

CANADA / JUDGMENT

McCliggot v. Elliott

2022 BCCA 315

COURT

British Columbia Court of Appeal

DECIDED

16 September 2022

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2022 BCCA 315 McCliggot v. Elliott

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McCliggot v. Elliott,

2022 BCCA 315

Date: 20220916

Docket: CA46728

Between:

Ryan McCliggot and Slegg Construction Materials Ltd.

Appellants

(Defendants)

And

Patricia Dawn Elliott

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Groberman

The Honourable Justice Dickson

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated

February 4, 2020 (Elliott v. McCliggot, Victoria Docket M144097).

Counsel for the Appellants, appearing via videoconference:

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J.J.L. Brun, K.C.

Counsel for the Respondent, appearing via videoconference:

K.J. Hauer

Place and Date of Hearing:

Vancouver, British Columbia

June 9, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 16, 2022

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Mr. Justice Marchand

Dissenting Reasons by:

The Honourable Mr. Justice Groberman (Page 45, para. 123)

Summary:

Majority (per Justice Dickson and Justice Marchand): This is an appeal from a civil jury trial relating to the injuries sustained in a motor vehicle accident. The jury awarded the respondent \$463,385.24, including \$350,000 in non-pecuniary damages. The appellants argue that the trial judge erred in providing an inadequate jury charge on how to assess non-pecuniary damages and they submit the jury's assessment of non-pecuniary damage was wholly out of proportion given the evidence and the comparative approach to appellate review. The appellants also submit that the jury's assessments of past loss of income and cost of future care were wholly erroneous and out of proportion. The respondent submits the comparative approach should be discarded and the awards should not be disturbed. Held: Appeal allowed in part. The comparative approach to reviewing damage awards made by a jury is firmly established in this Court's jurisprudence and a three-member division is not entitled to discard the approach. The jury charge was adequate and error-free. However, the non-pecuniary damage award was wholly disproportionate and sufficiently anomalous such that the majority would allow the appeal to the extent of reducing this amount from \$350,000 to \$250,000. The majority would otherwise not disturb the damages

award for past loss of income earning capacity and cost of future care.

Dissent (per Justice Groberman): Justice Groberman would have reduced the non-pecuniary damage award to \$200,000, and comments on the comparative approach to jury awards and on the inability of a judge to instruct the jury on ranges for non-pecuniary damages.

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Reasons for Judgment of the Honourable Justice Dickson:

Introduction

- [1] The respondent, Patricia Elliott, sustained soft tissue injuries in a motor vehicle accident. Seven years later, a jury awarded her \$463,385.54 in damages, including \$350,000 for non-pecuniary damage, \$46,500 for past income loss, and \$15,000 for the cost of future care. The appellants, Ryan McCliggot and Slegg Construction Materials Ltd., seek an order allowing the appeal, setting aside the jury's verdict and remitting the assessment of damages to the trial judge. Alternatively, they ask this Court to reassess Ms. Elliott's non-pecuniary damage, past income loss and cost of future care.

- [2] According to the appellants, the judge erred by providing the jury with an abbreviated and inadequate charge on how to assess non-pecuniary damages. In addition, they say the jury's assessments of non-pecuniary damage, past income loss, and the cost of future care were wholly out of proportion and constituted palpable and overriding factual errors. Consequently, they submit that this Court should intervene, set aside the jury awards and order that damages be reassessed, in whole or in part.
- [3] The appeal centers on the correct approach to appellate review of a damage award made by a jury and whether application of that approach justifies intervention in this case. In particular, the parties disagree on the extent, if any, to which comparator awards made by judges provide helpful guidance on review of whether a jury award for non-pecuniary damage is out of all proportion and wholly erroneous such that it should be set aside. The appellants submit the comparative approach is well-established and helpful, and say its application shows the award in this case is wholly erroneous and should be reduced substantially. Ms. Elliott submits the comparative approach is illogical and should be discarded, and says the award should not be disturbed or, alternatively, reduced only to a limited extent.
- [4] In my view, the comparative approach is firmly established in this Court's jurisprudence. A three-member division is not entitled to discard it. However, the limits to its utility in some cases have become increasingly apparent over time, and it has minimal value in this case due to the unique impacts of Ms. Elliott's injuries in her specific circumstances. Nevertheless, given the nature and extent of those injuries and impacts, the \$350,000 award for non-pecuniary damage is wholly disproportionate and sufficiently anomalous that a reduction is appropriate. On the other hand, the evidence is capable of supporting the past income loss and cost of future care awards, and the jury charge was adequate and error-free.
- [5] For the reasons that follow, based on the evidence viewed most favourably for Ms. Elliott and the review standard articulated in *Moskaleva v. Laurie*, 2009 BCCA 260, I would allow the appeal to the extent of reducing the non-pecuniary damage award from \$350,000 to \$250,000.

Background

- [6] On November 8, 2012, Ms. Elliott was driving her minivan in Victoria, B.C. While she was stopped, the personal appellant reversed a flat-deck lumber truck owned by the corporate appellant into her minivan. The lumber truck was travelling at approximately 15 km/hr at the time of impact. The appellants admitted liability for the accident.
- [7] Ms. Elliott was 36 years old when the accident happened. A single mother, she lived in a rented residence on Ambassador Avenue in Victoria with her three children, then ages 16, 12 and six. Ms. Elliott supported herself and her children by operating an unlicensed daycare out of the Ambassador residence. The residence had four bedrooms, a backyard and an area that served as a playroom. Ms. Elliott paid \$2,200 in monthly rent.

- [8] Ms. Elliott started her daycare business in 2007, shortly after the birth of her youngest daughter. Working with children was her career of choice, she enjoyed the work immensely and she was able to work from home. The ability to work from home was extremely important to Ms. Elliott because her children lived with significant challenges and medical disabilities. In particular, her eldest son struggled with a learning disability and self-sufficiency; her middle daughter struggled with a learning disability, depression and a condition that caused extreme weight gain; and, her youngest daughter had optic nerve hypoplasia, nystagmus and hyperpituitarism, which required numerous hospitalizations. Fortunately, operating the daycare allowed Ms. Elliott to be present for her children after school to provide them with much-needed support.
- [9] In addition to caring for her own children, Ms. Elliott typically cared for three to five children at her unlicensed daycare. In the years leading up to the accident, the daycare generated only modest net taxable earnings, although Ms. Elliott was able to write-off a significant portion of her rent, heat, telephone and motor vehicle costs as business expenses. She charged monthly fees of between \$700 and \$750 per child, depending on her relationship with their parents and whether a child also had siblings at the daycare. As part of the daycare service she supplied daily snacks for the children, but the parents provided their diapers, clothing and lunch.
- [10] Ms. Elliott and her family moved into the Ambassador residence in 2010 and, in 2011, she began the process of obtaining a license with a view to expanding her business. With a license, she would be able to take in up to seven children at a time at potentially higher monthly rates per child than the rates she was able to charge for the unlicensed daycare. The licensing application process was nearly complete at the time of the accident. In particular, Ms. Elliott had provided the Vancouver Island Health Authority with the required references and criminal record check, and she had received approval to operate a licensed daycare. The only outstanding requirement was installation of a fence around concrete steps located in the backyard of the residence.
- [11] The day of the accident was the last day that Ms. Elliott worked in her daycare business. For about a month thereafter, she hired a replacement worker in the hope of making a prompt recovery and returning to operating the daycare. However, it soon became clear that Ms. Elliott could not return to working at the daycare because her injuries prevented her from performing the sort of physical activity involved in caring for young children.
- [12] Ms. Elliott sustained soft tissue injuries in the accident, predominantly of the cervical and thoracic spines, which caused daily headaches, chronic myofascial pain and mild thoracic outlet syndrome. More specifically, she suffered a whiplash to her neck that led to myofascial pain affecting the neck, trapezius muscles, and upper to mid back areas, with daily headaches and periodic numbness and tingling in the right upper extremity. Her acute symptoms improved after about four months, then gradually plateaued, and her condition is now considered permanent. It includes a constant aching discomfort in her back and shoulders, tension and stiffness in her neck, interrupted sleep and daily low-grade

headache, with moderate monthly flare-ups and severe flare-ups every two to three months.

[13] Ms. Elliott had no related pre-existing injuries or medical conditions.

[14] As a result of her injuries, Ms. Elliott was forced to close her daycare business in mid-December 2012. Without income from the business, she was unable to pay her rent for the Ambassador residence. In January 2013, she and her children were evicted. They left the property at the beginning of February 2013. Thereafter, she moved with them to a smaller, less expensive rental property.

[15] For the four-month period after the accident, Ms. Elliott received emergency social assistance payments to help support her family. In April 2013, her doctor advised that she could resume working and she found part-time employment as an office administrator. From that point forward, she worked in sedentary office jobs and eventually became a bookkeeper. Her hourly wage in April 2013 when she began performing office work was \$13.50.

[16] Ms. Elliott's hourly wage for her office work gradually increased from April 2013 onward. By the trial date, it had reached \$26 per hour. She stopped working for six months in 2015 and for three months in 2019 for reasons unrelated to the accident. From April 2013 to the trial date, she also missed approximately one to one-and-a-half days of work per month due to her injuries. She was otherwise generally able to work in an office environment, although she experienced discomfort with prolonged sitting, avoided heavy lifting and had to use a heating pad at her desk.

[17] Ms. Elliott's post-accident income tax returns disclosed higher net income than the net income shown on her pre-accident income tax returns. Specifically, her pre-accident income tax returns disclosed the following gross and net business income:

- 2009 - \$33,502 (gross)/\$6,775 (net);
- 2010 - \$28,617 (gross)/\$8,101 (net);
- 2011 - \$26,886 (gross)/\$6,153 (net); and
- 2012 - \$29,565 (gross)/\$2,667 (net).

[18] Her post-accident income tax returns and T4 statement disclosed the following net income:

- 2013 - \$23,072;
- 2014 - \$24,128;
- 2015 - \$19,667;
- 2016 - \$38,424;
- 2017 - \$41,645; and

· 2018 - \$44,808.

