

CANADA / JUDGMENT

Lee v. Dawson

2006 BCCA 159

COURT

British Columbia Court of Appeal

DECIDED

31 March 2006

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2006 BCCA 159err1 Lee v. Dawson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lee v. Dawson,

2006 BCCA 159

Date: 20060331

Docket: CA031066

Between:

Ik Sang Lee

Respondent

Appellant by Cross-Appeal

(Plaintiff)

And

Gary Robert Dawson and James Western Star Ltd.

Appellants

Respondents by Cross-Appeal

(Defendants)

And

British Columbia Coalition Of People With Disabilities

Intervenor

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Braidwood

P.G. Foy, Q.C., A.M. Gunn and

R.W. Parsons

Counsel for the Appellants

J.J. Arvay, Q.C. and M.P. Maryn

Counsel for the Respondent

N.H. Smith, Q.C. and D.K. Miura

Counsel for the Intervenor

Place and Date of Hearing:

Vancouver, British Columbia

26, 27 and 28 April 2005

Place and Date of Judgment:

Vancouver, British Columbia

31 March 2006

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Braidwood

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Overview

- [1] In an action for damages for personal injuries, the jury made an award for non-pecuniary damages that substantially exceeded the rough upper limit. The trial judge reduced the damages to the rough upper limit which was then about \$294,600. The defendants have appealed that award, amongst others, and ask to have the sum of \$195,000 substituted on the ground that it would compare more closely with awards for similar injuries in other cases. The plaintiff has cross-appealed and seeks to have the jury award of \$2,000,000 restored.
- [2] The plaintiff, Ik Sang Lee, was 17 years old when he was injured in a road accident. He had immigrated to Canada with his family two years before the accident. He is Korean and the first-born son in his family.
- [3] The accident happened in March 1997, while the plaintiff was a passenger in his uncle's car, travelling on the Trans Canada Highway near Lytton, British Columbia. A transport truck hauling two trailers spilled its load of lumber as it rounded a corner. The lumber crushed a portion of the vehicle in which the plaintiff was riding and forced it into the ditch.
- [4] The accident caused the plaintiff a traumatic brain injury, dramatic personality changes, permanent psychological injury, major chronic depression, permanent facial scarring and other physical injuries causing permanent, constant and disabling pain. About one year after the accident, the plaintiff underwent an operation on the left side of his face and eyelid. For nearly two years following the surgery, he was required to wear a Jobst compression face mask. There was evidence that the plaintiff's serious facial disfigurement caused him to suffer shame, alienation, social isolation, and psychological trauma and that his cultural background exacerbated the impact of his injuries.
- [5] As indicated by their large award for non-pecuniary damages, the jury must have accepted the expert evidence that in Korean culture, mental illness and disability are viewed as shameful both to the individual affected and to his family and, as a result, family members with disabilities are hidden away from society. There was also evidence to the effect that in Korean culture, a first-born son is required to meet high expectations and an inability to meet those expectations is considered shameful. With the plaintiff's cultural background, his injuries had a profoundly negative impact on him.
- [6] By the time of trial, the plaintiff was 23 years old. The evidence was that the plaintiff would remain, psychologically, at about the chronological age he was at when the accident occurred and that in the competitive workplace, he would be permanently unemployable.
- [7] The defendants filed a jury notice and the case proceeded to trial before a judge and jury. Counsel did not request that the trial judge instruct the jury on the rough upper limit and the trial judge did not do so.
- [8] On 14 February 2003, following a 13-day trial, the jury delivered their verdict awarding the plaintiff damages composed of the following:

Non-Pecuniary Loss

\$2,000,000.00

Past Loss of Income

36,000.00

Pre-judgment Interest on Past Loss of Income

3,116.00

Future Loss of Diminished Earning Capacity

782,000.00

Future Non-Wage Benefits

62,560.00

Past Special Damages

13,712.86

Pre-judgment Interest on Past Special Damages

788.03

Future Special Damages

88,000.00

"In Trust" Claim for Parents

45,000.00

Total:

\$3,031,176.89

[9] The jury also found that the plaintiff required a management fee to manage the pecuniary awards.

[10] Several months after the jury verdict had been delivered, the trial judge heard submissions from counsel on the issue of whether the jury award for non-pecuniary damages ought to be reduced, as the defendants submitted, to the rough upper limit adjusted for inflation to 14 February 2003, the date of the jury's verdict, or whether the jury verdict of \$2,000,000 ought to be sustained, as the plaintiff urged.

- [11] The trial judge also received submissions regarding the award of a management fee and a tax gross-up and the defendants' motion that \$68,000 of the future special damages award and \$500,000 of the diminished earning capacity award be structured under s. 55(1) of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (the Act) which provides for structured judgments.
- [12] In reasons dated 27 June 2003, which are reported at (2003), 17 B.C.L.R. (4th) 80, 50 C.C.L.I. (3d) 212, 2003 BCSC 1012, the trial judge concluded that the award for non-pecuniary damages had to be reduced to the rough upper limit of \$294,600, but she declined to order a structured judgment.
- [13] Counsel subsequently agreed to fix the management fee at \$114,258.88 without prejudice to their positions on appeal. The final trial order was entered on 23 September 2003.
- [14] On this appeal, the defendants acknowledge that in view of the large award and for the purposes of the appeal, the jury must be taken to have resolved all evidentiary conflicts in favour of the plaintiff and his experts.
- [15] It is convenient to note here that one of the arguments the defendants made on the appeal concerns some submissions plaintiff's counsel made during his opening and closing address to the jury. No objection was made by defendants' counsel at the time and, in view of the judge's instructions to the jury about the need for detachment when considering what to award by way of damages, I do not propose to consider the argument further.
- [16] On the appeal, the defendants challenge the awards for non-pecuniary loss, future diminished earning capacity, and future non-wage benefits. The defendants seek to have the three damage awards reduced as follows: the non-pecuniary award from \$294,600 to \$195,000; the future loss of diminished earning capacity from \$782,000 to \$625,600; and the future non-wage benefits from \$62,560 to \$50,048. The defendants also ask this Court to set aside the management fee and tax gross-up, and to order a structured judgment under the Act.
- [17] On the cross-appeal the plaintiff argues that the trial judge's non-pecuniary award at the rough upper limit ought to be set aside and the jury award of \$2,000,000 restored. The plaintiff's main argument on the cross-appeal is that the application of the rough upper limit in cases in which plaintiffs receive near catastrophic or catastrophic injuries does not accord with s. 15 Charter values because the effect of its application is to discriminate between classes of persons injured in tort actions founded in negligence. In that regard plaintiff's counsel points out that the decisions of the Supreme Court of Canada in *Thornton (Next Friend of) v. Prince George School District No. 57*, [1978] 2 S.C.R. 267, *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, and *Arnold v. Teno (Next friend of)*, [1978] 2 S.C.R. 287 ("the trilogy"), predate the entrenchment in the Constitution of the Canadian Charter of Rights and Freedoms, in particular, s. 15. The plaintiff contends that if the rough upper limit is properly regarded as a rule of law and this Court finds that the rule is inconsistent with Charter values, the Court is not bound by stare decisis to apply the law as it now stands

concerning the rough upper limit.

