerald relies upon the provisions of the Motor Carrier Act, R.S.B.C. 1996, c. 315, the Occupiers' Liability Act, R.S.B.C. 1996, c. 337, By-Law No. 6066 of the City of Vancouver and the policies implemented by Yellow Cab relating to the operation of the taxicabs owned by them. Ms. Fitzgerald claims that, as a result of being pricked by the hypodermic needle, she has suffered some physical pain as well as ongoing permanent psychological damage.
- [2] In their defence, the Defendants deny that Ms. Fitzgerald was pricked by a hypodermic needle or that she suffered the injury and damages she alleges. In the alternative, the Defendants submit that any duty owed to Ms. Fitzgerald was met by the inspection methods which were put in place and which were followed by Mr. Tin regarding all taxicabs which were in use on the day of the alleged incident.

BACKGROUND

- [3] On the day in question, Ms. Fitzgerald and her daughter entered the taxi driven by Mr. Tin at approximately 9:08 p.m. so that they could be driven to a location close to where a friend worked where her friend could join them so that all three could then be driven to the friend's home where the friend had agreed to help Ms. Fitzgerald with her nails and hair.
- [4] When she and her daughter first entered the vehicle, Ms. Fitzgerald stated that her daughter entered the back seat of the taxi first, that she placed the middle seatbelt around her daughter, and that she then entered the taxicab and sat behind the driver. When her friend entered the taxi, the friend occupied the seat beside the daughter of Ms. Fitzgerald.
- [5] Mr. Tin testified that Ms. Fitzgerald was in the middle of the back seat and that her daughter was directly behind him. I reject that testimony. First, all witnesses testified that Ms. Fitzgerald and her daughter did not leave the taxi when they waited at the location until the friend entered the taxi. Second, the friend testified that Ms. Fitzgerald was sitting behind Mr. Tin and that her daughter was sitting in the middle. Third, it is improbable that Ms. Fitzgerald would have entered the taxi from the passenger side as Mr. Tin testified, then place her daughter immediately behind Mr. Tin and then sit in middle place on the seat. Fourth, it is unlikely that a shoulder seatbelt would have been chosen by Ms. Fitzgerald for her daughter rather than the seatbelt without shoulder attachment which was available in the middle place on the seat. A shoulder seatbelt suitable for adults would be unsuitable for a three-year-old child. I find that Ms. Fitzgerald was sitting behind Mr. Tin and that her daughter was sitting in the middle place on the seat throughout their ride that night.

- [6] After the friend joined Ms. Fitzgerald and her daughter in the taxi and as they were going to the friend's home, both Ms. Fitzgerald and her friend testified that Ms. Fitzgerald's daughter dropped a toy that she had been playing with and, in the words of Ms. Fitzgerald, "started to fuss". Ms. Fitzgerald testified that she and her friend looked for the toy, could not find it, she brought her daughter out of the seatbelt and put her onto her lap, that her friend found the toy, that after her daughter was placed back between them, her friend said "What's that?", Ms. Fitzgerald saw that her daughter had something in her hand and that she was about to put whatever she had in her hand into her mouth, that Ms. Fitzgerald grabbed the object, and that "it stuck" her at the base of the small finger of her left hand.
- [7] Ms. Fitzgerald testified that she recognized seconds afterwards that it was a syringe and that she then told Mr. Tin "instantly" that she had been poked with a needle. She testified that Mr. Tin asked her to put it on the floor so he would get it later, that she put it on the ground, that she used her cellphone to telephone her mother, her mother was upset and advised her to take the needle with her and go to a doctor, that her friend had a newspaper, that she wrapped the syringe in the newspaper after trying "to bend the tip of the syringe as I did not want to get stuck by it", that she phoned her mother again, that she phoned her doctor and left a message for him, that they then arrived at her friend's home, and that she took the syringe with her when she left the taxi.
- [8] The testimony of the friend of Ms. Fitzgerald is consistent with the testimony of Ms. Fitzgerald in these regards. The testimony of Mr. Tin is not. He does not recall being advised by Ms. Fitzgerald that she had been pricked by a needle. Although Mr. Tin is vague on much of what happened while Ms. Fitzgerald, her daughter and her friend were in the taxi, I note him as testifying that he did hear the word "needle" but other than that he could not hear what was being said.
- [9] Ms. Fitzgerald testified that she was very upset by this time and that she telephoned Yellow Cab to complain about the incident. A transcript of that telephone conversation was in evidence. Various conversations that Ms. Fitzgerald had with representatives of Yellow Cab were recorded. Unfortunately, there is no time or date noted in the transcripts. As well, not all conversations were recorded and, in particular, any conversation between Mr. Tin and his dispatcher was either not recorded or, if recorded, no transcript has been made available.
- [10] In what is described as "Conversation #1", the exchange between Ms. Fitzgerald ("F") and the dispatcher ("D") is transcribed as follows:

F: I got picked up at 31?? ???? And I was with my 2 ½ year old daughter. She dropped her toy and I bent down to pick it up and was stabbed in the hand with a syringe.