[19] In addition to preventing her from returning to daycare work, Ms. Elliott's injuries affected her housekeeping, recreational and other activities. For example, she had to modify her cooking and housekeeping practices, golfed less often, and stopped engaging in activities such as ten-pin bowling and playing laser tag. She received periodic physiotherapy, massage therapy and trigger point injections to treat her pain, and took over-the-counter analgesics for symptom management on a daily basis. She also stretched regularly and was careful to avoid overexertion, which could trigger a flare-up. Going forward, her doctors recommended that she continue with similar treatments and medication for pain management, together with targeted exercise.

At Trial

[20] Both parties filed jury notices early in the litigation. However, three months before trial Ms. Elliott indicated in her trial brief that the trial should proceed without a jury. The appellants, on the other hand, elected to proceed by way of jury trial and paid the jury fees.

[21] The trial was conducted over the course of six days from January 27 to February 4, 2020.

The Evidence

[22] At trial, Ms. Elliott described her injuries, their physical effects and their impacts on her activities of daily living. For example, she testified that she experiences "a constant pulling and an ache in my mid back and my shoulders and my neck", "a constant headache that sits in the base of my skull at the top of my neck" and periodic "numbness and tingling in my right arm and the first two fingers on my right hand". She described her daily pain as always present but fluctuating in intensity, stating that she could generally work through the pain and keep it at 1 to 2 on a 10-point scale with the help of medication. In addition, she said, she experienced monthly flare ups that reached levels of 3 to 4 or up to 5 to 6 and lasted for three to four days at a time.

[23] Ms. Elliott also testified regarding her reduced working capacity and compromised recreational, social and other activities. As well as describing the changes in her work, home and recreational activities, she told the jury that she was in a romantic relationship at the time of the accident, but that it ended in January 2013. She stated further that she had not been in another romantic relationship since then because she felt unable to engage in physical intimacy due to the tension and stiffness she experienced in her body every day.

[24] Significantly, Ms. Elliott went on to describe the central importance of parenting in her life and the negative impact of her injuries on her ability to parent her special-needs children. She expressed dismay that she had gone from being a "hands-on" parent to taking a lot of time for self-care and not being as present for them as she was before the accident occurred. In direct examination, she testified that her middle daughter had recently been hospitalized for a suicide attempt. She also testified that, since the accident, "I feel like I've been failing

[the children] as a parent".

[25] On cross-examination, counsel for the defendants emphasized the significant increase in Ms. Elliott's employment income after she closed her daycare business. He also questioned whether she would genuinely prefer to return to childcare work if it was possible for her to do so. They had this telling exchange in that regard:

Q: Okay, by my reckoning 2018 you're almost, just a little bit short of doubt what you were in your best years in daycare, weren't you?

A: Yes.

Q: If someone were to offer you a job right now for \$13.50 an hour doing babysitting would you quit your job and do that?

A: Would it allow me to stay home with my kids?

Q: Well, would you quit?

A: Sorry?

Q: Well, would you quit your job?

A: If it gave me the capability of staying home with my kids and I was physically able to do so, yes.

Q: You would take a pay cut like that to stay home?

A: Yes.

[26] In addition to her own testimony, Ms. Elliott relied on the evidence of her son and a close friend, both of whom described their observations of her injuries and their impacts. She relied further on the expert evidence of two doctors: the first, a physiatrist; the second, an orthopaedic surgeon who examined her at the defendants' request. The medical evidence indicated that she sustained soft tissue injuries of the cervical and thoracic spines, which resulted in cervicogenic headaches, generalized deconditioning and chronic myofascial pain of the affected regions of her body. Both doctors opined that Ms. Elliott's symptoms were unlikely to change much in the future. Both stated that she was no longer physically able to operate a daycare.

Closing Addresses to the Jury

[27] In his closing address to the jury, Ms. Elliott's counsel submitted that she was a credible witness who wanted to get better and had tried hard to recover. However, he stated, through no fault of her own, she had failed fully to heal. He discussed the nature of Ms. Elliott's injuries and their impacts on her life, emphasizing her love of daycare work and the vital importance to her of work that allowed her to be at home to provide support for her special-needs children. He also emphasized her distress borne of her feeling that, since the accident, she had been failing her family.

[28] In dealing with pecuniary damages, Ms. Elliott's counsel provided the jury with a written summary of the damage awards that she was seeking. He explained the purpose of the summary like this:

I have prepared a summary to assist you in understanding what Ms. Elliott seeks under each of those heads. It's not something that's binding on you in any way. It's simply so you're understanding what Ms. Elliott says is fair in her belief. You can accept some of it, none of it, or all of it

[29] Next, counsel went through the written summary. In addressing the claim for past loss of earnings, he began by reminding the jury that they did not know what would have happened in Ms. Elliott's work-life but for the accident. He also reminded them that she was in the process of getting a licence for her daycare to allow her to take in more children when it occurred. He then referred to a table in the summary that set out various time periods and assumptions which counsel incorporated into calculations. He put those calculations forward in support of Ms. Elliott's claim for past loss of earnings.

[30] One of the assumptions incorporated in the calculations was that the daycare fees Ms. Elliott was charging at the time of the accident were covering her monthly rent of \$2,200. For the November 2012 to March 2013 period, her counsel treated that \$2,200 figure as her monthly income, multiplied it by four and subtracted \$5,187.75 for the social assistance she received, leaving a net figure of \$3,612.25, which was claimed as lost income for that four-month period. For April 2013 to January 2020, counsel identified nine sub-periods based on the locations where Ms. Elliott worked and the hourly wage she was paid, then calculated the value of 1.5 days per month lost due to accident-related injuries at the hourly rate for each sub-period. For the sub-periods from January 2016 to May 2019 when she worked at a particular location, he discounted the calculation by 75% because she had testified that she took 75% of her accident-related sick days as vacation days when she worked there. He did not include any past wage loss claim for the periods in 2015 and 2019 when Ms. Elliott was off work for reasons unrelated to the accident. He also suggested that the jury deduct income tax from the resulting final figure, which led to an overall request of \$8,865 for past loss of earning capacity.

[31] Counsel went on to address Ms. Elliott's claim of \$79,200 for future loss of earning capacity, then turned to her cost of future care claim. Referring to the summary, he explained that the \$11,045 claim was based on the evidence that Ms. Elliott spent about \$30 per month on medication and required ongoing physiotherapy at a cost of \$25 per treatment for six sessions per year. He stated that the figure claimed was based on such future care costs to the point that Ms. Elliott turns 65 years old.

[32] For his part, counsel for the defendants emphasized that Ms. Elliott was obliged to prove her alleged losses on a balance of probabilities. He characterized the evidence as sparse in important respects and focused on the improvement in Ms. Elliott's net income after she closed her daycare. He also challenged the reliability of the figures in the summary

regarding past income loss and submitted that "if there is a period of time after the accident where the plaintiff probably could argue successfully that she had difficulty earning money, it would be the period of time from November 8th to the beginning of April". As to the cost of future care, he argued that the evidence was insufficient to support the claim advanced.

Jury Charge

[33] On the third day of the trial, the judge advised counsel that she would be providing them with a copy of her draft charge to the jury. She said that she intended to abbreviate the charge because the case was not very complicated, but she did not intend to strictly follow the abbreviated instructions found in the model Civil Jury Instructions, commonly known as "CIVJI". She went on to ask counsel for their preliminary input on various damages issues. As to non-pecuniary damage, the judge said this:

And with respect to non-pecuniary loss, I've just simply taken it right out of the sample from CIVJI, that is pain, injury, suffering, and loss of enjoyment of life from the date of the accident, being November 8th, 2012, until the plaintiff's estimated time of recovery either before or after today. [] And then a total for the non-pecuniary loss.

[34] Neither counsel expressed concern with the approach described by the judge.

[35] Two days later, the judge provided counsel with a draft jury charge and solicited their further input. After reviewing the draft, both commented on certain issues, but neither had anything to say about the proposed charge on non-pecuniary damages. The following day, the judge provided counsel with a final draft of the charge and asked for additional input. Again, neither counsel raised any concern regarding the draft in relation to Ms. Elliott's non-pecuniary damage claim.

[36] Following counsel's addresses, the judge charged the jury. She reviewed the functions of a judge and jury, the weighing of evidence, and several other issues. She also summarized the evidence, the standard of proof and counsel's submissions to the jury. As to the latter, she said this:

[80] In counsel's submissions to you, they suggested dollar figures that you might choose to award Ms. Elliott for certain of the heads of damage in issue, although not for the non-pecuniary damages for pain and suffering, for which neither counsel nor I may suggest dollar figures. Because the assessment of damages is a question of fact for you to decide, you are not bound by counsel's suggestions. As I have indicated, the arguments of counsel are not evidence from which you can find facts. You may only find facts based on the evidence you heard and you must award Ms. Elliott reasonable compensation based on your findings of fact.

[Emphasis added.]