- [18] The plaintiff also argues that the trial judge erred in applying the rough upper limit as a strict rule of law binding upon her, when it should be viewed as a guideline. Other submissions were advanced concerning the appropriateness of maintaining the rough upper limit with respect to non-pecuniary damages and the need to re-examine its underpinnings in light of present day policy and our greater understanding concerning the effect of various disabilities.
- [19] The British Columbia Coalition of People with Disabilities (the "intervenor") obtained leave to intervene in the cross-appeal and presented arguments on the conceptual underpinnings and practical effects of the rough upper limit on people with disabilities.
- [20] While it seems to me that the plaintiff and the intervenor have advanced persuasive arguments for revisiting the conceptual basis for the rough upper limit, this Court remains bound by the trilogy. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, the Supreme Court of Canada observed that the rough upper limit is to be applied as a rule of law, and that observation, which accords with the reasoning of the Supreme Court of Canada in the trilogy and in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, binds this Court.
- [21] For the reasons which follow, I would dismiss the defendants' appeal from both the pecuniary and non-pecuniary awards, as well as from the order dismissing the application for a structured judgment. I would also dismiss the cross-appeal.

II. The defendants' appeal from the jury award for diminished earning capacity and future non-wage benefits

- [22] In appealing the jury awards for diminished earning capacity and non-wage benefits claims, the defendants argue that the jury was not properly instructed on a contingency deduction being made for residual earning capacity and that the jury award therefore ought to be reduced by a contingency of 20 percent. The defendants seek to have the awards of \$782,000 and \$62,560 set aside and to have substituted awards of \$625,600 and \$50,048 respectively.
- [23] In my view, the defendants' argument cannot be sustained. There was evidence that after the plaintiff came to Canada his grades improved as he learned English. He did well in mathematics but his other grades were generally average. There was some evidence that the plaintiff wished to be an accountant, although given his age at the time of the accident, that occupation could not be described as a firm goal.
- [24] A labour economist identified \$650,529 and \$798,393 as the present values of the future gross income stream of, respectively, an average foreign-born British Columbia male and an average British Columbia male, both with secondary school graduation. The expert also identified discounted future income earnings of \$1,298,230 for a certified general accountant and \$2,034,800 for a chartered accountant. The expert stated that a further allowance ought to be made for non-wage benefits of between seven and ten percent of earnings.

- [25] The plaintiff's submission to the jury was that his vocational prognosis was grim and that he would not be able to work. He conceded that his becoming a chartered accountant had not been established as a reasonable possibility but submitted that, at the very least, he would have attained some post-secondary education, probably at university, and could have become a certified general accountant rather than a chartered accountant.
- [26] There was an abundance of evidence to support a finding that the accident had a very significant impact on the plaintiff's educational and vocational attainment, for it occurred at a time when he was very vulnerable to those factors. One vocational expert testified that the plaintiff was competitively unemployable, and that he would be permanently so. That expert considered that the plaintiff would only be able to manage a voluntary placement with a lot of support. Another vocational consultant was of the view that the plaintiff had physical, cognitive and emotional limitations to the development of a career. The plaintiff's treating psychiatrist opined that without a stable sense of self, the plaintiff would be unable to work. A neuropsychologist expressed a guarded prognosis for the plaintiff's educational and vocational attainment, absent progress on his psychological and psychiatric issues. A specialist in physical medicine and rehabilitation was of the view that the plaintiff would be able to manage most sedentary, light work and some moderate types of physically demanding work but he acknowledged that a change in appearance could affect a person's self-esteem and drive, resulting in a loss of work capacity.
- [27] While the defendants may have wished the trial judge to have put more emphasis on a contingency deduction for residual earning capacity, it is not accurate to say that the jury was not instructed on contingency deductions, including residual earning capacity.
- [28] The two pecuniary damage awards the defendants have challenged were questions of fact for the jury. At trial, the plaintiff sought an award for future loss based on diminished earning capacity in the range of \$949,400 to \$1,031,384 but the jury awarded \$782,000 which is between 19 percent and 24 percent lower than the award sought. It is impossible to determine whether the jury award was the result of any one or all of the contingencies the trial judge mentioned, including residual earning capacity, a different line of work or early retirement, or on some other basis.
- [29] In view of the foregoing, I would not accede to the defendants' argument on this point.
- III. Did the trial judge err in not granting an order under s. 55 of the Insurance (Motor Vehicle) Act?
- [30] Before the trial judge, the defendants sought an order that \$68,000 of the \$88,000 awarded for future special damages and \$500,000 of the award for future loss of diminished earning capacity be paid as a structured judgment under s. 55 of the Act. The trial judge rejected the defendants' submissions on the ground that the structured judgment proposed by the defendants was not in the plaintiff's best interests.
- [31] Section 55 of the Act provides:

55 (1) The court must order that an award for pecuniary damages in a motor vehicle action be paid periodically, on the terms the court considers just,

- (a) if the award for pecuniary damages is, after section 25 has been applied, at least \$100 000 and the court considers it to be in the best interests of the plaintiff, or
- (b) if
 - (i) the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, and
 - (ii) the court considers that the order, that the award be paid periodically, is not contrary to the best interests of the plaintiff.

(2) Despite subsection (1), the court must not make an order under this section

- (a) if one or more of the parties in respect of whom the order would be made satisfies the court that those parties do not have sufficient means to fund the order, or
 - (b) if the court is satisfied that an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery for damages arising out of the accident.
- (3) If the court does not make an order for periodic payments under this section, it may make an award for damages that includes an amount to offset liability for income tax on income from investment of the award.

[32] In support of their position that the trial judge erred in not ordering a structured judgment under s. 55, the defendants submit that structured judgments for pecuniary awards greater than \$100,000 must be ordered unless the plaintiff discharges the onus of demonstrating that a structured judgment is not in his or her best interests. The defendants highlight the benefits of a structured judgment, including certainty and guarantee of performance and elimination of the risk of a plaintiff dissipating the award prematurely. As well, a structured judgment eliminates the need for a tax gross-up because payments generated by the annuity that result from the structure are tax-free in the hands of the plaintiff. Additionally, a structured judgment generally eliminates the need for a management fee, which is typically 15 to 20 percent of the award. In the defendants' submission, a structured judgment ought to be viewed as the norm, and a lump sum payment the exception.