D: By?

F: A syringe in the cab.

D: By a driver?

F: No, no no, the needle was in the cab. And I reached down to grab my daughter's toy and it stabbed me in the hand.

D: Oh my god

F: In the Cab Door

D: Did you go to a Doctor right away? You going to a hospital right away?

F: No, I can't right now. I'm at my friend's house. But I have the needle with me.

D: Oh My God

F: But I just wanted to call you and let you know.

D: Did you tell the driver anything about it yet?

F: Yes I told him he (inaudible)

D: Well, the best thing to do always, always, no matter what the driver thinks or not, is to always to go the hospital ...(inaudible) or walk in clinic.

F: Yeah, well, its closed now and I was with my daughter and I ...but anyways I just wanted to let you know. I'm not trying to get anybody in trouble.

D: No, No, No, I'm glad you called. Would you like...to see a doctor by any chance.

F: No, that's okay. I'll take myself. I just wanted to let you know that it was on the floor? Of the cab and...my daughter was the one who reached for it.

F: I told him [the driver] and I said to him I just got stabbed by a needle

D: And what did he say?

F: He was like Oh, Oh ...Oh I guess it was one of my customers. I said the needle just stabbed mind [sic] in the hand. He goes oh show me where it is and I'll pick it up after we stop. But I picked it up...

D: OH right, go pick it up after you get dropped (sarcastic).

F: He said he would...show him where it was later and he would get it.

D: Yeah, right (sarcastic).

F: But my daughter was in the cab so I grabbed...

D: Oh, it doesn't work that way. The first thing (inaudible)...he asks the customer "would you like to go ...would you like me to take to you to the hospital or something like that". That's the first question we gotta ask. But anyway, give 'em a call tomorrow (inaudible) ...person will straighten the whole thing up for you.

- [11] After that discussion and after receiving the advice of her family doctor that she should go to the hospital, she and her friend and her daughter went to the hospital where Ms. Fitzgerald tested negative for Hepatitis B and C. Ms. Fitzgerald was at the hospital for about 5 hours, was injected three times, was given written materials regarding Hepatitis B and C as well as HIV, and was prescribed medication which required her to take 13 pills per day for 10 days. At trial, Ms. Fitzgerald testified that, after the visit to the hospital, "I was getting really scared".
- [12] Ms. Fitzgerald found it difficult to sleep that night and described the side effects from the medication she was given as causing "cramps, shakes, got really hot, then really cold, made me very irritable".
- [13] Ms. Fitzgerald ("F") spoke to a representative of Yellow Cab ("NM") the day after the incident and the transcript reflects the following:

F: ...It was then? In a Yellow Cab that my daughter picked up the needle inside the cab. And that's how I got poked. The needle was on the seat of the cab. And she grabbed it [inaudible] ...and I didn't know what she had her hand and I reached for it and was poked in the hand for it. And I needed...they told me to call back and talk to someone about it. . . .

F: Well...I don't know...To let you know that I am now at high risk for getting AIDS, Hepatitis... because of the needle in your cab.

NM: Well, I think its ahh...The Aids thing I wouldn't worry too much about. I think it's more of a problem with Hepatitis...

F: Actually, no...it's AIDS. I'm taking medication now for catching AIDS because it was a needle with drugs in it...I took the needle to the hospital...With me...Because the Cab driver wouldn't even take the god-damn needle out of his cab...he said just leave it there I'll get it later when you get out.

. . .

F: Please understand I don't mean to come across as rude but I'm actually ...quite scared.

NM: Mmm. Yeah, well. My understanding is that we've had drivers poked with needles before and that they found...and they've been told by [inaudible] people at St. Paul's and VGH and that, they're actually more concerned about Hepatitis than they do about contracting Aids because the Aids virus dissipates quite quickly after.

F: But when I went to the hospital they told me that that needle could have been put in there 2 minutes before I got into that Cab. They have no idea when that needle was put in there.

NM: Yeah, well, no of course.

F: That needle went right into my hand.

NM: Well where was the needle sitting. Where...where?

F: The needle was on the seat.

F: Well [inaudible]...I'm a paying customer...I should be getting into a Cab and be pricked by a needle and think it's their responsibility and make sure that if they have a shitty character in their cab...

[break in tape for approximately 7 seconds]. . . .