- [37] Because the main grounds of appeal concern the jury's assessment of non-pecuniary damage, I will reproduce the judge's charge on this issue in full:
- [88] I will deal first with the head of damages called non-pecuniary loss. Non-pecuniary losses are personal injury losses that have not required an actual outlay of money. The purpose of such an award is to compensate Ms. Elliott for such things as pain, suffering, disability, inconvenience and loss of enjoyment of life[.]
- [89] Your award should compensate Ms. Elliott for her pain and suffering, inconvenience and loss of enjoyment of life both up to the date of trial and in the future provided that those losses were caused by the accident.
- [90] In assessing damages, you may consider what use Ms. Elliott can make of the money you may choose to give her. One purpose of making an award under this heading is to substitute other amenities for those she has lost. It is meant to provide some money to make Ms. Elliott's life more bearable.
- [91] With respect to Ms. Elliott's complaints relating to pain, injury, and suffering from the date of the accident until the date of the trial, you heard her own evidence about her lifestyle and activities before the accident and her evidence about how she has been affected by her injuries. You also heard the evidence of Nadine Dalzell and Ms. Elliott's son about their observations of the impact of the accident on Ms. Elliott. As well, you have the written reports of Dr. Waseem (and his oral testimony) and Dr. Masri setting out their medical opinions, including their assessment and prognosis.
- [92] When fixing a sum for damages with respect to pain, injury, and suffering, you know that damages can never be adequate in the sense that a person would undergo this pain and suffering in exchange for money. Although you cannot truly compensate for pain and suffering, you must try to assess an amount for Ms. Elliott that is fair and reasonable and bears some reasonable relation to the loss and injury claimed, as shown in the evidence.
- [93] A judge sitting alone without a jury is required to consider similar awards of other judges, to maintain consistency with them. But the law does not permit me to provide you with copies of other trial judgments relating to similar kinds of cases, or to tell you about awards in other cases.
- [94] If I were to tell you the approximate range of damages I might award, and you adopted what I said, you would merely be returning a verdict based upon a judge's opinion. In that event, the educational value of your independent judgment would be lost to the law. Besides, my assessment would be based on my view of the evidence. It might be entirely different from yours. As I have said it is your duty to determine a sum that is fair and reasonable to both parties, based on the evidence you have heard.
- [38] The judge turned next to Ms. Elliott's claim for past loss of income. Given the appellants' position on this issue on appeal, I will also reproduce this aspect of the charge in full:

- [95] You heard from Ms. Elliott that she claims to have lost income as a result of the accident.
- [96] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity, that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
- [97] If you are satisfied on a balance of probabilities that Ms. Elliott's ability to earn income was impaired as a result of the injuries she sustained in the accident, you must go on to assess the likelihood that, had the injuries not occurred, Ms. Elliott would have earned more in income in the period between the accident and the trial than she actually earned and make an award for past loss of income using that assessment. The question of what would have happened had the accident not occurred is a hypothetical one and, as such, it need not be proven on a balance of probabilities, but rather it is given weight in accordance with its likelihood. Common events of life, or contingencies, such as sickness, layoffs, pay raises and promotions, should be taken into account. It is also open to you to consider Ms. Elliott's past employment history including the fact that, at the time of the accident, according to her she was operating her own business in her in-home daycare.
- [98] Taking account of all of these factors, it is for you to decide whether Ms. Elliott has proven, on a balance of probabilities, that she suffered a loss of income as a result of the injuries sustained in the accident in the period from the date of the accident to the date of trial.
- [99] Ms. Elliott submits that an award of \$8,865.73 is reasonable under this head. That number is based on: (1) her initial loss from her daycare from the time of the accident until her return to the workforce in April 2013; (2) after April 2013, her evidence that she missed 1 to 1 ½ days per month; and (3) as agreed between counsel, that there be a reduction for tax of 22.7%.
- [100] The defendants submit that there could be an award of damages for past income loss from the date of the accident until Ms. Elliott's return to work in April 2013 but that she has not met the evidentiary burden on her to prove this loss.
- [101] It is for you to decide whether Ms. Elliott has established her claim under this head, keeping in mind that damages are not limited to actual lost income but include the loss of capacity to work.

[Emphasis added.]

- [39] After dealing with the claim for loss of future earning capacity, the judge turned to the cost of future care claim, noting that Ms. Elliott was only claiming the cost of physiotherapy and over-the-counter medications under this head of damage. In discussing the claim, the judge reviewed the salient evidence and told the jury that the amount awarded "should be fair and adequate and there must be an evidentiary link between each item or treatment sought and the disability or pain suffered by Ms. Elliott".

Jury Verdict

[40] The jury deliberated for over seven and a half hours. It returned with the following verdict:

a)

Special damages:

\$ 3,885.54

b)

Past loss of income earning capacity:

\$ 46,500.00

c)

Loss of future earning capacity:

\$ 45,000.00

d)

Cost of future care:

\$ 15,000.00

e)

Loss of housekeeping capacity:

\$ 3,000.00

f)

Non-pecuniary damages:

\$350,000.00

Total Award:

\$463,385.54

On Appeal

[41] The appellants contend the judge erred by providing the jury with unduly abbreviated and inadequate instructions on how to assess non-pecuniary damages. They also contend the jury's assessment of non-pecuniary damages was wholly erroneous and out of all proportion in that it falls so substantially beyond the upper range of awards set by judges in the same class of cases that it must be reduced. They contend further that the assessments of past loss of income and the cost of future care were wholly erroneous, unprincipled and unsupported by the evidence. Consequently, they submit, this Court should set aside the jury verdict and remit the case to the trial judge to assess damages, or, alternatively, direct a new trial on damages or assess non-pecuniary damages, loss of income to the date of trial and the cost of

future care.

- [42] In support of their submission, the appellants rely on the comparative approach to appellate review of jury awards, which approach Ms. Elliott contends is illogical and should be discarded. In addition to the utility of applying the comparative approach, the appeal raises the following issues:
- a) Did the trial judge err in providing the jury with unduly abbreviated and inadequate instructions on how to assess non-pecuniary damages?
 - b) Was the jury's \$350,000 award for non-pecuniary damage wholly erroneous and out of all proportion such as to warrant appellate intervention?
 - c) Were the jury's assessments of past loss of income and the cost of future care wholly erroneous and unprincipled in light of the evidence?
 - d) If the judge or jury erred, what is the appropriate remedy?

Discussion

Non-pecuniary Damages

- [43] The purpose of non-pecuniary damages is to provide solace and to make life more endurable for an injured plaintiff. To the extent possible, non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, direct and indirect, including the loss of amenities and enjoyment of life: *Moskaleva* at para. 95; *Boyd v. Harris*, 2004 BCCA 146 at para. 29. That said, it has long been recognized that "there is no medium of exchange for happiness" and putting a money value on pain and suffering is impossible: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 31. It has also been recognized that "[t]he monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one": *Dilello* at para. 32, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
- [44] As Justice Dickson (as he then was) explained in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, the amount of an award for non-pecuniary damages is determined by a functional approach that does not depend exclusively on the gravity of the injury. Rather, it depends additionally on the ability of the award "to ameliorate the condition of the victim considering his or her particular situation". It follows that the need for solace does not necessarily correlate with the seriousness of an injury. When assessing non-pecuniary damages, the role of the trier of fact is to gain a full appreciation of the plaintiff's overall loss and determine an amount of compensation appropriate to the circumstances of that particular plaintiff: *Lindal* at 637.
- [45] In the trilogy of cases decided in 1978, the Supreme Court of Canada imposed a rough upper limit of \$100,000 as the amount to be awarded for non-pecuniary damages in cases involving catastrophic injuries: *Andrews*; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267. A rule of law

and policy, the legal ceiling acts as a "governor on an engine" and, adjusted for inflation, to limit what could otherwise be an unlimited sum without influencing the assessment of non-pecuniary damages before the limit is reached. As explained in *Boyd*:

- [32] 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
- [46] Because the specific circumstances of each case govern, non-pecuniary damage awards are by their nature highly variable and not amenable to a tariff: *Lindal* at 637. However, as Chief Justice Finch observed in *Dilello*, the effect of the upper limit has filtered down to non-pecuniary damage awards generally, which has resulted in a rough tariff system in cases involving judge-alone awards. In non-catastrophic cases tried by juries, though, the jury is not told about the upper limit, in part because the amount of damage caused by an injury is a factual question and also to preserve the educational value of the independent judgment of the jury. For these reasons, juries are left to apply their own understanding of community values and common sense to their subjective appreciation of the evidence, consistent with the law as the judge explains it. Consequently, jury awards are even less predictable than judge-alone awards. They also tend to suggest that non-pecuniary damage awards made by judges may not conform to contemporary community standards as to appropriate compensation. In particular, jury awards tend to suggest that judges improperly suppress non-pecuniary damage awards by scaling them to the upper limit, whether consciously or unconsciously: *Dilello* at paras. 23-30; *Boyd* at paras. 8, 30, 36; *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 117-121, leave to appeal ref'd, [2006] S.C.C.A. No. 100 (S.C.C.).
- [47] In *Stapley*, Justice Kirkpatrick provided a list of common factors that influence an award of non-pecuniary damages. Now commonly referred to as the "Stapley factors", she described those factors in this way:
- [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

Standard of Review: Misdirection or Non-direction of Juries

- [48] The standard of review for legal errors such as misdirection or non-direction is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. Even in cases where errors were made, an appellate court may decline to interfere with a jury award if counsel failed to object at the trial level. As a general rule, an appellate court will not order a new trial where no objection was taken to impropriety or an error in the course of a trial unless there has been a substantial wrong or miscarriage of justice: *Knauf v. Chao*, 2009 BCCA 605 at paras. 18-21.
- [49] As explained in *Knauf*, the failure of counsel to object to an alleged error in a civil trial, while not determinative, is a significant consideration when an appellate court decides whether to order a new trial:
- [19] After reviewing a number of case authorities, [in *Arland v. Taylor*, [1955] 3 D.L.R. 358] Mr. Justice Laidlaw set out the following four propositions he extracted from the case authorities:
- (1) A new trial is contrary to the interest of the public and should not be ordered unless the interests of justice plainly require that to be done.
 - (2) An appellant cannot ask for a new trial as a matter of right on a ground of misdirection or other error in the course of the trial when no objection was made in respect of the matter at trial.
 - (3) A new trial cannot be granted because of misdirection or other error in the course of the trial "unless some substantial wrong or miscarriage has been thereby occasioned".
 - (4) A party should not be granted a new trial on the ground of non-direction in the Judge's charge to the jury where, having opportunity to do so, he did not ask the Judge to give the direction the omission of which he complains of.
- [21] Thus, the general rule is that a new trial will not be ordered where no objection is taken to impropriety or error in the course of a trial unless there has been a substantial wrong or miscarriage of justice.

Standard of Review: Jury Awards

- [50] The amount of damages or loss sustained by a plaintiff is a factual question: Negligence Act, R.S.B.C. 1996, c. 333, s. 6. Accordingly, an appellate court will not set aside a finding on the amount of damages in the absence of palpable (obvious) and overriding (material) error: *M.B. v. British Columbia*, 2003 SCC 53 at para. 54; *Housen* at paras. 5, 6, 10.
- [51] The standard of review for damage awards made by juries is even more deferential than the standard applied to judge-alone awards. On appeal, a jury's damage award will only be set aside in the rare case where the award is "wholly disproportionate or shockingly unreasonable": *Moskaleva* at para. 127; *Little v. Schlyecher*, 2020 BCCA 381 at para. 6.
- [52] The correct approach to appellate review of damage awards made by juries has been the subject of considerable judicial comment over the past two decades. Specifically, the propriety of looking to comparator cases decided by judges when assessing whether a jury award is inordinately low, inordinately high or wholly erroneous has been repeatedly questioned and debated in several judgments of this Court.