[33] Section 55 has not been the subject of much judicial scrutiny in this Court but the Ontario Court of Appeal has considered similarly worded legislation in several cases including *Wilson v. Martinello* (1995), 23 O.R. (3d) 417, 125 D.L.R. (4th) 240 and *Chesher v. Monaghan* (2000), 48 O.R. (3d) 451, 186 D.L.R. (4th) 595, leave to appeal ref'd [2000] S.C.C.A. No. 399. While the British Columbia legislation is not identical in wording to the Ontario legislation, I think no one would argue that the legislation in the two provinces differs appreciably in purpose.

- [34] The Ontario case law on the equivalent provision suggests to me that the courts in that province have not taken a mechanical approach to its application but have engaged in an analysis of the evidence with a view to the overarching concern of the plaintiff's best interests. The inartful drafting of the Ontario provision, which was the subject of comment in *Wilson v. Martinello*, may have made precise adherence to the words of the section impossible and similar drafting problems in s. 55 may have the same result. In that respect I note that different onuses seem to be engaged by subsections 1(a) and 1(b) of s. 55. Section 1(a) requires that an order for periodic payments be made if, after s. 25 of the Act has been applied, the award for pecuniary damages is at least \$100,000, "and the court considers it to be in the best interests of the plaintiff". That positive phraseology is unlike the negative formulation in subsection (1)(b)(ii), where an order for periodic payments is to be made if the court considers that the order "is not contrary to the best interests of the plaintiff". The words "not contrary" in s. 55(1)(b)(ii) suggest that the court is to assume that the structured judgment is in keeping with the best interests of the plaintiff, unless the plaintiff demonstrates otherwise. The difference in wording may alter how the onus falls but that it is not a point that needs to be explored in this case.
- [35] One submission made by the defendants does require comment, however. It is the responsibility of the defendant to produce for the court a structured judgment proposal. It is not the court's function to draft the terms of a structured judgment. The particular terms of a structured financial plan are within the expertise of actuaries and other trained financial planners. I mention this because the defendants proposed a "two-stage" approach in which the plaintiff must first demonstrate that it is not in his best interests to have periodic payments. That approach appears to me to mask the importance of the question of whether the structure of the particular plan proposed accords with the plaintiff's best interests.
- [36] It also seems to me that in order to meet the onus of showing that periodic payments are not in his or her best interests, a plaintiff does not have to propose an alternative structure to that of the defendant. Nor does the plaintiff have to put forward a definitive plan as to how he or she will invest the lump sum. What factors are relevant in making the determination will vary from case to case and depend on the evidence.
- [37] In this case, the issue as it was put before the trial judge was whether the particular structured judgment the defendants proposed was in the plaintiff's best interests. The trial judge rejected the defendants' submissions that the plaintiff might spend all of the money in the next few years and become a burden on society. She was satisfied that the plaintiff and his family were fiscally responsible and that if the award were paid in a lump sum, the plaintiff's father would engage a professional to manage the funds and would oversee the management of a discretionary trust fund. The trial judge criticized the particular structure proposed by the defendants and took the view that a structured judgment was not in the plaintiff's best interests because the inflexibility of the judgment would make it difficult for him to save sufficient money to pay for an operation to repair the damage to his face.

- [38] In declining to order a structured judgment the trial judge said, in part:
- [14] In the case at bar, the defendants contend that the plaintiff has no specific plans, other than to turn the money over to his father, who will turn it over to an investment manager. It is not disputed that given the age of the plaintiff at the time of the accident, he has never invested money or controlled large sums of money. The defendants maintain that if the sums are paid to him in a lump sum, the money must last him the remainder of his life. That is true, however, I do not share the defendants' concern that the plaintiff may spend all of the money in the next few years and have nothing left. I also do not think there is a likely risk he will end up being a burden to society.
- [15] The plaintiff's parents moved to British Columbia from Korea in 1995 for the purpose of providing a better life for their two sons. The plaintiff is the elder son, or what was described as the centerpiece of the household. One of his roles as the elder son was not only to be successful in life, but to take care of his parents in their old age. The plaintiff had plans to be an accountant but those plans vanished with the motor vehicle accident in 1997. It has fallen on the plaintiff's younger brother to assume the role of elder son. I mention this to point out that the family is a traditional Korean family that places great value on helping each of their family members throughout life. The sons honour their parents. It was clear from the evidence that the plaintiff had lived and had planned to live his life as the traditional elder son, and in accordance with his parents' wishes. I am satisfied that the family lives frugally, within their means, and is careful with their money. They are not spendthrifts.
- [16] The plaintiff's parents own and operate a small restaurant. His father has always been involved in any fiscal decisions made by his son, both before and after the accident. I am satisfied that if the award is paid in a lump sum, the plaintiff's father will engage a professional to manage the funds, and will oversee the management of a discretionary trust fund with the actual investments handled by a professional advisor at a financial institution, to ensure that the funds will generate the income anticipated to meet the plaintiff's needs for the rest of his life.
- [17] The plaintiff's facial disfigurement has been a source of shame and embarrassment to him and his family. The shame is much greater by virtue of Korean cultural values than North American cultural values. The plaintiff would like to "fix" his face. Defence contends that there is no evidence that an operation is planned. I am satisfied however, that an operation will likely be carried out in the future. As the plaintiff stated in evidence, the doctors in California told him that they could try to fix his face, but to him, "trying" was not enough; he wants his face "fixed". Which brings me to the weaknesses and strengths of the proposed structured settlement.

- [18] According to Geraldine Straus, a principal of McKellar Structured Settlements Inc., a structured settlement must be designed at the outset, according to the circumstances and needs of the recipient, by using an annuity as the funding instrument to provide a guaranteed monthly tax exempt income. There can be guarantee periods designed in the structured settlement so that payments would continue to be paid for the guarantee period in the event of premature death.
- [19] The proposed structured settlement goes to age 65. I find merit to the plaintiff's argument that on the one hand the defendants suggest that the plaintiff is not sophisticated enough to handle money; yet on the other hand, he has to be sophisticated enough to save for his "retirement" after the age of 65.
- [20] The weaknesses in the circumstances of this case are that the structured settlement is locked in and the monthly payments, apart from indexing, cannot be changed. That means that if a large sum of money is needed for an operation, the plaintiff will have to have saved the money from the stream of payments. There is no flexibility in that regard.
- [21] The plaintiff has satisfied me that a structured settlement is not in his best interests, and I decline to make such an order.
- [39] The decision of the trial judge is consistent with the view that the best interests of the plaintiff are demonstrated as a matter of evidence. In this case, the trial judge found that questions of fiscal irresponsibility on the part of the plaintiff or his family were not of concern. The plaintiff's father, who was financially competent, demonstrated a willingness to engage the appropriate professionals in the course of generating an investment strategy. The trial judge found that potential future events demanded the kind of financial flexibility in which the structure proposed by the defendant was deficient. The trial judge found that the plaintiff had discharged the onus that a structured judgment was not in his best interests. The trial judge did not mention every consideration the defendants raised in their submissions in this Court but that does not lead to a conclusion that the trial judge erred in principle or was plainly wrong in result.
- [40] In my opinion, the defendants have not demonstrated any error in principle and the conclusion reached by the trial judge was open to her on the evidence. Accordingly, I would not accede to the defendants' appeal on this point.
- [41] I turn now to the central issue on the appeal.