NM: Oh, I'm not doubting it. I'm not saying its not. I'm saying it that way at all. It's just unfortunately...Vancouver is a very big drug city... and that's the ...it's very unfortunately because as I say that it just runs rampant through the city. I mean I've walked down Granville Street at 33rd Ave and found and seen needles laying on the ground at 33rd and Granville on the West side of the city...SO I mean it seems to be everywhere now. It's a drug culture of Vancouver. It's very thick and there are a lot of people you know, and the public...[they are the public?] We do try and transport people from all walks of life and...unfortunately the drivers I mean they're taking a high volume of people and things...You know we've found needles underneath the seats...loose...whatever...unfortunately a lot of drug addicts are very irresponsible people...they're not umm.

[14] Ms. Fitzgerald sought treatment from her family doctor, Dr. Dubland, and was eventually given a prescription to calm her and to allow her to sleep. Subsequently, Ms. Fitzgerald has tested negative for the HIV virus. The final test took place approximately 7 months after the incident. Ms. Fitzgerald was hesitant to have the final test done and, accordingly, the final test which could have been given approximately six months after the accident was slightly delayed.

[15] Despite receiving assurances from her doctor that she did not contract Hepatitis A or B or the HIV virus, Ms. Fitzgerald testified that she remains very much affected by the incident. First, she says that the incident resulted in the break-up of her relationship with her fiancé. She stated that the reason they had split up was that he wanted more children, and that she was frightened that if she got pregnant she might infect him and any children. Second, she stated that the incident continues to cause her insomnia. Third, the incident and the continuing fear that the HIV virus may take up to 7 years to be reflected has caused her and continues to cause her stress. Fourth, as a result of the inability to sleep, she has been required to take a night job. Fifth, she continues to lose weight.

[16] At trial, my notes reflect that Ms. Fitzgerald stated that the incident: "Changed my life. Don't take my kids to a park. Scared they will get poked". "Chose to be alone." She indicated that people are saying about her "There's the girl who may have AIDS" and she stated that she is "tired of telling people about myself".

[17] In this regard, my notes indicate that her friend testified at trial: "She didn't want to touch anyone, go out, be sociable." "Edgy, moody, she wasn't sleeping". "This has totally changed her. Afraid for her kids. They'll get poked. She is on top of them. Careful what they do, where they go." "She is reserved. Doesn't want to go out. She 'spaces out' when I talk to her."

WAS MS. FITZGERALD POKED BY A NEEDLE THAT DAY?

- [18] The Defendants say no. Ms. Fitzgerald and her friend say yes. I am satisfied that Ms. Fitzgerald has proven on a balance of probabilities that she was poked in the hand by a needle that day. First, the family physician examined her 6 days after the incident and reported that: "... the needle poke was on her fourth finger of her left hand. The site felt sore, according to her." I am satisfied that it is highly unlikely that her doctor would come to that conclusion if there was not a needle poke present on the day of his examination.
- [19] Second, I am satisfied that the needle poke which was present 6 days later resulted from an incident in the taxi on July 21, 2000. I accept the testimony of Ms. Fitzgerald and her friend in that regard. I found their re-living of the incident at trial was compelling and in no way contrived. Third, I note Mr. Tin as testifying he did hear the word "needle". While he denied that Ms. Fitzgerald said to him that she had been hurt by a needle, I am satisfied that there is no other logical explanation about why he would have heard the word "needle" and why he would recall that he heard that word during their ride in his taxi that day.
- [20] Fourth, while Mr. Tin denies that he was shown a needle or that he saw a needle at any point, he did recall that, when Ms. Fitzgerald left the taxi, there was "a wrapped paper" in her right hand. I find this consistent with the testimony of Ms. Fitzgerald and her friend about the needle being wrapped in newspaper. Fifth, there is a notation of "Needle" in the Daily Trip Sheet of Mr. Tin. While Mr. Tin testified that this notation was made about 5 minutes after the ride had ended and when his dispatcher called him to ask why he had not driven Ms. Fitzgerald to the hospital, I am satisfied that it is more likely that he made the notation immediately after dropping Ms. Fitzgerald at her friend's home. I do not accept his testimony as to when and why he wrote that word in the Daily Trip Sheet as there is a conflict in his testimony between the time noted in the Daily Trip Sheet about when he picked up the next ride, his testimony that he did not pull the taxi over to write down this entry in his Daily Trip Sheet, and his testimony of how long after the trip in question he received a call from his dispatcher and then wrote "needle" in the Daily Trip Sheet.
- [21] Sixth, the recorded conversation between Ms. Fitzgerald and the dispatcher that night shows either a contemporaneous complaint made to Yellow Cab or part of an elaborate scheme to extract damages from the Defendants. I am satisfied that Ms. Fitzgerald has proven on a balance of probabilities that it is the former and I find no evidence which would allow me to conclude that it was the latter.
- [22] Counsel for the Defendants submits that there are so many inconsistencies in the various versions that Ms. Fitzgerald has given about the incident that I should disbelieve her testimony and the testimony of her friend. At trial, she could not remember having a jacket but at her May 28, 2002 discovery she stated that she did. In an interview for an article that appeared in The Province newspaper, Ms. Fitzgerald is quoted as saying that her daughter had picked up a syringe from the floor whereas at Trial Ms. Fitzgerald did not know where her daughter had obtained the syringe. In the conversation that she had with the dispatcher