The Comparative Approach

- [53] The comparative approach was established in this province in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.), leave to appeal ref'd, [1993] S.C.C.A. No. 137 (S.C.C.), where Chief Justice McEachern reviewed leading English authorities on appellate review of damage awards, including *Davies v. Powell Duffryn Associated Collieries*, [1942] A.C. 601 (H.L.) and *Nance v. British Columbia Electric Railway*, 3 D.L.R. 705, [1951], 2 W.W.R. (N.S.) 665 (J.C.P.C.). Speaking for the majority, he concluded that appellate interference is justified if a jury damage award falls substantially beyond the upper or lower range of comparable judge-made awards:
- [6] The opinion of Lord Wright in *Davies* introduces the concept of proportionality between the award and the circumstances of the case. This must include reference to other cases because a priori reasoning is hardly a basis for reviewing damage awards.
- [8] Because of its reference to inordinately low or high awards and to wholly erroneous estimates of the damage, *Nance* continues the proportionality approach taken in *Davies*. This calls for consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases. In my view, an award is inordinately high, low, or disproportionate if it falls substantially beyond the upper or lower range for damage awards in the same class of case.
- [54] Justice Gibbs dissented in *Cory*. In doing so, he emphasized the statements in *Davies* and *Nance* that a jury award "will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case": *Cory* at para. 34, citing *Davies*. He also observed that an appellate court reviewing a jury award for non-pecuniary damage "must guard against usurping the role of the jury as trier of

fact, including the fact of appropriate solace, by some intuitive selection of an arbitrary lesser sum": Cory at para. 36. He described an extreme award that would shock the conscience as an award that is "so outrageously large, considering the nature and extent of the injuries sustained, as to be out of all proportion": Cory at para. 37.

- [55] The respondents in Cory were farmers. In explaining his view that the jury awards did not meet the "out of all proportion" test, Justice Gibbs detailed the respondents' injuries and the impacts of those injuries on their lives. After noting the "real world values" applied by the jury and questioning the applicability of the proposed comparable cases, he stated that "even true comparables cannot be said to be more than rough guides": Cory at paras. 48-49. He also emphasized the functional approach to assessing non-pecuniary damages: Cory at paras. 38-50. Then he said this:
- [51] The most obvious inutility of awards by trial judges as comparisons in this case is that the comparables do not meet the requirements of the functional approach. They do not take into account the factors unique to the circumstances of the Cory's which the jury must have taken into account. There can be no real comparison between the nature and extent of the pain and suffering the farmer is compelled to endure while continuing to perform the tasks demanded of him by the natural progression of the seasons and the pain and suffering from injuries which a plant or office or other salaried worker is able to cosset by unpenalized inactivity while the healing process is at work.
- [52] As well, comparables suffer from two other shortcomings. Firstly, reliance by a trial judge on awards made by other trial judges of co-ordinate jurisdiction tends to perpetuate an element of circularity. Secondly, imposing trial judge awards as an appropriate measure of reasonableness negates the very purpose of a jury, to bring into the courtroom the standards and the common sense of the community.
- [53] I am not persuaded that the jury in this case did otherwise than conscientiously assess non-pecuniary damages impartially, as directed by the trial judge, and by the application of the standards and common sense of the community.
- [56] Ten years after Cory, Justice Thackray observed in *Ferguson v. Lush*, 2003 BCCA 579, leave to appeal ref'd, [2003] S.C.C.A. No. 558 (S.C.C.) that this Court had adopted the procedure of comparing jury awards to judge-made awards for review purposes. However, he found no such comparison would be appropriate in that case: *Ferguson* at para. 52. Quoting from his earlier judgment in *Laycock v. Long*, 2002 BCCA 186, he commented that there is a lack of logic to citing comparable cases of judge-made awards on appellate review because juries are generally not supplied with guidelines as to an appropriate range of damages: *Ferguson* at para. 50, citing *Laycock* at para. 22. Accordingly, he stated, applying the comparative approach to determine whether a jury erred "is illogical, unfair to the jury and unfair to the civil jury system": *Ferguson* at para. 50, citing *Laycock* at para. 22.

- [57] The following year in *Boyd*, Justice K. Smith closely examined the comparative approach, its evolution and its application in the jurisprudence. After noting the deferential review standard for factual findings, he emphasized that civil juries contribute significantly to the judicial system by bringing their common sense and collective values to the deliberative process, enhancing settlement rates and influencing views of what is fair, just and reasonable in damage assessments: *Boyd* at paras. 6-10. Nevertheless, he stated appellate intervention is justified on occasion to moderate "clearly anomalous" jury awards, promote fairness and uniformity, and maintain public confidence in the courts:
- [11] appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.
- [58] Justice Smith described identifying the extent of permissible deviation in a jury award from the conventional range of judge-made awards in comparable cases as a "difficult problem": *Boyd* at para. 12. He noted that the comparative approach is fraught with subjective judgment, but he found helpful guidance in *Foreman v. Foster*, 2001 BCCA 26, where Justice Lambert explained that this Court is reluctant to interfere with a jury award because, among other things, the jury's findings of credibility or other facts on the way to its assessment are unknown: *Boyd* at para. 13, citing *Foreman* at para. 32. Bearing in mind the guidance in *Foreman*, Justice Smith concluded that a greater margin of deviation from the conventional range of damages awards made by judges is required to justify appellate interference in jury awards: *Boyd* at paras. 12-14.
- [59] Justice Smith also emphasized that judges should not compare a plaintiff's injuries to those in the 1978 trilogy when assessing non-pecuniary damages: *Boyd* at paras. 29-32. He stated that a jury award in an amount not previously awarded by judges except in near catastrophic cases is not necessarily excessive if it is grounded in the evidence, noted that judges may scale their awards to the upper limit and observed that such scaling improperly suppresses the upper end of the reasonable range of judge-alone awards: *Boyd* at paras. 35-36.
- [60] As to the comparative approach, Justice Smith said this:
- [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.
- [42] The identification of comparable cases is not a simple task. Each case is unique. The process should be systematic and rational, not conclusory. We must therefore search for common factors that influence the awards, such as, most obviously, the age of the plaintiff and the nature of the injury. However, comparisons can be made on a more abstract level, as well. The factors to be considered include the relative severity and duration of pain, disability,

emotional suffering, and loss or impairment of enjoyment of life. The awards in the comparable cases must be adjusted for inflation. When the appropriate range is identified, adjustments must be made for the particular circumstances of this case, including the plaintiff's need for solace, which must be considered subjectively: *Penso v. Solowan*, supra, at 261. Then, in determining whether the award falls so far outside the acceptable range as to justify appellate interference, we must make allowance for the fact that the award was assessed by a jury. Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.

- [61] The comparative approach was considered again in *Stapley*. Speaking for the majority, Justice Kirkpatrick quoted from *Boyd and Lindal*, and applied the "horizontal" comparative approach in adjusting a non-pecuniary damage award from \$275,000 to \$175,000: *Stapley* at paras. 39-44, 113. However, in dissent, Chief Justice Finch expressed the view that comparing jury awards and judge-alone awards was "no longer a useful exercise": *Stapley* at para. 117. In doing so, he emphasized the absence of reasons in a jury case and resulting impossibility of comparing the factual basis of a jury award with the facts found in cases decided by judges, as well as the improper suppressing effect of the upper limit on judge-alone awards. He also emphasized the loss of the intended corrective effect of jury awards when judge-alone awards are used to test the reasonableness of jury awards: *Stapley* at paras. 117-126.
- [62] Chief Justice Finch perceived a further problem with reducing the non-pecuniary damage award in *Stapley* given that it was the appellant who had issued the jury notice. He observed that the defence may well seek a jury trial believing a jury will award less than a judge and knowing that low jury awards are rarely overturned on appeal due to the jury's presumably negative view of the plaintiff's credibility. That being so, he stated, unless great appellate deference is also paid to high jury awards the defence benefits from a "win-win equation" by opting for a jury trial, which creates an appearance of unfairness: *Stapley* at para. 123. In light of his view that judge-alone awards and the upper limit are inappropriate standards, he concluded that the only remaining guideline by which to measure and review jury awards are decisions of this or other appellate courts: *Stapley* at para. 127.
- [63] In *Moskaleva*, the comparative approach was subjected to further scrutiny and criticism. Speaking for a unanimous division of the Court, Justice Rowles cited *Cody*, *Boyd and Dilello* to affirm that a jury award "is not wrong simply because it does not conform with damage awards made by judges" and stated that, based on the test articulated in *Young v. Bella*, 2006 SCC 3, appellate interference is only justified in those rare cases where the award is "wholly disproportionate or shockingly unreasonable": *Moskaleva* at paras. 104, 119, 123, 127-129. She characterized the applicable test in personal injury cases as less than well-settled and

remarked that the comparative approach established in *Cory* recognized, but did not emphasize, the greater appellate deference due to jury awards: Moskaleva at paras. 96, 105. Citing *Dilello*, she also noted that non-pecuniary awards are inherently arbitrary and that a jury's subjective appreciation of a plaintiff's pain and suffering is not necessarily wrong if it falls outside the range of awards made by judges in similar cases: Moskaleva at para. 113, citing *Dilello* at para. 49.