IV. The non-pecuniary award

(a) The trial judge's reasons for substituting an award at the rough upper limit

- [42] Before referring to the arguments put forward on the appeal and cross-appeal, I will set out the judge's reasons for substituting an award at the rough upper limit for the jury award of \$2,000,000. The trial judge said the following concerning the positions put to her by the parties and her reasons for reaching the conclusion she did:

- [4] The defendants seek to reduce the jury's award for non-pecuniary damages from \$2 million to the \$100,000 "cap" or rough upper limit set by the Supreme Court of Canada in the 1978 trilogy of cases. Taking into account inflation, the rough upper limit currently amounts to approximately \$294,700.
- [5] The plaintiff contends that the award should not be set aside on the ground that the award is a finding of fact within the meaning of s. 6 of the Negligence Act, R.S.B.C. 1996, c.333 which was enacted by the Legislature knowing of the law enunciated by the trilogy. However, that contention appears not to be correct, as the legislation was expressly referred to by Madam Justice L'Heureux-Dubé in *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 which I read as finding that the rough upper limit is a matter of law.
- [6] The plaintiff argues that the rough upper limit has been severely criticized and is too low for the circumstances of this case. [Plaintiff's counsel] contends that given the plaintiff's 60 year life expectancy, with the rough upper limit, he will receive the equivalent of \$13.69 a day, or less than the current price of a movie and a bag of popcorn.
- [7] Although Thackray J.A. in *Brisson v. Brisson*, [2002] BCCA 279, [2002] B.C.J. No. 1154 at ¶ 41 stated that *ter Neuzen v. Korn* was limited to the question of whether the jury should have been charged on the upper limit, I consider myself bound to follow that decision, in particular, the following statement of Sopinka J. at ¶ 114:

114 Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive. While it is true that the matter can be corrected on appeal, an appeal may be unnecessary if the correct amount is fixed at trial.

- [8] Whether the rough upper limit should no longer be followed is not before me, and must be decided in another case at another time. Accordingly, I am obliged to reduce the jury award from \$2 million for non-pecuniary damages to \$100,000 plus an amount for inflation. The letter of April 15, 2003 from Columbia Pacific Consulting indicates that as of February 2003, the amount of the award would be \$292,600, or \$294,700 as of April 2003. I assume the parties can agree on the figure as of February 14, 2003 and judgment for non-pecuniary damages will be entered for that amount. . .

(b) The plaintiff's Charter values argument on the rough upper limit

- [43] The plaintiff's primary submission is that the rough upper limit set out in the trilogy is a common law rule, and it must now be interpreted to accord with Charter values. I have set out below a summary of the argument the plaintiff put forward on this point.

- [44] The principle of stare decisis does not prevent this Court from altering or eliminating the cap to bring it in line with the Charter because no higher court has previously ruled on this issue. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 91, supports the proposition that the common law must be interpreted in such a manner as to ensure that it develops in accordance with the fundamental values and principles underlying the Charter.
- [45] The rough upper limit was established by the Supreme Court of Canada in 1978, prior to the advent of the Charter and the operation of s. 15. The plaintiff contends that the rough upper limit is inconsistent with the equality and non-discrimination guarantee of s. 15 of the Charter and should no longer be applied.
- [46] The plaintiff acknowledges that a Charter rights analysis is not engaged in this case, as the litigation is between private parties. The absence of a government actor shifts the focus in this case to a Charter values analysis, pursuant to *Hill v. Church of Scientology of Toronto*, supra, at para. 95. That is, Charter values are being invoked to modify the common law; it is not a case in which Charter rights are being exercised to strike down legislation.
- [47] The plaintiff acknowledges that there is authority to the effect that a plaintiff in a Charter values analysis bears the burden with respect to both the infringement and justification stages of the analysis and, for the purposes of this appeal, the plaintiff is content with this strict test, despite the suggestion in other authorities that a plaintiff may not bear the burden at the justification stage.
- [48] An analysis based on Charter values is less rigorous than a rights analysis. The plaintiff reasons that a law that is revealed to be inconsistent with the Charter on a rights approach is, a fortiori, inconsistent with the Charter as revealed by a values approach. The plaintiff therefore proposes to use *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, which sets out the framework of a rights analysis, in order to demonstrate the strength of his argument. In explaining his reasons for adopting this approach, the plaintiff referred to *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251, in which this Court reflected on the decision of the Ontario Superior Court of Justice in *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321, 215 D.L.R. (4th) 223. In *Halpern*, the Court applied the full s. 1 analysis to a Charter values challenge to the common law. The Court in *EGALE* determined that the Court is at liberty to choose whether it will apply a full Charter analysis where the common law, rather than a legislative provision, is the subject of the challenge. In applying the more stringent analysis, the Court in *EGALE* reasoned that the case involved a question of significant importance, and more than an incremental change in the law was sought.
- [49] The plaintiff referred to *Law*, at paras. 51-53, in describing the values enshrined in s. 15. On the authority of *Law*, human dignity is at the core of the equality guarantee. The framework for analysis in a s. 15 inquiry is set out at para. 88 of *Law*. The first issue is this: "Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already

disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?" (at para. 88).

- [50] The plaintiff turned to *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 in discussing the issue of the selection of the proper comparator group. In *Hodge*, Binnie J., for the Court said at para. 23:

The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter . . .

- [51] Then, at para. 25, Binnie J. referred to the necessity of identifying the "universe of people" potentially entitled to equal treatment in relation to the subject of the claim. The plaintiff argues that, in this case, the relevant universe of people potentially entitled to equal treatment is all plaintiffs who have suffered personal injury as a result of negligence. The claimant is a member of this universe who has suffered great loss; the comparator group is comprised of all those who have suffered injury or loss that is not serious. The upper limit permits the comparator group to receive full and fair compensation for their non-pecuniary damages. Those less seriously injured plaintiffs are not subject to any limit because courts are to assess non-pecuniary damages without regard for the upper limit until the limit is reached. In that regard, the plaintiff referred to *Boyd v. Harris* (2004), 237 D.L.R. (4th) 193, 2004 BCCA 146, in which Smith J.A. used the analogy of a governor on an engine to describe how non-pecuniary damages are considered by juries:

- [32] The governor on an engine is a useful analogy. Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

- [52] In the plaintiff's submission, the fact that juries are not informed of the cap unless the plaintiff has sustained a serious injury underscores the point that plaintiffs with less serious injuries have the advantage of a jury's assessment of their damages without the constraints imposed by the cap.