on the night of the incident, she stated that she bent down to pick up the toy and was stabbed in the hand with the syringe, whereas at trial it was her friend who found the toy and she did not indicate that she had been stabbed when she bent over to pick up the toy. In the conversation the next day with the Night Manager of Yellow Cab, she stated that the needle was on the seat but, at trial, she indicated she did not know where the needle was located. At trial, she stated that they waited about 15 minutes at the drugstore while her friend was in the store but it was the testimony of her friend and Mr. Tin that the wait was a short one. At trial, he stated that she was merely "starting to put" her daughter back from her lap to the seat when the incident occurred whereas her friend and Ms. Fitzgerald also stated that Ms. Fitzgerald's daughter was back in the middle seat and fully seat-belted before the incident occurred. Ms. Fitzgerald testified that either she or her friend gave the needle to the nurse at the hospital but there is no record of that in the records maintained by the hospital. While the hospital records indicate that she told a nurse that she had "pricked self when reaching for a toy", my notes indicate that she testified "can't remember what I told her". At trial, Ms. Fitzgerald testified not only that the nurse took the needle away for testing but also that the nurse took the needle away but advised her that the needle could not be tested.

[23] I am satisfied that the inconsistencies can be explained by the emotion that was created by the incident. I accept the evidence of Ms. Fitzgerald that both her friend and her mother became considerably agitated by the incident and that, as a result, so did Ms. Fitzgerald. As well, I am satisfied that the recommendation received from Dr. Dubland that she immediately go to the hospital added to the fragile, emotional state of Ms. Fitzgerald that night. Additionally, it is not surprising that what led up to Ms. Fitzgerald being pricked by the needle would be of lesser importance to her than the fact that she had been pricked by the needle. In those circumstances, I am satisfied that it would be highly likely that she would not be attempting to remember exactly what had happened prior to being pricked by the needle.

[24] I am satisfied that Ms. Fitzgerald has proven on a balance of probabilities that her hand was punctured that night as a result of coming into contact with a hypodermic needle. The questions which then arise are whether adequate steps were taken by Yellow Cab and Mr. Tin to make sure that the taxi was in a condition which was safe for Ms. Fitzgerald and whether, if Yellow Cab failed to meet the duty of care which was imposed upon it, that negligence has caused all of the ongoing injuries alleged by Ms. Fitzgerald.

APPLICABLE STATUTORY AND BYLAW PROVISIONS

[25] The applicable provision of the Motor Carrier Act, R.S.B.C. 1996, c. 315 is as follows:

17 A motor carrier must maintain his or her property and equipment in a condition to enable the motor carrier to provide, and must provide, according to his or her powers and within the limits of the capacity of his or her vehicles, service to all persons in all respects adequate, safe, efficient, just and reasonable.

I find that the taxi cab occupied by Ms. Fitzgerald that evening was "commercial passenger vehicle" as defined under the Motor Carrier Act and that Yellow Cab Company Ltd. was a "motor carrier" as defined under the Motor Carrier Act.

[26] By-law No. 6066 of the City of Vancouver deals with "vehicles for hire" such as taxis and provides in part:

24.(1) The interior and exterior of every vehicle for hire shall be kept clean and in good repair, and whenever the owner of any vehicle for hire receives notice, either given to the owner personally or to a driver of the vehicle, signed by the Inspector, that such vehicle for hire is not in a fit or proper condition for use, stating briefly the condition complained of, such owner shall forthwith cease to use such vehicle or, within the time mentioned in such notice, shall remedy the condition complained of.

POLICIES IN EFFECT AT YELLOW CAB

[27] At his May 28, 2002 discovery, John Palis, the General Manager of Yellow Cab, stated that major cab companies had policy manuals which were virtually identical and which were established by the Justice Institute and the Taxi Host Program of the City of Vancouver. The policy manual of Yellow Cab dealt with the "maintenance of the cab". I record him as describing what happens when the driver comes on shift as follows: "His car has to be more or less inspected from - the interior is inspected for any debris, trash, etc. The mats are removed. The interior is vacuumed. The back seat is checked ... everything is functioning. For example, seatbelts, doors, etc."

[28] Regarding the policy in place for a driver inspecting the taxi after a ride has concluded, I record Mr. Palis as stating: "When a customer is let out, the driver is instructed to make sure that there is nothing on the back seat or on the floor." "That would involve taking a good look." "Well, not necessarily getting out of the cab, but to turn around and take a look at the back seat to make sure that the person hasn't left anything behind." Mr. Palis agreed that the following was the "standard policy" of Yellow Cab: "Drivers are supposed to check the back seat after every fare to make sure nothing has been left behind".