- [64] Justice Rowles went on to say that some aspects of the comparative approach may be compatible with the palpable and overriding error standard, but that the "preferable formulation of the approach to appellate review" of jury damage awards is that articulated in *Young*: Moskaleva at para. 119. She also recognized the concern expressed by Chief Justice Finch in *Stapley* as an additional possible reason to accord greater appellate deference to high jury awards, namely, the "win-win equation" for the defence and appearance of unfairness created unless great deference is shown: Moskaleva at para. 123.
- [65] Shortly after its release, some counsel argued that Moskaleva stood for the proposition that jury awards should no longer be compared with judge-alone awards for appellate review purposes. That argument was unsuccessful. For example, in *Bransford v. Yilmazcan*, 2010 BCCA 271 Justice Hall responded to the argument by stating "I doubt if Moskaleva goes quite that far": Bransford at para. 17. Shortly thereafter, in *Taraviras v. Lovig*, 2011 BCCA 200 Justice Garson stated that Justice Rowles in Moskaleva "did not reach a firm conclusion about the correctness of the comparator approach". She also stated that "it is appropriate and logical to use comparator cases as a rough guide to assist the court on appellate review": Taraviras at para. 40.
- [66] Justice Garson went on to say that the concerns of the dissent in *Cory* and *Stapley* are adequately addressed by the more deferential standard of review and greater margin of deviation applied to jury awards: Taraviras at para. 41. In her view, the review standard expressed in Moskaleva and the comparative approach described in *Boyd* appropriately balance the need for fairness and uniformity with the intended function of juries. She also saw nothing inconsistent with the Moskaleva test and the use of comparator cases "to inform the appellate court in the application of [that] test" because to do otherwise would leave the appellate review as a "wholly intuitive exercise which risks inconsistent results from case to case": Taraviras at para. 42.
- [67] As to application of the Moskaleva test and the comparative approach, Justice Garson said this:
- [43] Thus, I view the task on appellate review of an award alleged to be inordinately high is to assume that the jury found the facts most favourable to the plaintiff, and then to first compare the award to judge alone assessments in a generous way, and then to assess the appropriate "margin of deviation" applying the Moskaleva test - that is, whether the award would "shock the court's conscience and sense of justice". As to what deviation would shock the court's conscience, I do find other appellate cases to be a useful guide. It is clear from

the authorities discussed that considerable deference must be accorded a jury verdict and even where on appellate review the award must be reduced, such reduction should continue to reflect the view of the jury implicit in the verdict.

Should the comparative approach be discarded?

Positions of the Parties

[68] Drawing on the criticisms outlined above, Ms. Elliott contends that comparing a non-pecuniary damage jury award to judge-alone awards is logically unsound and entirely unhelpful. As a result, she submits the comparative approach should be discarded, or at least "deemphasized". In support, she argues that interference with a jury's non-pecuniary damage award is insufficiently justifiable on the basis that it wholly lacks proportion to judge-alone awards and, therefore, the sole focus on appellate review should be on the second element of the Young test, namely, whether the award is "shockingly unreasonable". In her submission, a shockingly unreasonable award is one that no jury acting judicially could have made based on the evidence at trial.

[69] According to Ms. Elliott, focusing solely on whether a non-pecuniary damage award is shockingly unreasonable aligns with the statement in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 that the test for interference with a jury award for general damages is whether it is "so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice": *Whiten* at para. 108. It also aligns with the test in *McCannell v. McLean*, [1937] S.C.R. 341, that a jury verdict on damages should not be set aside "unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it", which test was adopted in *Thomas v. Foskett*, 2020 BCCA 322 at para. 47. In addition, she argues, unlike damages for losses such as lost earning capacity, non-pecuniary damages can never be disproportionate to the loss in question because the loss is non-monetary.

[70] In other words, Ms. Elliott contends that any notion of proportionality is meaningless without a form of mathematical relationship between two quantities, such as a dollar loss awarded for past income loss compared to a loss in employment income dollars. However, as stated in *Dilello*, an award for non-pecuniary loss is, at its core, inherently arbitrary. Accordingly, Ms. Elliott submits that while a jury award for non-pecuniary damages can be plainly unjust or such that no jury acting judicially could have arrived at it on the evidence, strictly speaking it can only be disproportionate in relation to judge-alone awards. As a result, she says the exclusive focus on appellate review should be whether a non-pecuniary damage award is "shockingly unreasonable".

[71] The appellants reply that the comparative approach is well-established in this Court's jurisprudence. In their submission, it has been applied without significant variation and played a helpful role in appellate review of jury awards for nearly two decades. They also submit that whether an award would "shock the court's conscience and sense of justice"

speaks to ensuring fairness between the parties in the administration of justice, which requires consideration of comparator awards to prevent perceived "lottery wins" and maintain uniformity among similarly-situated plaintiffs. In addition, they say, comparator awards provide helpful guidance on the appropriate range of just awards when a jury award shocks the conscience of the Court and a "rethink" at this juncture in the development of the law is neither necessary nor desirable. They also say that engaging in that process would be inappropriate in this case because the appeal was heard by a three-member division, which is not entitled to overturn prior decisions of the Court.

Analysis

- [72] In my view, there is merit in aspects of both parties' submissions. There are also weaknesses in both.
- [73] First, I do not accept Ms. Elliott's submission that the concept of proportionality requires a mathematical relationship between two quantities. Proportionality is concerned with the proper balance of one thing relative to another in size or degree. When something is out of all proportion to something else, it is far greater or more serious than it should be: Collins English Dictionary, HarperCollins Publishers, "out of all proportion to". Given the purpose of non-pecuniary damages and the Stapley factors, a very high dollar award could plainly be wholly disproportionate to the circumstances in a case involving a transient injury that caused minimal pain and disruption despite the fact that the loss is not strictly mathematically quantifiable.
- [74] Moreover, while Justice Rowles questioned the utility of the comparative approach in Moskaleva, she framed the issue for determination on review as whether a jury award is wholly disproportionate or shockingly unreasonable. Bearing in mind that test and the innumerable authorities that hold a proportionate relationship can exist between a non-pecuniary damage award and a plaintiff's overall circumstances, to the extent that Ms. Elliott argues the concept of proportionality is meaningless except in relation to judge-alone awards, I do not agree.
- [75] Nor do I agree that we are entitled to discard the comparative approach given the existing state of the jurisprudence. While I accept that its foundation in policy and principle has been repeatedly questioned and criticized in both unanimous and dissenting judgments, the comparative approach has also been expressly endorsed and adopted as a rough guide for appellate review in others, including Boyd, Bransford, and Taraviras. In my view, to have any prospect of success, Ms. Elliott's arguments for its wholesale abandonment should be made to a five-judge division of this Court.
- [76] On the other hand, as the appellants acknowledge, the reasoning underlying the dissents in Cory and Stapley has led this Court to "raise the bar" to the present level when reviewing jury awards. As I see it, this is attributable to the persuasive aspects of that reasoning, which are also reflected in unanimous decisions of the Court such as Ferguson and Moskaleva.

Moreover, as the law has developed it has become increasingly apparent that the challenges associated with identifying "true comparables" and a corresponding range of reasonable judge-alone awards limit the utility of the comparative approach in some cases. In my view, we can and should take these developments into account.

- [77] More specifically, we can and should fully recognize that some of the Stapley factors, such as physical injury, age, and disability, are generally amenable to comparison. However, others, such as the nature and depth of emotional suffering, a jury's subjective appreciation of that suffering and appropriate solace may be unique and difficult to identify and compare from case to case. The absence of a necessary correlation between the gravity of an injury and a plaintiff's need for solace increases the challenge in this regard. As Justice Dickson explained in *Lindal*, the subjectivity and specificity of non-pecuniary loss makes all non-pecuniary damage awards highly variable and not amenable to a tariff. When combined with the lack of available reasons on key facts such as the solace and replacement amenities considered appropriate by a jury, these challenges may render application of the comparative approach problematic in a given case.
- [78] In my view, this case exemplifies the problem. The nature and extent of Ms. Elliott's physical injuries and related disabilities are readily discernible from a transcript of the evidence, considered most favourably from her perspective. They are also reasonably common and have often been considered by judges in other cases in the past. However, the same cannot be said of Ms. Elliott's unique form of emotional suffering caused by losing her home and the ability to "hands on" parent her special-needs children, the jury's subjective appreciation of that suffering, and the solace and replacement amenities intended by the jury. Nor are the real-world values and contemporary standards applied by the jury in exercising its independent judgment on appropriate compensation uninfluenced by the upper limit necessarily obvious. In such circumstances, identifying "true comparables", a corresponding range of reasonable judge-alone awards, and an appropriate margin of deviation from that range can be an elusive goal.
- [79] As stated in *Boyd*, in applying the comparative approach the first task "is to determine whether the decisions cited are reasonably comparable and whether they suggest a range of acceptable awards": *Boyd* at para. 41. In my view, it follows that the level of regard this Court should have to decisions cited as comparators is directly linked to the degree of comparability between their circumstances and those of the plaintiff in the case under review. The closer the proposed comparators are in material respects, the greater the heed this Court should pay to the conventional range they suggest would be appropriate. Conversely, the less comparable they are, the less heed is due to that suggested range.
- [80] Where, as here, the plaintiff's non-pecuniary loss is not amenable to close comparison in material and important respects to losses suffered by other plaintiffs in other cases, applying the comparative approach is less directly helpful than it can be in more common cases. Nevertheless, to the extent that material and important aspects of a loss can be meaningfully compared, doing so provides a helpful starting point on appellate review of a

jury award. However, the review should then go on to account for the additional unique aspects of the loss, considered at their highest from the perspective of the plaintiff. It should also do so in a generous manner, bearing in mind the perspective of the jury as reflected by its award.

[81] In my view, the need to ensure fairness and uniformity in the administration of civil justice and to respect the proper function of juries is balanced in such cases by applying this additional step, the upper limit and the Young test, and by looking to other appellate decisions for guidance in determining whether, on the Young standard, intervention is justified. This approach aligns with the reasoning in unanimous decisions such as *Ferguson* and *Moskaleva*, as well as the dissents in *Cory* and *Stapley*. It also recognizes the inherent limits in the comparative approach and reflects developments in the law since *Cory*, while comporting with those authorities in which the comparative approach has been expressly adopted and affirmed.

[82] With the foregoing standards, principles, and approach in mind, I turn to the appellants' specific grounds of appeal.

Did the judge err by providing the jury with unduly abbreviated and inadequate instructions on how to assess non-pecuniary damages?

Positions of the Parties

[83] The appellants contend the judge provided insufficient guidance to the jury by delivering her charge "in an abbreviated fashion with limited modification" and thus by telling the jury little more than to "pick a number". Most significantly, they say, the judge failed to provide the jury with the well-known list of *Stapley* factors to assist them in assessing non-pecuniary damages, which, given the complexity of the case, amounted to a legal error. They acknowledge that no objection was taken to the charge, but they say that failure does not detract from its inadequacy. They also say the abbreviated and inadequate nature of the charge may help to explain the shockingly unreasonable non-pecuniary damage award that the jury ultimately made.