- [53] The plaintiff contrasts the treatment under the common law of people who suffer non-serious injuries as the result of negligence to that of people in the position of the claimant, who are entitled to compensation only up to the upper limit. The common law cap imposes this differential treatment. The result is that seriously injured plaintiffs are not fully compensated for their loss.

- [54] To support his submissions, the plaintiff referred to *Moore v. Mobile Infirmity Association*, 592 So. 2d 156, a decision of the Supreme Court of Alabama, in which a challenge to a cap of \$400,000 for non-pecuniary damages in medical malpractice cases was launched. The court found that the cap created favoured classes and sub-classes based on the severity of the plaintiff's injury, and that this was impermissible. The plaintiff contends that the same effects are caused by the imposition of the cap in Canada.
- [55] The plaintiff submitted that the second step in the analysis set out in *Law* is to determine whether "the claimant [is] subject to differential treatment based on one or more enumerated and analogous grounds" (at para. 88). The plaintiff referred us to *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCR 54, in which the Supreme Court found that the impugned law was discriminatory where the distinction drawn by the law was based on kinds of disability. The plaintiff directed us to paras. 71, 74-76 and 79-80 in support of his argument that distinctions based on the existence, severity, and type of disability are considered distinctions based on the enumerated ground of disability. On this basis, the plaintiff submits that the first two steps in the *Law* analysis are met.
- [56] In his factum, the plaintiff contends that the upper limit also draws a distinction between plaintiffs with mental disabilities and those with physical disabilities. Those with mental disabilities are adversely affected by the upper limit because physically injured plaintiffs are more likely to be entitled to a large physical care award than are mentally injured plaintiffs. One of the underlying rationales of the upper limit, as discussed in the trilogy, is that a large future care award will leave the non-pecuniary award little to accomplish. However, non-pecuniary damages are capped for both mentally and physically injured plaintiffs. Mentally injured plaintiffs do not receive pecuniary awards which would leave non-pecuniary awards with little to accomplish.
- [57] Another point raised by the plaintiff is that the upper limit does not apply in defamation cases: *Hill v. Church of Scientology*, at paras. 167-173. In other words, the upper limit further differentiates between the disabled plaintiff and plaintiffs who have suffered an injury to reputation as a result of defamation.
- [58] The plaintiff submits that the third step in the *Law* framework for analysis is embodied in a simple question: Is there discrimination? The question is fleshed out in *Law* at para. 88 as follows:

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[59] The plaintiff goes on to refer to the Court's direction in *Law*, at para. 62, to consider the contextual factors that speak to a determination of whether a law perpetrates an assault on a person's dignity. Of the various factors discussed by the Court; the most pertinent in this case is the one the Court identified as the "most compelling." The Court explained the point as follows, at para. 63:

As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group [citations omitted].

[60] The Court continued, at para. 63:

These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[61] The plaintiff analogizes the application of these contextual factors to the treatment of seriously disabled persons and persons with cognitive or psychological disabilities, or both, to those suffering from pre-existing disability. On the strength of *Law*, the plaintiff contends that the common law, insofar as it distinguishes between the severely disabled and the less disabled, is discriminatory.

[62] When asked by the bench to clarify whether the discrimination at issue is simply that which is imposed by the cap, plaintiff's counsel responded that the discrimination encountered by persons injured as a result of negligence extends further than the discrimination imposed by the cap. The plaintiff asserted that non-pecuniary damages are intended to provide solace and to assist the injured person in re-integrating into society. In failing to permit full compensation for serious injury and loss, the common law perpetuates the disadvantage of people who are already disadvantaged. In the plaintiff's submission, the effect of the cap is the imposition of an extra layer of discrimination to the plight of the disabled in our society, who, unfortunately, face many challenges as a result of prevailing social attitudes and the lack of accessibility to jobs, education, and society generally.

[63] In his factum, the plaintiff further argues that the arbitrary figure selected for the cap reinforces that there is no correspondence between the non-pecuniary damages available to a plaintiff and the needs, capacity, or circumstances of the disabled plaintiff.

[64] The plaintiff contends that the refusal of the Supreme Court of Canada to apply the upper limit in defamation cases in *Hill v. Church of Scientology*, *supra*, draws illusory distinctions between personal injury cases and defamation cases. Chief among the plaintiff's points on this issue is that the lack of correspondence between this distinction and the needs of

personal injury plaintiffs is demonstrated by the purpose of the non-pecuniary award, which is to provide solace. In the plaintiff's submission, few would argue that one who has suffered denigration of reputation is in greater need of solace than one who has suffered catastrophic injury.

- [65] The plaintiff notes that a further rationale underlying the cap, as set out in the trilogy, is the desire to avoid shockingly high insurance premiums. However, the Alberta Court of Appeal has held, in *Ferraiuolo v. Olson* (2004), 357 A.R. 68, 2004 ABCA 281 at paras. 112-166 and 151-159, that a law that deprives plaintiffs of legitimate damages in order to avoid an increase in premiums for other people, has a discriminatory purpose.
- [66] As a final point, the plaintiff submits that the modification of the common law through the elimination of the upper limit does not preclude the application of reasonableness to the assessment of non-pecuniary damages in order to avoid an exorbitant award. The plaintiff submits that the approach to quantification should be approached on a subjective-objective basis. The plaintiff submits that the objective element of the approach ought not to be in the nature of comparing other damage awards granted by judges in other cases, but rather by having the jury adopt the view set out in *Law*, supra, at paras. 60-61, of a "reasonable person, dispassionate and fully appraised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant." Specifically, the plaintiff submits that the jury could be charged as to the reasonableness requirement in the non-pecuniary award.