[29] A portion of the Policy Manual of Yellow Cab was in evidence. The applicable provisions are as follows:

On the night shift drivers shall wait until female or elderly customers get safely into their apartments or homes before leaving.

Please get out and open doors for your passengers (most of the complaints from people are that the driver does not assist their passengers!!).

You are expected to keep your car clean at all times, to empty your ashtrays and to clean out litter. If your car's exterior is too dirty, you may put it through a car wash and put the receipts into your envelope when you cash in Cars are expected to be vacuumed out at the end of each shift.

When possible, open doors for your customers - especially seniors, handicapped and grocery customers. At night, please wait for senior and female passengers to get inside their apartment, etc. - Sometimes they use taxis because they feel it is not safe to walk the streets at night.

[30] In a separate listing of "Driver Responsibilities", drivers were advised that they should consider themselves "sales representatives" of Yellow Cab and that they were to conduct themselves accordingly including:

- (e) Waiting for female or elderly customers to get safely into their apartment or home during night hours. ...
- (o) Making sure that nothing has been left behind in the car at the end of a trip before you drive away;

WHAT DUTY WAS OWED BY YELLOW CAB?

[31] In *Fraser v. U-Need-A-Cab Ltd.* (1984) 43 O.R. (2d) 389 (Ont. H.C.), the Plaintiff was injured by a defective door while exiting a taxicab. In dealing with the contract between the parties, Henry, J. concluded that the contract carried with it: "...an implied warranty that the taxi-cab provided ... was reasonably safe for her use..." (at p. 396). Henry, J. also concluded:

While not an insurer of the safety of passengers it carries in its own vehicles, it has at common law a duty to take all due care and to carry safely its passengers as far as reasonable care and forethought can attain that end. The plaintiff is answerable for defects which careful and reasonable examination of its vehicles would have revealed: see *Day v. Toronto Transportation Com'n et al.*, [1940] 4 D.L.R. 484 (a case of negligent operation of a streetcar, where Hudson J. said: "The care required is of a very high degree" (p. 441 S.C.R., p. 489 D.L.R.)); *Barkway v. South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392 (H.L.) (a case of a defective tire); 5 Hals., 4th ed., p. 181.

The duty of the defendant as a common carrier of passengers is therefore to take care that its taxicabs are safe from defects that careful and reasonable inspection would reveal. The duty owed to the passenger is one of the periodical inspection and testing so as the defendant's own vehicles are concerned. If injury occurs by reason of a defect in the vehicle, the onus is on the defendant to show that reasonable inspection would have discovered it. That duty was also the duty owed to the plaintiff by the owner of the Peckham cab. (at pp. 398-9).

[32] Subsequently, the appeal from the judgment against the defendant was dismissed by the Ontario Court of Appeal. While the decision in *Fraser* dealt with the duty of care owed regarding a mechanical defect, I am satisfied that the same duty of care applies regarding other conditions in the interior of the vehicle which involve matters other than keeping the interior and exterior of the vehicle in good repair. I am satisfied that the common law duty of care is the same obligation imposed by s. 17 of the Motor Carrier Act as well as s. 24(1) of the By-law No. 6066 of the City of Vancouver.

- [33] In British Columbia, Yellow Cab can fulfill the duty that it owes to its customers by removing hazards which a "careful and reasonable examination of its vehicles would have revealed". This careful and reasonable inspection does not include measures such as the removal of the passenger's seat. However, as the duty owed by Yellow Cab is a duty owed to all of its passengers, the careful and reasonable inspection which is required of it cannot be fulfilled if that careful and reasonable inspection occurs only at the beginning of each shift and does not occur prior to the entry of each customer into the taxi when it is in operation. A careful and reasonable inspection at the beginning of the shift only allows Yellow Cab to fulfil the duty which it owes to the first passenger of the day. Dealing with the duty of care which was imposed on Yellow Cab, two questions arise: (a) did Yellow Cab have in place a "careful and reasonable inspection" procedure; and (b) was such a "careful and reasonable inspection" procedure followed that day by Mr. Tin?
- [34] In *Garner v. Blue & White Taxi Co-operative Ltd.* [1995] O.J. (Q.L.) No. 2636 (Ont. G.D.), Leitch, J. found that neither the driver nor the plaintiff detected the presence of a syringe when the plaintiff entered the vehicle and that: "...there is no evidence that the syringe was in a location where it could be seen on a visual inspection of the motor vehicle." (at para. 21)
- [35] Leitch, J. confirmed that the requirement of a careful and reasonable inspection also related to objects within the vehicle which might make the vehicle unsafe. Leitch, J. described the duty of care imposed on the defendant as follows:

The duty of Mr. Paynton was to ensure his vehicle was safe from defects that a careful and reasonable inspection would reveal. This duty requires periodic inspection and testing. (*Fraser v. U-Need-A-Cab Ltd.* (1984), 43 O.R. (2d) 389 (H.C.J.), *affd.* 50 O.R. (2d) 281 (C.A.)). The by-laws of the City of Mississauga and The Blue & White Taxi Co-operative require regular inspection.