[84] In support of their submission, the appellants emphasize the caution in *Knauf* that judges "should be very cautious in using CIVJI's Abbreviated Instructions": *Knauf* at para. 33. They also emphasize the inherent challenges associated with assessing non-pecuniary damages and say that trial judges should not be parsimonious in their instructions to juries when dealing with this difficult area of the law. They go on to say that, as stated in *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 26, while the model instructions in CIVJI are only a guide and judges are always entitled to choose whether to adopt any portion, at a minimum in every case in which the plaintiff claims ongoing and permanent injuries, the judge should list the *Stapley* factors in their charge to ensure its adequacy.

- [85] Ms. Elliott responds that the jury charge in this case was not an abbreviated CIVJI charge with limited modification, as characterized by the appellants. On the contrary, she says, the charge was, in substance, a full CIVJI charge with some limited modification, including the omission of Part 12.03(4) which lists the Stapley factors. Additionally, she points to the collaborative process by which the draft charge was constructed and notes the appellants did not object to the instruction on non-pecuniary damages at any stage of that process. All things considered, she submits, the charge was manifestly adequate and entirely error-free.
- [86] In support of her submission, Ms. Elliott emphasizes the failure of counsel to object to an alleged error in a civil trial is a significant, though not definitive, consideration on appeal, as explained in *Knauf* at paras. 19-21. She also emphasizes that, as is clear from *Lennox*, judges are entitled to choose whether to adopt any portion of CIVJI, which includes whether to list the Stapley factors as outlined in Part 12.03(4). Moreover, she says, listing the Stapley factors in a case such as this would not have assisted the jury to resolve the most complex question for determination, namely, the appropriate solace for the individual plaintiff in light of contemporary standards and the unique and compelling circumstances of the case.

Analysis

- [87] I agree with Ms. Elliott. In my view, considered as a whole, the jury charge was adequate and error-free on the question of how to assess non-pecuniary damages. I also agree that the charge is more accurately described as a full CIVJI charge with limited modification than as an abbreviated CIVJI charge with limited modification, although neither label is legally relevant.
- [88] That said, I accept that, as the appellants submit, it is generally both prudent and desirable for trial judges to include the list of Stapley factors when instructing juries on how to assess non-pecuniary damages. However, I would not go so far as to say that doing so is legally necessary in a predetermined set of circumstances. Every case must be decided based on its own facts.
- [89] In my view, it could have been helpful and would have been prudent for the judge to include the list of Stapley factors in her jury charge in this case. Nevertheless, her failure to do so did not amount to a legal error or cause a miscarriage of justice.
- [90] I would not give effect to this ground of appeal.

Was the jury's \$350,000 award for non-pecuniary damages wholly erroneous and out of proportion such as to warrant appellate intervention?

Positions of the Parties

- [91] The appellants accept that the jury found Ms. Elliott to be highly credible. In their submission, viewed most favourably from her perspective, the evidence showed that she sustained moderate soft tissue injuries which improved over time but did not fully heal and

will likely continue to bother her indefinitely. However, they emphasize that she was able to return to gainful employment within four months of the accident and to work regularly at more remunerative employment thereafter, except for missing up to one-and-a-half days per month due to complaints related to the accident. They also say that her testimony and the medical evidence showed that Ms. Elliott generally suffered from mild pain with moderate flare-ups and was able to resume most of her recreational activities, albeit with restrictions.

- [92] All things considered, the appellants submit that a reasonable upper limit award for non-pecuniary damages made by a judge in a similar case would have been in the range of \$80,000 to \$90,000, or possibly up to \$100,000. In support of this submission, they cite several judge-alone decisions as comparators, namely, *Oberholtzer v. Tocher*, 2018 BCSC 1089; *Klingler v. Lau*, 2019 BCSC 1776; *Montgomery v. Williamson*, 2015 BCSC 792; *Merko v. Plummer*, 2016 BCSC 1403; *Olson v. Ironside*, 2012 BCSC 546; *Evans v. Keill*, 2018 BCSC 1651; *Daleh v. Schroeder*, 2019 BCSC 1179. The appellants submit that all of these decisions involved more serious injuries than those suffered by Ms. Elliott, with *Montgomery* being the most similar. They also emphasize that, at the time of the jury's verdict, the rough upper limit for non-pecuniary damages was \$388,177.
- [93] I will summarize the judge-alone decisions upon which the appellants rely for purposes of applying the comparative approach, as adjusted to 2020-dollar amounts stated by counsel.
- [94] In *Oberholtzer*, a 58-year-old bank employee suffered soft tissue injuries to her neck, upper back, shoulder area, arms and thumbs, with painful headaches, prominent pain in her upper back, shoulders and arms, and reduced functionality in her thumbs. Her injuries resulted in chronic myofascial pain and thoracic outlet syndrome, with flare-ups of pain and long-term impairment in her quality of life. Although she was stoic and continued with activities in her life, the plaintiff's ability to work was impacted and she had to work reduced hours with modified duties. She was not expected to improve in the future. The non-pecuniary damage award, adjusted to 2020-dollars, was \$96,710 without the reduction applied for failure to mitigate.
- [95] In *Klingler*, a 36-year-old pediatric occupational therapist suffered soft tissue injuries to her neck, shoulders, upper and lower back, and migraine-like headaches. Her injuries improved over time, but the prognosis for a full recovery was extremely poor and she was left with myofascial pain syndrome in her neck and upper back. As a result of her injuries and related inability to return to her prior level of physical activity, the plaintiff's pre-existing anxiety and mood difficulties were aggravated and her ability to work effectively in her demanding job was impacted. The non-pecuniary damage award, adjusted to 2020-dollars, was \$94,790.
- [96] In *Montgomery*, a self-employed salesman suffered soft tissue injuries to his neck, upper back and shoulder area, and experienced headaches. His symptoms improved over time, but they did not fully resolve. Further improvement was expected in future, but a full recovery was not predicted. As a result of his injuries, the plaintiff experienced chronic myofascial

pain, social withdrawal and his pre-existing degenerative shoulder problems were aggravated, leading to shoulder surgery five to ten years earlier than would have been necessary otherwise. He was also unable to work as many hours as he did previously due to pain and fatigue. The non-pecuniary damage award, adjusted to 2020-dollars, was \$102,151.

- [97] In *Merko*, a 46-year-old office worker suffered soft tissue injuries to her neck, upper back, shoulder area, and experienced headaches. She was diagnosed with chronic myofascial pain, with an aggravation of her pre-existing headache condition. Her chronic pain was expected to continue into the future and her ability to work was impacted, although she worked through her pain. In future she might need to reduce her hours of work and there was a chance she would be unable to sustain full-time work as long as she would have otherwise. The non-pecuniary damage award, adjusted to 2020-dollars, was \$100,479.
- [98] In *Olson*, a 19-year-old cook suffered whiplash-type injuries to her neck, upper back, and lower back. She suffered nightmares, her pre-accident migraine headaches were aggravated and she developed a painful jaw disorder and myofascial pain in her neck, upper back and lower back, together with post-traumatic thoracic outlet syndrome and depression. As a result of her injuries, the plaintiff took three months off work and then returned to lighter duties. It was unlikely that she would ever fully recover. The non-pecuniary damage award, adjusted to 2020-dollars, was \$111,047.
- [99] In *Evans*, a 34-year-old grocery store produce manager suffered soft tissue injuries to her neck, trapezius, upper back, mid-back and lower back areas, with headaches and sleep disruption. Her work and recreational life were impacted, she gained weight, became depressed and made two suicide attempts. She was left with chronic myofascial pain affecting her neck, shoulder and upper back, with cervicogenic and migraine headaches. Over time, her symptoms improved but they did not resolve and she was unlikely to fully recover. The non-pecuniary damage award, adjusted to 2020-dollars, was \$111,980.
- [100] In *Daleh*, a 24-year-old student, suffered soft tissue injuries in two accidents, leading to myofascial pain syndrome, major depressive disorder and some mild anxiety, which led her to take medical leave from her post-secondary program for one semester. With proper treatment, there was a reasonable potential for her to be able to work full-time. The non-pecuniary damage award, adjusted to 2020-dollars, was \$129,713 without a reduction applied for failure to mitigate.
- [101] Relying on these decisions as reasonable comparators, the appellants submit that the jury's non-pecuniary damage award of \$350,000 clearly falls outside of the acceptable range for similar cases decided by judges. Indeed, they say, the award is nearly four times greater than the anticipated upper limit of \$100,000 for a judge-alone damage award. The appellants also emphasize that Ms. Elliott has not cited any alternative judge-alone decisions as comparators to support an alternative reasonable judge-alone range for similarly-situated plaintiffs. In their submission, this provides further support for the acceptable range of judge-alone awards that they propose.

- [102] According to the appellants, even allowing for a significant margin of deviation, the \$350,000 non-pecuniary damage award is obviously a palpable and overriding error, wholly out of all proportion and shockingly unreasonable. That being so, they say, appellate interference is required. As to remedy, in addition to seeking an order allowing the appeal, the appellants identify three possibilities, namely, an order for a new trial on all heads of damages, an order remitting the assessment of damages to the trial judge or an order substituting our own assessment of non-pecuniary damages, past loss of income to the trial date and future care costs. Given that she had the advantage of hearing the witnesses, they submit the preferable option is for us to remit the assessment of damages to the trial judge.
- [103] Ms. Elliott responds by emphasizing that her injuries, while not catastrophic, are chronic, persistent, and likely to last indefinitely. In particular, she says that she will likely experience pain for the rest of her life, require daily painkillers and continue to suffer from regular flare-ups that interfere with her ability to work. In addition, and most importantly, she is unlikely ever to be physically capable of resuming her chosen career of working with children in a daycare, which, coupled with the new demands of self-care, significantly impacts her ability to "hands on" parent her own special-needs children. In her submission, in these circumstances it cannot be said that the \$350,000 award is shockingly unreasonable in that no jury acting judicially could have made the award based on the whole of the evidence.
- [104] In the alternative, Ms. Elliott submits that, applying the comparative approach, we should reduce the award, but in a restrained manner that reflects due deference to the determination of the jury. She submits that an award of between \$200,000 and \$250,000 answers this description. In support of this submission, she argues that her injuries are generally comparable to those of the plaintiff in *Little*, although, she acknowledges they are somewhat less severe than Ms. Little's injuries. On the other hand, she says, their impacts are also unique and severe in some respects.
- [105] In *Little*, a jury awarded the plaintiff \$447,000 for pain, suffering, and loss of amenities. On appeal, she conceded the award must be reduced to the upper limit (then \$375,000) and acknowledged a further reduction to \$250,000 would be appropriate. Ms. Little's injuries included myofascial neck pain, mechanical back pain, left shoulder pain, chronic post-traumatic cervicogenic headaches, and an increase in frequency of migraine headaches, together with chronic pain and an adjustment disorder with depressed mood. As a result of these injuries, her vocational and avocational activities were limited, which limitations were expected to continue indefinitely. She argued that comparable cases suggested a range of judge-alone awards of between \$147,000 and \$171,000; the appellants suggested that judge-alone awards supported damages of \$115,000. Citing *Taraviras and Boyd*, Justice Fenlon was satisfied that a reduction was required and concluded that an award of \$250,000 would meet the lower standard of review applicable to judge-alone awards, but would not shock the Court's conscience and sense of justice.