V. Analysis of the plaintiff's Charter values argument

- [67] The plaintiff proposes that the appropriate comparator group for the purposes of the s. 15 analysis is comprised of less severely disabled plaintiffs who are entitled to full compensation for their non-pecuniary damages by virtue of the fact that the cap does not curtail their full recovery of these damages.
- [68] In my respectful view, the jurisprudence on the nature and purpose of non-pecuniary damages undermines the plaintiff's proposal for a comparator group in this case.
- [69] Non-pecuniary damages are not, by their nature, capable of fulfilling the function of full recovery for non-pecuniary loss, as contended by the plaintiff. There is more to the rationale for the cap than full compensation for pecuniary loss. As Morden J.A. stated in *Payne v. Alb* (1999), 44 O.R. (3d) 598, 121 O.A.C. 255 [cited to O.R.] at 606:

It is a fact that there is no monetary exchange value relating to pain and suffering, loss of amenities, and shortened expectation of life. "Full compensation in relation to non-pecuniary losses is meaningless, and arguably, dangerous since such losses by their nature cannot be fully restored." McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1991), 59 Can. Bar Rev. 1 at p. 7.

[70] The plaintiff attacks the premise that the cap imposes an artificial limit on an otherwise appropriate non-pecuniary damage award, but this argument ignores the fact that non-pecuniary damage awards, by their nature, are arbitrary figures which do not fit with the concept of "full" or "adequate" compensation. In *Lindal v. Lindal*, supra, the Court emphasized that non-pecuniary damages are intended to provide solace, and are not dependant solely upon the severity of the injury sustained by the plaintiff.

[71] In *Hodge v. Canada*, supra, Binnie J. noted that many s. 15 challenges have been lost on the basis of the selection of the wrong comparator group, and in that regard he observed at para. 18:

As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to be the Achilles' heel in a variety of recent cases, including *Granovsky*, supra, *Lovelace*, supra, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In other cases, the selection has sparked a good deal of judicial debate, as in *M. v. H.*, [1999] 2 S.C.R. 3, and *Gosselin*, supra. The correctness of the "comparator group" contended for by a claimant has thus been an important battleground in much of the s. 15(1) jurisprudence and, in my view, this issue is also at the forefront of the present appeal.

[72] Having highlighted the importance of the selection of the correct comparator group in *Hodge*, Binnie J. then discussed the criteria for identifying the appropriate comparator group. For ease of reference, I will repeat the relevant passage from para. 23 of *Hodge*:

The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter . . .

[73] *Hodge* contains a survey of the comparator group question from the recent jurisprudence of the Supreme Court in s. 15 cases. Two cases have relevance here: *Nova Scotia (Workers' Compensation Board) v. Martin*, supra, and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28. In *Martin*, the claimants alleged that the Nova Scotia Workers' Compensation scheme was discriminatory in that it excluded from its purview workers suffering from chronic pain. The claimants characterized themselves as members of a group of chronic pain sufferers, and proposed as a comparator group chronic pain sufferers whose injuries were not employment related. The latter group was free to pursue relief in tort damages. However, the Court rejected this comparator group, and found instead that the correct comparator group was comprised of those workers subject to the scheme who did not have chronic pain and were eligible for compensation for their employment-related injuries. In commenting on the Court's re-framing of the comparator group in *Martin*, Binnie J. in *Hodge* stated, at para. 28:

... There was no proper alignment between the benefit sought and the ground of discrimination alleged. The asserted comparator group shared the personal characteristic on which the s. 15(1) claim was based (chronic pain disability), but the benefits under the Workers' Compensation Act were by definition not available to people who had suffered their injuries outside the workplace in circumstances altogether outside the scope of the statutory compensation plan.

[Underlining added.]

[74] The comparator group identified by the Court as appropriate in *Granovsky*, supra, is also instructive. In that case, the claimant contended that a disability pension for which he was not eligible was discriminatory. The claimant was not eligible to receive the pension for two reasons: his disability was temporary, and the pension was available only to the permanently injured; and, second, he had not made the contributions to the pension required for eligibility, due to his disability. The claimant proposed as the proper comparator group able-bodied workers who, by virtue of having no disability, were able to make the requisite pension contributions. The Court, however, defined the comparator group as "[T]he body of CPP contributors who suffered a severe and permanent disability in the years of their respective contribution histories and who therefore did benefit from the drop-out provision to which the appellant claims entitlement on the basis of his equality rights" (at para. 52). In elucidating the error of the proposed comparator group in *Granovsky*, Binnie J. in *Hodge* commented as follows, at para. 32:

... The Court rejected [the claimant's] choice of comparator group because it ignored the basis of the benefit he was seeking, i.e., able-bodied workers are not within the universe of persons potentially eligible for a disability pension. If and when they did qualify, it would be because they were no longer able-bodied. In other words, the benefit sought by the claimant did not correspond with the personal characteristic of the comparator group that he asserted to be the basis of his s. 15(1) claim. The proper comparator group was the permanently disabled CPP contributors with whom *Granovsky* could not properly demand equal treatment.

[Underlining added.]

[75] These passages underscore the importance of the correlation between the benefit sought by the claimant and the personal characteristics of the comparator group. In my view, the nature and purpose of non-pecuniary damage awards undermines the plaintiff's proposal for the comparator group in this case.

[76] In *Lindal v. Lindal*, supra, the Court defined the nature of non-pecuniary damage awards. The Court clearly indicated that non-pecuniary awards are not solely dependent upon the gravity of the injury. Their purpose is not compensatory; rather, the objective is to provide a substitute for lost amenities in an effort to improve the victim's condition and to make the plaintiff's life more bearable. At 637, of the *Lindal* decision, the Court stated:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[77] The Court further articulated the purpose of non-pecuniary damages, at 642-643:

. . . The award of \$100,000 for non-pecuniary loss in the trilogy was not in any sense a valuation of the assets which had been lost by Andrews, Thornton and Teno. As has been emphasized, these assets do not have a money value, and thus an objective valuation is impossible. The award of \$100,000 was made, as earlier indicated, in order to provide more general physical arrangements above and beyond those directly relating to the injuries in order to make life more endurable. This is reflected in the fact that an identical sum was awarded to each of the three plaintiffs in those cases, even though their injuries were quite different. James Andrews, for example, suffered a lesion of the spinal cord which paralysed most of his upper limbs, spine and lower limbs. He no longer had normal bladder, bowel and sex functions. Andrews was severely, if not totally, disabled. By way of contrast, Diane Teno had suffered a severe brain injury. Her speech was affected and she has a severe spastic paralysis on her left hand and arm. She was able to walk by herself but did so clumsily.

No one would suggest that the injuries suffered by these two individuals were precisely identical. The Court recognized that their situations were in many ways quite different. Notwithstanding these differences, the Court awarded the same sum for non-pecuniary loss. Equally, the fact that Brian Lindal's injuries are different from and arguably more severe than those of James Andrews does not justify an award of more than \$100,000 in this case.