The existence of the syringe in Mr. Paynton's vehicle could only have been detected by the removal of the rear passenger seat which Mr. Paynton ultimately did in an effort to locate the syringe once he was made aware of the incident at the Mississauga Hospital. I find that it was not negligence on Mr. Paynton's part to fail to detect and then remove this syringe from his vehicle in these circumstances. The rear passenger seat was not a removable seat. There are no standards in the taxi industry requiring the removal of seats as part as [sic] cleaning a vehicle. It was not a requirement of either the City of Mississauga by-law or the by-laws of Blue & White Taxi to remove the rear back seat on a regular basis. It is entirely reasonable that drivers not remove the back seat as part of their interior inspections.

I am satisfied that Mr. Paynton's vehicle was safe from defects which a careful and reasonable inspection would reveal. Therefore, I find that the plaintiff's injuries and resulting damages were not caused by the negligence of the defendant Mr. Paynton. (at paras. 22-25)

- [36] While what is mandated by Yellow Cab for each driver to do when he or she comes on shift is sufficient to qualify as a "careful and reasonable inspection", what is mandated by Yellow Cab for a driver to do between rides is not. When a driver comes on shift, the mats are removed, the interior is vacuumed, and the interior is inspected for debris and trash. While

this is sufficient to assure the driver that the taxi has been left in a condition which is safe for the first passenger of the day, the procedure which is in place after each ride ends does not constitute a careful and reasonable inspection for subsequent passengers.

- [37] First, the emphasis on the inspection after a customer has left the taxi is to make sure that the person has not left anything behind. Second, Yellow Cab recommends but does not require the driver to exit the taxi in order that there can be a complete inspection of the passenger area. Even in taxis where the front seat is split, not all of the passenger area can be inspected by the driver merely looking over his or her shoulder to see whether there is anything on the back seat or on the floor which can be seen from the front seat. Third, while drivers are urged to get out and open doors for passengers, this requirement is not mandatory so that one easy and effective means of inspecting the passenger area is not mandated as each passenger is exiting the taxi. Bruce Helgason is the Senior Operations Manager of Yellow Cab. I record him as describing the procedure which is in effect after each fare as follows: "Drivers are encouraged very strongly to check the back seats and floors after every customer leaves." This procedure falls far short of requiring drivers to do so.
- [38] I find that the procedure which Yellow Cab has put in place does not constitute the careful and reasonable examination of its vehicles which is required before it can be said that a taxi is safe from defects or dangers that a careful and reasonable inspection would reveal. The careful and reasonable inspection which takes place at the beginning of the shift should be repeated in part after each customer leaves the taxi during a shift. A careful and reasonable inspection before a customer enters the passenger area should consist of the driver inspecting under the front seats, lifting or removing the mats on the floor of the passenger area, inspecting the interior for debris and trash and checking between the passenger seat and the passenger seat-back for anything that may have been left by the previous customer. I am satisfied that an inspection involving the driver merely looking over his or her shoulder is not the careful and reasonable examination required in order that Yellow Cab can meet the duty of care owed to its passengers. The procedure adopted by Yellow Cab does not meet the test described in Day, supra, as it can not be said that the care given is of a "very high degree".
- [39] Even if I am wrong in that finding, I am satisfied that Mr. Tin did not undertake the inspection procedure which Yellow Cab had in place. Mr. Tin described the routine during his shift as "I check seat and floor for anything left". I also record him being asked the following question and giving the following answer:

Q So you just turned your head?

A Yeah, turned.

- [40] While testifying, Mr. Tin was asked to demonstrate how he would do a search which he described as a "quick look at the seat and floor". When he demonstrated by a quick look over his right shoulder, he did not also look over his left shoulder and he did not appear to look downward. When Mr. Tin was asked whether it was the case that he could see behind his

own seat, I record him as reply: "Yes, because a space between the front seat". Although he stated that he could see the floor behind his own seat, that is clearly not possible without getting out of the taxi. As to whether he checked the back seat between each fare, I record Mr. Tin as testifying: "Nearly every time". This is other than in accordance with the instructions received from Yellow Cab.