[106] According to Ms. Elliott, as in Little, the jury's award in this case should be reduced to a level that would be inordinately high relative to a conventional judge-alone award in a similar case, but not "shockingly unreasonable". In other words, she says, as in Little, we should reduce the award to something in the range of \$200,000 to \$250,000.

Analysis

[107] As Taraviras directs, I begin by assuming the jury found the facts most favourable to Ms. Elliott. Bearing those facts in mind, in my view the comparator decisions cited by the appellants are reasonably comparable with respect to the nature and gravity of Ms. Elliott's physical injuries and her related disabilities, but they are not comparable with respect to the negative impact of the injuries on her life, her emotional suffering, and her related need for solace. That being so, I am not persuaded that the comparator decisions cited support a range of reasonable judge-alone awards of between \$80,000 and \$100,000 in a similar case.

[108] As I see it, none of the comparator decisions cited by the appellants share the central and unique feature of Ms. Elliott's non-pecuniary loss, namely, her deep emotional suffering caused by the combined losses of her home, her chosen career, and her ability to continue providing full "hands on" single parenting for her special-needs children every day. Nor do the comparators involve the complete cessation of romantic relationships for a prolonged period due to physical discomfort. Given these significant, subjective, and specific aspects of Ms. Elliott's overall loss and need for solace, I do not find it surprising that she did not identify any alternative judge-alone decisions for purposes of comparison.

[109] Can it nevertheless be said that the \$350,000 award is wholly disproportionate or shockingly unreasonable such that appellate interference is warranted? In other words, can it be said that the award is so exorbitant or grossly out of proportion to the overall circumstances of Ms. Elliott's case, bearing in mind the cited comparators to the extent helpful, that no jury reviewing the evidence as a whole and acting judicially could have made the award? I conclude that it can.

[110] In reaching this conclusion, I acknowledge the great deference due to the jury's assessment of appropriate compensation based on its best judgment and full subjective appreciation of the evidence, unfettered by the inclination to scale the award to the upper limit. I also acknowledge the presumptive depth and intensity of Ms. Elliott's emotional suffering as a single parent rendered less capable of caring for her special-needs children, which, in my view, would increase the reasonable range of likely judge-alone awards from that the appellants proposed to something in the range identified by the plaintiff in Little, namely, \$147,000 and \$171,000. That said, considering the nature and extent of Ms. Elliott's injuries, their significant but not devastating impacts and the ameliorative amenities such as supplementary childcare support available to help ease Ms. Elliott's emotional suffering, in my view the award is sufficiently anomalous that it amounts to an "outlier" in the sense contemplated in Boyd. Accordingly, it requires moderation on appeal.

[111] While I am persuaded that the award should be modified, I do not consider it just or necessary to order a new trial or remit the assessment of non-pecuniary damages to the trial judge. The appellants chose to have Ms. Elliott's claim tried by a jury with all of the attendant risks and uncertainties, including the risk that an unsustainable award would be replaced with an award made by this Court based on the most favourable view of the evidence and significantly higher than a likely conventional judge-alone award. Applying that standard and bearing in mind the unique consequences of Ms. Elliott's injuries in her challenging life and this Court's guidance in *Little*, I would reduce the non-pecuniary damage award from \$350,000 to \$250,000.

Were the jury's assessments of past loss of income and the cost of future care wholly erroneous and unprincipled in light of the evidence?

Positions of the Parties

[112] The appellants do not challenge the legal correctness of the jury charge on past loss of earning capacity or the cost of future care. However, they submit that there was no principled basis in the evidence to support the jury's awards under either of those heads of damage.

[113] In support of their submission on the \$46,000 past loss of earning capacity award, the appellants emphasize that Ms. Elliott sought an award of \$8,865.73. However, the award made by the jury was approximately five times greater than the amount sought. They also emphasize that Ms. Elliott's daycare earnings before the accident were extremely modest, even accounting for the fact that her business expenses reduced her taxable income and covered some of her living costs. Nevertheless, they say Ms. Elliott's income undeniably increased substantially after the accident when she changed jobs.

[114] According to the appellants, it was open to Ms. Elliott to adduce economic evidence in support of a past loss of earning capacity claim based on hypothetical past events in connection with her nascent plan to expand her daycare, but she did not do so. In these circumstances, they say the possibility that she might have carried through with her plan and suffered a past income loss of \$46,000 attributable to her inability to do so was entirely speculative, and there was no principled basis in the evidence to support such an award.

[115] As to the \$15,000 award for the cost of future care, the appellants note that it was 35 per cent higher than the \$11,045 award sought based on the estimated cost of over-the-counter medication and physiotherapy expenses for a 22-year period. In their submission, like the past income loss award, the \$15,000 cost of future care was unsupported by the evidence. In consequence, they say, both the past loss of earning capacity and future cost of care awards must be set aside.

[116] Ms. Elliott acknowledges that the jury awarded substantially more than she suggested for past loss of income. However, she says, it also awarded substantially less than she suggested for future loss of earning capacity, with the net result that the overall award for pecuniary

losses differed from the total amount that she sought by only \$7,389.27. In addition, and importantly, she says, her suggestions were based on a very conservative analytical framework with several built-in assumptions, none of which were binding on the jury. For example, her past income loss calculations assumed that her daycare would have stayed unlicensed, closed when it did and she would have undertaken the same type and amount of office work thereafter, and her future care claim was based on medication and physiotherapy costs lasting only until her 65th birthday. Based on a different analytical framework and factual assumptions, all of which were available on the evidence and the law, she submits the jury was entitled to make the awards that it did.

Analysis

- [117] I see no relevance to the relationship between the total amount Ms. Elliott suggested for all of her pecuniary losses, on the one hand, and the amounts awarded by the jury for past loss of earning capacity and future care costs, on the other. However, I agree with her that both awards are supportable on the applicable legal principles and the evidence.
- [118] The principles that govern the determination of past loss of earning capacity are uncontroversial. In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel described them like this:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [119] Similarly, the principles that govern the determination of the cost of future care are uncontroversial. A plaintiff is entitled to recover the necessary and reasonable future care costs, as established by an evidentiary link between the medical evidence and the costs claimed: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 38-39.
- [120] In my view, the jury was entitled to find that Ms. Elliott would likely have expanded her daycare as planned and thereby increased her income to an extent that exceeded her office-work earnings in the preceding seven years by roughly \$46,000. Such findings were reasonably available based on her testimony regarding the advanced stage of her plan and anticipated increases in monthly rates and numbers of clients, together with the income that she actually earned before and after the accident. Although it might have been helpful, economic evidence was not required to enable the necessary assessment, which, as noted in *Grewal*, is not a calculation. The jury was also entitled to find that Ms. Elliott would

require pain medication and physiotherapy for at least a decade beyond her 65th birthday, which would account for the discrepancy between the \$11,045 sought and the \$15,000 award.

[121] As such, I would not give effect to this ground of appeal.

Conclusion

[122] For all of the foregoing reasons, I would allow the appeal to the extent of reducing the non-pecuniary damage award from \$350,000 to \$250,000, but I would not otherwise disturb the award.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Marchand"

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[123] I have had the opportunity to read the majority reasons of my colleague, Justice Dickson. Those reasons set out the law applicable to the review of jury awards of non-pecuniary damages with admirable clarity. They also fully and accurately describe the circumstances of this case. For the most part, I agree with my colleague's analysis.

[124] I am, however, of the view that the amount that the majority proposes to award for non-pecuniary damages remains too high, and so am providing reasons for my dissent.

[125] I have two supplementary purposes for writing separately. The first is to defend this Court's approach to the review of non-pecuniary damage awards given by juries. The Court applies a highly deferential standard to such awards. That said, it has unequivocally endorsed an approach allowing it to compare a jury award to awards that have been given in judge-alone trials (the "comparative approach"). As outlined by my colleague, some former members of the Court were critical of that approach, going so far as to suggest that it is illogical and lacks utility. While those criticisms have been most forcefully expressed in dissenting judgements, they have, from time to time, also surfaced in the reasoning of the majority. The result is a lack of clarity as to the rationale for this Court's approach. The respondent invites us to abandon the comparative approach entirely. I agree with my colleague that we must decline that invitation. It seems to me, too, that the time has come to counter some of the criticisms that have been levelled at the comparative approach.

[126] My second supplementary purpose for providing dissenting reasons is to decry the lack of guidance given to juries as to the appropriate level of non-pecuniary damages. It is unfortunate that we fail to provide juries with information about the range of non-pecuniary damages awarded in similar cases. The result is a lack of consistency and predictability in awards that is intolerable in a system of justice. While it is beyond the powers of this division to revisit the reasoning in *Brisson v. Brisson*, 2002 BCCA 279, there is

a need for that to occur in one way or another: either through legislative change or the overruling of that case by a court competent to do so. Juries must be furnished with the appropriate tools to allow them to make their assessments if they are to treat litigants justly.

The Award in this Case

[127] I will begin by addressing the issues that are directly before the Court in this case.

[128] I agree with my colleague's observations on the adequacy of the jury charge. The instructions on non-pecuniary damages would have been greatly improved by including a discussion of the factors referred to in the majority judgment in *Stapley v. Hejslet*, 2006 BCCA 34. In the context of this case, however, the absence of such discussion did not render the charge inadequate.