It is true that the Court in *Andrews* spoke of exceeding the limit of \$100,000 in 'exceptional circumstances'. The variety of possible fact situations is limitless, and it would be unwise to foreclose the possibility of ever exceeding the guideline of \$100,000. But, if the purpose of the guideline is properly understood, it will be seen that the circumstances in which it should be exceeded will be rare indeed. We award non-pecuniary damages because the money can be used to make the victim's life more bearable. The limit of \$100,000 was not selected because the plaintiff could only make use of \$100,000 and no more. Quite the opposite. It was selected because without it, there would be no limit to the various uses to which a plaintiff could put a fund of money. The defendant, and ultimately, society at large, would be in the position of satisfying extravagant claims by severely injured plaintiffs.

It is apparent, therefore, that there was no justification for exceeding the limit of \$100,000 in the case of Brian Lindal. While his injuries were different from those of the plaintiffs in the trilogy, this alone does not justify exceeding the upper limit.

[78] In *Leischner et al. v. West Kootenay Power & Light Co. Ltd. et al.* (1986), 70 B.C.L.R. 145, 24 D.L.R. (4th) 641 [cited to B.C.L.R.], this Court reiterated that justification for non-pecuniary damages when it held that the comparison of a plaintiff's injuries to those sustained by the trilogy plaintiffs was not an appropriate approach to the assessment of non-pecuniary damages. The Court stated, at 174-175:

The trial judge assessed damages for non-pecuniary loss at \$70,000. He did so after comparing the injuries suffered by the plaintiff to those of Andrews, Thornton, Teno and Lindal. That was not a correct approach but, in our opinion, the quantum of damages was not assessed at an inordinately low or high level.

In saying that was not a correct approach we have regard to what was said in *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 641-42, 34 B.C.L.R. 273, [1982] 1 W.W.R. 433, 19 C.C.L.T. 1, 129 D.L.R. (3d) 263, 39 N.R. 361. Non-pecuniary loss ought not to be measured on a scale of \$100,000, and assessed by comparison to the injuries suffered in "the trilogy" by Andrews, Thornton or Teno. The individual's particular loss and how money can function to provide substitute amenities must be paramount. . .

[Underlining added.]

[79] Those authorities are consistent with the view that non-pecuniary awards are not proportional to the severity of the injury suffered by the plaintiff, because the rationale for a non-pecuniary award provides no direct relationship between the degree of the injury sustained and the quantum of non-pecuniary damages that is appropriate.

[80] While I do not agree that the comparator group chosen by the plaintiff is appropriate for the reasons I have stated, it seems to me that there may be another "comparator" group that would incorporate the thrust of the plaintiff's Charter values argument. The plaintiff has proposed to compare plaintiffs seriously injured through negligence, whose non-pecuniary loss is not fully "compensable" as a result of the cap, to plaintiffs who are not seriously injured, and whose non-pecuniary loss is fully compensable, because this loss does not approach the upper limit. In focusing on the relative severity of the injuries of these groups, the benefit sought (unlimited access to non-pecuniary damages) is misaligned with the ground of discrimination alleged (the severity of the injury). Stated differently, the choice of comparator group ignores the basis of the benefit sought, i.e. unlimited non-pecuniary damages.

[81] The Supreme Court of Canada has clearly indicated that the amount of non-pecuniary damages should not depend solely on the severity of the injury, "but upon its ability to ameliorate the condition of the victim considering his or her particular situation": *Lindal v. Lindal*, *supra* at 637. Insofar as the proposed comparator groups depend solely on the

severity of the injury as the basis for discrimination under the cap, those groups are misconceived. A more appropriate characterization of the group to which the claimant in this case belongs would incorporate the claimant's need for solace, or the need for amelioration of the plaintiff's condition. The inclusion of this element would permit a closer correlation between the benefit sought (the elimination of the cap) and the discrimination alleged.

- [82] The proposed comparator group may be characterized as follows. The claimant belongs to a group of plaintiffs injured through negligence who, owing to the nature of their injuries, requires the solace and amelioration of their condition that can only be provided by non-pecuniary damages above the cap amount. The comparator group might be comprised of plaintiffs injured through negligence who, owing to the nature of their injuries, require solace and amelioration of their condition, but these requirements can be fully addressed by a quantum of non-pecuniary damages that falls beneath the cap.
- [83] Using the comparator group I have proposed does not get around what I see as the fundamental problem which is the present rationalization for the award of non-pecuniary damages.

VI. Summary of the other arguments that were advanced by the plaintiff and the intervenor

- [84] While I have concluded that the cross-appeal must be dismissed, I will summarize the additional arguments made which underscore the need to re-examine the underpinnings for the rough upper limit and the conceptual and practical difficulties it has created in its application:
- (i) The language used to describe the rough upper limit in the trilogy referred to the rough upper limit not as a strict rule of law, but as a guideline, the purpose of which was to set a "rough upper parameter" on non-pecuniary loss;
 - (ii) Time and judicial experience with the rough upper limit have demonstrated that it has been converted into a strict rule of law, which is a role that ought to have been left to the legislature. The fact that the guideline has been converted into a strict rule of law is demonstrated by the fact that since the trilogy, no court has awarded or upheld a non-pecuniary award that exceeds the guideline amount;
 - (iii) Twenty-five years have passed since the trilogy set out the upper limit. The policy reasons that justified its adoption no longer exist, and the continued imposition of the rough upper limit is not justified;
 - (iv) In the trilogy, the Supreme Court noted that the possibility of having an extravagant claim was higher with respect to non-pecuniary damages because of the difficulties with quantification of the injuries for which non-pecuniary damages compensate. In the plaintiff's submission, difficulty in quantification does not relieve the court of its obligation to determine the issue;