- [41] When I asked Mr. Tin the sequence of events of what happened when he reached the destination of Ms. Fitzgerald, I record him as stating: "Her left hand holding something. Put hand on seat corner. Not sure if to show me something or just to support. She closed the door. I marked the trip sheet and then I moved the car." At this point in the testimony, he did not indicate that he conducted a visual inspection of the passenger area after Ms. Fitzgerald, her daughter and her friend had exited the taxi. If what he did after this particular trip is indicative of what steps Mr. Tin took to inspect the passenger portion of the taxi on that day and on other days, I cannot be satisfied that he followed the safety procedures that Yellow Cab had in place.
- [42] Accordingly, even if I am wrong in concluding that the procedures of Yellow Cab do not constitute a careful and reasonable inspection, I am satisfied that Ms. Fitzgerald has proven on a balance of probabilities that Mr. Tin did not undertake the procedures which Yellow Cab submits as constituting a careful and reasonable inspection. In the circumstances, I find that Yellow Cab and Mr. Tin failed to meet the duty of care that was imposed upon them and that Ms. Fitzgerald has suffered damages as a result of that breach.
- [43] I find that a careful and reasonable inspection of the passenger area would have revealed the presence of the syringe. I am satisfied that this is not the situation as was present in *Garner, supra*, where the needle could only be located by the removal of the back seat of the taxi. The fact that the syringe was found by a three-year-old child allows me to conclude that it could have been found if Mr. Tin had conducted a careful and reasonable inspection before Ms. Fitzgerald and her daughter entered the taxi. The question which then arises is what damages are available to Ms. Fitzgerald as a result of the breach of duty of care by Yellow Cab and/or Mr. Tin?

DAMAGES AVAILABLE TO MS. FITZGERALD

- [44] Counsel for the Plaintiff referred to no cases dealing with the appropriate quantum of damages when submitting that non-pecuniary damages in the amount of \$25,000 should be awarded. Counsel for the Defendant submitted that, if damages are to be awarded, the Court should be governed by the decision in *Garner, supra*, where the plaintiff was punctured by a needle located in a taxi operated by the defendant. The plaintiff went to a hospital where it was discovered that there was nothing lethal in the syringe and, although he repeatedly tested negative for HIV, he remained fearful of becoming HIV positive. The plaintiff's wife testified that the plaintiff now used a separate bathroom, used different dishes and had ceased all sexual activity.

- [45] Leitch, J. concluded that the defendant had met its obligation to the plaintiff so that there should be no damages. However, he went on to assess damages for loss of enjoyment of life at \$5,000. Garner appears to be the only Canadian decision where a Court has dealt with the damages flowing from the possibility that HIV has been contracted.
- [46] In reviewing decisions from the United States, there is a lack of uniformity as to what a plaintiff must prove to be successful in their claim. Because that is the case, there is a wide variation in the period of time for which pain and suffering will be compensated and a resulting wide range in the damages which have been awarded. In a majority of the United States jurisdictions, Courts have adopted an "Actual Exposure" approach requiring the plaintiff to prove actual exposure to the HIV virus. The following cases have set out the Actual Exposure approach: *Marriot v. Sedco Forex Int'l Resources, Ltd.*, 827 F.Supp. 59 (D. Mass. 1993); *Burk v. Sage Product*, 747 F.Supp. 285 (E.D. Pa. 1990); *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995); *Russaw v. Martin*, 472 S.E.2d 508 (Ga. Ct. App. 1996); *Neal v. Neal*, 873 P.2d 871 (Idaho 1994); *Doe v. Northwestern Univ.*, 682 N.E.2d 145 (Ill. Ct. App. 1997); *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995); *Pendergist v. Pendergrass*, 961 S.W.2d 919 (Mo. Ct. App. 1998); *De Milio v. Schrager*, 666 A.2d 627 (N.J. Super. Ct. Law Div. 1995); *Petri v. Bank of New York Co.*, 582 N.Y.S.2d 608 (Sup. Ct. 1992); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014 (Sup. Ct. 1992); *Brown v. New York City Health and Hosp. Corp.*, 648 N.Y.S.2d 880 (App. Div. 1996); *Lubowitz v. Albert Einstein Med. Center, N. Division*, 623 A.2d 3 (Pa. Super. Ct. 1993); *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997); *Carrol v. Sisters of St. Francis Health Serv., Inc.*, 868 S.W.2d 585 (Tenn. 1993); *Sanders v. State*, No. 14433-0-III, 1997 WL 43664 (Wash. Ct. App. 1997); *Johnson v. West Virginia Univ. Hosp., Inc.*, 413 S.E.2d 889 (W.Va. 1991); *Babich v. Waukesha Mem'l Hosp., Inc.*, 556 N.W.2d 144 (Wis. Ct. App. 1996); *Majca v. Beekil*, 701 N.E.2d 1084 (Ill. 1998); *Falcon v. Our Lady of the Lake Hosp.*, 729 So.2d 1169 (La. Ct. App. 1999); *Schott v. St. Charles Hosp.*, 250 A.D.2d 587 (N.Y. Sup. Ct. A.D. 1998); *Drury v. Baptist Mem. Hosp. Sys.*, 933 S.W.2d 668 (Tex. Ct. App. 1996); *Shumosky v. Lutheran Welfare Servs. of Northeastern Pa., Inc.*, 784 A.2d 196 (Pa. 2001).
- [47] In contrast to the Actual Exposure approach is a more liberal "Possible Exposure" approach under which the mere possibility of exposure to HIV can result in a successful claim so long as it can be determined that the plaintiff's fear is reasonable. Cases in which the "Possible Exposure" approach has been adopted include: *Marchica v. Long Island R.R.*, 810 F.Supp. 445 (E.D.N.Y. 1993); *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995); *Barrett v. Danbury Hosp.*, 654 A.2d 748 (Conn. 1995); *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185 (Ind. Ct. App. 1998); *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993); *Hartwig v. Oregon Trail Eye Clinic*, 580 N.W.2d 86 (Neb. 1998); *Madrid v. Lincoln County Med. Ctr.*, 909 P.2d 14 (N.M. Ct. App. 1995); *Castro v. New York Life Ins. Co.*, 588 N.Y.S.2d 695 (1991); *Williamson v. Waldman*, 696 A.2d 14 (N.J. 1997).
- [48] If damages are available, most jurisdictions in the United States have limited the time period for which damages are available to what has been characterized as either the "window of anxiety" or the "window of recovery". This time period was described in *De Milio v. Schrager*, 666 A.2d. 627 (N.J. Super. Ct. 1995) as follows:

If [the] plaintiff succeeds in carrying his ultimate burden of proof and prevails on the issue of liability, any recovery would be limited to the period comprising the plaintiff's reasonable window of anxiety - the period from the time of possible exposure to the point when [the] plaintiff knew or should reasonably have known that he was not infected with HIV, after which any continuing distress must be deemed to be unreasonable as a matter of law, and thus, not compensable. (at p. 636)

- [49] Examples of cases that have adopted the "window of anxiety" or "window of recovery" approach are as follows: *Brown v. New York City Health and Hosp. Corp.*, supra; *Marchica v. Long Island R.R.*, supra; *Faya v. Almaraz*, supra; *Carrol v. Sisters of St. Francis Health Servs., Inc.*, supra; *Madrid v. Lincoln County Medical Ctr.*, supra; *Williamson v. Waldman*, supra; *De Milio v. Schrager*, supra; *Hartwig v. Oregon Trail Eye Clinic*, supra, *William Lombardo v. New York University*, 648 N.Y.S.2d 658 (App. Div. 1996).
- [50] I am satisfied that the "Possible Exposure" approach should be adopted in Canada. Until it can be shown with reasonable certainty that a plaintiff is not HIV positive, that plaintiff suffers the mental anguish of having a reasonable fear that they have become HIV positive. It was not unreasonable for Ms. Fitzgerald to fear HIV infection after being exposed to a syringe. A syringe is clearly a medically viable channel of transmission of the HIV virus. The applicable standard of medical care requires that a person such as Ms. Fitzgerald conduct her life as if she had been actually exposed to HIV-positive fluids until such time as a blood test reveals, to a certain statistical level of confidence, that she is not HIV positive. During that period of time, it is not unreasonable, speculative, or fanciful for such a person to have a real and intense fear that he or she is HIV positive. Until seven months after the incident, Ms. Fitzgerald had a reasonable and genuine concern arising out of her fear of HIV infection and she should receive compensation for the resulting mental suffering.
- [51] However, I am satisfied that the period of anguish should be limited to the seven month period between the time of the incident and the receipt of confirmation that the testing undertaken by her family doctor proved that she was HIV negative. Subsequent to receiving that advice, any further mental anguish cannot be described as reasonable.
- [52] After the test results were known, Ms. Fitzgerald was guided more by the misguided and thoughtless views of friends who expressed the opinion that it would be six or seven years before she could be certain that she was not HIV positive rather than by the test results provided to her by her family doctor. Her reliance on the ill-informed views of so-called friends in preference to the opinion expressed by her family doctor can hardly be described as reasonable.

CONCLUSION

In reviewing the decisions of courts in the United States regarding the quantum of damages, the range of damages which has been awarded is great. Jury awards have ranged between \$3,000 and \$2 million. In the circumstances of this case, I am satisfied that an appropriate award for damages suffered by Ms. Fitzgerald as a result of her hand being punctured by a syringe is \$15,000. Ms. Fitzgerald will also be entitled to her costs on a Party and Party (Scale 3) basis.

"G.D. Burnyeat, J."

The Honourable Mr. Justice G.D. Burnyeat

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Prepared on 30 October 2026 · Esheria