- (v) In the trilogy, the Supreme Court was concerned that non-pecuniary damages might be awarded on the basis of improper considerations such as sympathy for the plaintiff, a desire to punish the defendant, or a perception of the defendant's "deep pockets". The plaintiff submits that a solution that is more rationally connected to this potential problem than an upper limit is a jury instruction that warns of the impropriety of these considerations;
- (vi) The Supreme Court in the trilogy expressed concern that non-pecuniary awards were increasing but that conclusion was not arrived at on the basis of any empirical evidence. Subsequent studies have demonstrated that the notion of sky-rocketing non-pecuniary awards is a false perception;
- (vii) A further policy consideration that was contemplated in the trilogy was that pecuniary awards provide the plaintiff with full compensation, and non-pecuniary awards should, therefore, be modest. The plaintiff argues that that conclusion assumes perfect compensation with respect to other heads of damage, and ignores other costs that might impair the ability of pecuniary awards to provide perfect compensation. Additionally, each head of damages is intended to address a specific loss, and non-pecuniary losses are not unique in this regard. The amount of non-pecuniary loss that is suffered is not contingent on the pecuniary losses the plaintiff has sustained;
- (viii) In the trilogy, the Supreme Court was concerned with the high social impact of high non-pecuniary awards. It highlighted increased insurance premiums as an example. The plaintiff submits that again, the Court made an assumption in the absence of evidence capable of supporting it;
- (ix) The rough upper limit disregards juries, and the importance of juries outweighs any hypothetical benefits that the guideline might bestow. The plaintiff argues that the jury is the only trier of fact capable of keeping up with the rapid pace of social, economic and technological change in our society. The imposition of the rough upper limit precludes juries from addressing these questions, with the result that the values of the community, as represented by the jury, are ignored. Moreover, the limit forces this Court to apply different standards to low jury awards and high jury awards. When reviewing a low award, the Court of Appeal applies the palpable or overriding error standard, on the assumption there is some evidentiary basis for the low award whereas a high award is reviewed on the comparative approach, thus ignoring the deference which ought to be shown to the factual findings of juries;
- (x) The legislature expressly declared in s. 6 of the Negligence Act, R.S.B.C. 1996, c. 333, that the amount of damages is a question of fact. The plaintiff submits that it does not appear that this legislative provision was considered in the trilogy. The plaintiff further submits that, pursuant to the principles of legislative supremacy, the decisions setting out the rough upper limit cannot be interpreted as imposing a rule of law that modifies s. 6 of the Act;
- (xi) The standard of appellate review applicable to questions of fact would be fundamentally altered if the rough upper limit is viewed as a strict rule of law rather than as a guideline. If the rough upper limit is applied with excessive strictness, then a jury award will be modified if it

exceeds the limit, regardless of whether it is "wholly out of proportion" or "so exorbitant or so grossly out of proportion as to shock the court's conscience and sense of justice" (per *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 159; *Foreman v. Foster* (2001), 84 B.C.L.R. (3d) 184; 2001 BCCA 26, and *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 613); and

(xii) The incremental method by which changes to the common law are made would be breached if the rough upper limit were adopted as a rule of law, as this would constitute a radical change in the common law that would be contrary to the principle that the common law evolves slowly, and radical changes are left to the legislature.

[85] The argument presented by the intervenor largely mirrored those outlined above, that is, the trilogy ought to be revisited and the cap on non-pecuniary damages abolished, but the intervenor put that submission in somewhat broader perspective.

[86] The intervenor's arguments may be summarized under four headings. First, the intervenor submits that the application of the cap produces unjust results for many plaintiffs whose situations differ from those of the plaintiffs in the trilogy. The plaintiffs in the trilogy cases were young and healthy prior to their respective injuries, and were therefore entitled to large awards for future losses. It was in this context that the Supreme Court reasoned that a large award for non-pecuniary damages would serve little purpose. In the intervenor's submission, the application of the cap discriminates against plaintiffs who are not entitled to large future care awards, such as people with pre-existing disabilities who are, after a subsequent injury, unable to advance a claim for income loss or cost of future care. Regardless of the previous injury or disability, these injured plaintiffs are entitled to compensation for pain, suffering, loss of amenities and disability and placing a cap on the "solace" provided by the non-pecuniary award can work an injustice.

[87] Second, the intervenor submits that the application of the cap erodes the principle of full compensation for pecuniary damages. In the intervenor's submission, the trilogy was premised on the notion that if a plaintiff receives full and fair compensation for pecuniary losses, then non-pecuniary damages may be limited. The intervenor argues that in cases subsequent to the trilogy, courts are increasingly relieving defendants of paying some care costs based on the assumption that the plaintiff will be able to rely on social programs for assistance. To support that submission, the intervenor referred to *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, 2002 SCC 9, and *Boren v. Vancouver Resource Society for the Physically Disabled* (2003), 184 B.C.A.C. 210, 2003 BCCA 388. The intervenor has referred to several other cases in which courts have used non-pecuniary damage awards to serve functions not contemplated in the trilogy. The result, the intervenor argues, is that the cap impairs the ability of non-pecuniary damage awards to meet their primary intended purpose.

- [88] Third, the intervenor argues that the cap is inadequate in light of society's changing perception of disability. A jury is expected to exercise the common sense of the community in making its awards. Since the trilogy was decided, disabled members of society have been integrated into mainstream society, with the result that juries today have had the benefit of exposure to people with disabilities, and have developed greater understanding of the impact of disability on the lives of individuals. Putting a cap on non-pecuniary awards is not consistent with community values, and this is demonstrated by the jury verdicts that have awarded damages in excess of the cap.
- [89] The intervenor's fourth submission is that the Supreme Court of Canada has given conflicting and, in some cases, unsupported policy reasons for the application of a cap on damages. In that regard, the intervenor points out that the Supreme Court has not applied a cap in defamation cases yet there is no rationalization for distinguishing between how a jury may arrive at an award in a defamation action and one in a personal injury case. The intervenor further submits that the \$100,000 figure selected for the cap was chosen arbitrarily and is lacking a logical foundation.
- [90] I agree with the plaintiff and the intervenor that the time may have come for the rationalization or conceptual underpinning for having a rough upper limit on non-pecuniary damages to be re-examined. However, I am not persuaded that it is open to this Court to proceed on the footing that the trilogy establishing the rough upper limit is not binding on us. Some of the submissions made by the appellant and the intervenor advocating a reconsideration of the rough upper limit seem to me to be compelling but, in the end, this Court cannot overturn the trilogy.

VII. The defendants' appeal of the judge's award for non-pecuniary damages

- [91] The defendants argue that the award for non-pecuniary damages ought to be reduced from the rough upper limit to \$195,000, which the defendants submit would be more in accord with the case authorities where plaintiffs have sustained similar injuries.
- [92] In my view, that submission cannot be given effect in this case. It is clear from their verdict that the jury regarded the injuries this young plaintiff sustained as catastrophic, both physically and emotionally.

VIII. Conclusion

- [93] I would dismiss the appeal and cross-appeal.

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Braidwood"

Correction: 10 August 2006

In the corrigendum dated August 1, 2006 the reference to *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th), 2003 BCCA 251, should have read as follows: "EGALE Canada Inc. v. Canada (Attorney General) (2003) 225 D.L.R. (4th) 472, 2003 BCCA 251."

Corrigendum to the reasons of

The Honourable Madam Justice Rowles - 01 August 2006

In paragraph 48 of the reasons, the reference to the Ontario Court of Appeal should be deleted and replaced by the Ontario Superior Court of Justice. The sentence will now read: "In explaining his reasons for adopting this approach, the plaintiff referred to *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th), 2003 BCCA 251, in which this Court reflected on the decision of the Ontario Superior Court of Justice in *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321, 215 D.L.R. (4th) 223."

In the third sentence of paragraph 87 the word "triology" should be replaced by the word "trilogy".

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