[129] I also agree with the majority judgment's analysis with respect to the awards of past income loss and costs of future care. While the awards might be described as somewhat surprising, there was evidence to support them. The jury made no reversible error in making its awards under those heads of damages.

[130] Finally, I agree with my colleague that the award of \$350,000 for non-pecuniary loss was wholly out of proportion to the damages suffered and must be reduced. I am of the view, however, that an award of \$250,000 for non-pecuniary damages in this case would also be wholly disproportionate to the damages suffered.

[131] My colleague has discussed the case law presented to us. She has pointed out that none of the cases are directly comparable to Ms. Elliott's situation. The most significant feature of Ms. Elliott's circumstances is that her children's disabilities made it important for her to work from her home and be with them. She found her work in running a small day care to be fulfilling. The accident made continuation of that work impossible. The injuries clearly had serious detrimental effects on her life.

[132] The cited cases remain useful for comparative purposes. Like the case before us, those cases involved particularly troubling features that went beyond the pain and suffering that were inevitable consequences of the physical injuries. Some of the plaintiffs suffered serious emotional difficulties, even to the point of attempting suicide.

[133] I acknowledge that it is difficult to compare the miseries suffered by the plaintiffs in the various cases, but, in my view, the cases at the high end of the range cited by the appellants approximate the non-pecuniary damages that have been demonstrated in this case.

[134] A judge-alone trial in this case could not have yielded a sustainable award of non-pecuniary damages exceeding \$140,000. Even applying the generous margin of deviation that the law requires, it seems to me that an award exceeding \$200,000 for non-pecuniary damages cannot be justified.

[135] Accordingly, I would reduce the non-pecuniary damage award to \$200,000. In all other respects, I agree with the disposition of the majority.

The Rationale for the Comparative Approach

[136] I turn, now, to more general observations concerning this Court's role in reviewing jury awards for non-pecuniary damages. This Court has stated that damage awards by juries are entitled to a greater "margin of deviation" than are awards by judges sitting alone (*Boyd v. Harris*, 2004 BCCA 146; *Little v. Schlyecher*, 2020 BCCA 381). Some courts in other jurisdictions have even attempted to quantify the margin of deviation, suggesting that an award that is "too high or too low by 50 per cent" may be set aside (see *Snushall v. Fulsang*, 258 D.L.R. (4th) 425 (Ont. C.A.) at para. 20, referring to *Howes v. Crosby* (1984), 45 O.R. (2d) 449 at 459 (Ont. C.A.)), though that rule of thumb has, to the best of my knowledge, not been adopted in this province.

[137] Several rationales have been provided for the proposition that juries should be given this special deference. In *Foreman v. Foster*, 2001 BCCA 26, Justice Lambert took the unusual step of writing concurring reasons that he, himself, recognized were obiter. The reasons were concurred in by Justice Braidwood and are cogent in their analysis. They state:

[32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 [(P.C. from British Columbia)] at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1985), 58 B.C.L.R. 273 (B.C.C.A.).

[138] This reasoning fully justifies the practice of appellate courts of assuming that the jury resolved all evidentiary conflicts in favour of the respondent and taking the respondent's case at its highest (see, for example *Taraviras v. Lovig*, 2011 BCCA 200 at para. 36). By itself, however, it cannot justify a margin of deviation that goes beyond the highest amount that a judge could award in a case.

[139] A number of rationales for the higher margin of deviation have been proposed. In *Boyd*, the Court said:

- [42] Requiring a greater margin of deviation in the case of a jury award respects the parties' original choice to have the damages assessed by a jury rather than a trial judge. It also promotes the instructional function of jury awards, in the sense that, to some extent, departure from the conventional range established by trial judges may serve as a corrective to the views of trial judges by shifting the range so that it more accurately reflects current community standards.
- [140] While a great deal of what was said in *Boyd* is instructive and helpful, it seems to me that the rationales expressed in this particular passage do not, at least today, withstand scrutiny.
- [141] First, it is rare for "the parties" to have chosen to have a case determined by a jury. Typically, the decision to place a case before a jury is made by only one party. In recent years, the choice to have a trial by jury is typically that of the defendant -- usually one whose defence is being conducted by an insurance company. In his dissent in *Stapley*, Chief Justice Finch suggested one possible reason for that preference:
- [123] It is, I believe, common knowledge at the bar, that this Court will almost invariably defer to an award made by a jury when it is said to be too low. In such a case the defendant can say - quite properly - that the jury must not have believed the plaintiff, that the award for general damages reflects the jury's view of the plaintiff's credibility, and that accordingly, this Court should not intervene. By opting for a jury trial, the defence may anticipate an award that is within the range a judge alone would have made, or less; but if the award is much higher than the range of judge alone awards, the defence can come to this Court to seek a reduction. It is a kind of "win win" equation for the defence, and has the appearance of unfairness.
- [142] It is difficult to know whether that rationale accounts for the fact that defendants currently choose juries much more often than plaintiffs. I have also heard it said that institutional defendants are simply of the view that juries are typically more skeptical than judges when it comes to assessing plaintiffs' claims.
- [143] Turning back to what was said in *Boyd*, the fact that the choice to have a case tried with a jury is not a mutual decision is of some consequence. If a party was resistant to having their case heard by a jury, it cannot be said that upholding a questionable award "respects [their] original choice to have the damages assessed by a jury". While it might be possible for this Court to apply a different standard of review depending on whether a party supported the decision to have the case tried by jury or opposed it, this Court has not endorsed such a practice. Further, while there is some attractiveness to the idea of saying to a party, in effect, "you've made your bed, now you have to lie in it", applying a different standard of review depending on the identity of the appellant creates its own concerns for equal justice.

- [144] In any event, while I acknowledge the practical limitations that this Court faces in correcting inordinately low jury awards for non-pecuniary damages, that problem is not remedied by making it equally difficult for this Court to interfere with unreasonably high jury awards. As I will indicate, a better solution would be to provide juries with more complete information on the range of damages conventionally given in similar cases.
- [145] The second rationale suggested in *Boyd* for enhanced deference to jury awards is the "instructional function of jury awards". Several cases have suggested that jury awards can serve as models for judge-alone awards. The difficulties with this rationale are manifold. First, jury awards are highly variable. Even if a judge set out to model their awards on those given by juries, they would be faced with a lack of uniformity in such awards. Second, jury awards suffer from practical obscurity --unlike judge-alone awards, they are not reported in easily accessible form. Even if they were, the fact that jury awards do not have reasons attached to them would make it difficult to give them precedential value. As a result, we do not see judges purporting to follow jury precedents in assessing general damages.
- [146] At one time, jury awards, at least in "catastrophic" cases, might have had sufficient notoriety to give them the potential to be instructional. Since the imposition of the "cap" on general damages, however, even that instructional value has been eliminated. Again, Chief Justice Finch made this point in his dissent in *Stapley*:
- [120] In fact, the corrective effect of jury awards on awards made by judges alone has been substantially, if not entirely, negated by the imposition of the 1978 \$100,000 limit. Awards by judges alone do not reflect what juries have awarded in recent cases.
- [147] While I do not think it is accurate, today, to suggest that jury awards have any real potential to be "instructional", it remains true that juries bring a somewhat different perspective to a case than does a judge. That fact might justify some greater margin of deviation for juries, but that rationale alone could not justify a margin as large as the one applied by this Court in its comparative approach.
- [148] Other cases have suggested that jury awards substantially in excess of those that a judge could properly grant should be upheld because awards of non-pecuniary damages are, in any event, "arbitrary". In *Dilello v. Montgomery*, 2005 BCCA 56, Chief Justice Finch said:
- [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases.
- [149] If non-pecuniary awards were truly arbitrary, this rationale would have merit. However, genuinely arbitrary awards would turn courts of law into courts of lottery. It is a fundamental principle of justice that similar cases be treated similarly. Arbitrary awards are the antithesis of justice.

[150] While courts have, from time to time, described non-pecuniary awards as "arbitrary", it is important to understand that they were not suggesting that such awards are purely random or without rationale. The best explanation, in my view, appears in the Supreme Court of Canada's decision in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 under the heading "Non-Pecuniary Losses". At 261, Justice Dickson, writing for a unanimous Court, observed:

[T]he problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

[151] The problem, then, is that monetary compensation is incommensurable with pain, suffering and loss of amenities of life. In my view, Justice Dickson's use of the phrase "arbitrary or conventional" was appropriate. The law deals with incommensurables with some difficulty. That does not make the manner in which it operates a purely arbitrary one. While it is true that there is no objectively appropriate punishment for most crimes, for example, we should not accept the characterization of sentences as "arbitrary"; it is more accurate to call them "conventional".

[152] As was noted in *Andrews*, our system of compensation for non-pecuniary loss is "gauged by earlier decisions". It is also adjusted according to contemporary appreciation of the harm suffered by aggrieved parties. Thus, there is both stability and flexibility to the compensation system.

[153] Unfortunately, though we must gauge non-pecuniary loss by previous decisions, we do not allow juries to access or consider such decisions. In effect, we are asking them to assess non-pecuniary damages without allowing them access to the appropriate tools. The gauge of previous decisions is what differentiates an arbitrary decision from one that is better described as "conventional". In the result, jury decisions on non-pecuniary loss are apt to be genuinely arbitrary.

[154] It is my experience and, I believe, the experience of most trial judges, that jurors are, with few exceptions, dedicated citizens who wish to perform their duties to the best of their abilities. They are deserving of respect.

[155] That respect lies behind the observation of Justice Thackray in his concurring judgment in *Laycock v. Longo*, 2002 BCCA 186:

[22] A jury is generally not supplied with guidelines as to a range of damages. The jury in the case at bar did not have before it the allegedly comparable cases cited to us by counsel for the appellant. Yet this Court is asked to find that the jury made an award "outside of the range." That is to say, the Court is asked to find that the jury was in error. This is illogical, unfair to the jury and unfair to the civil jury system.

- [156] Justice Thackray repeated his comment from Laycock at para. 50 of his unanimous judgment in *Ferguson v. Lush*, 2003 BCCA 579 (which upheld an allegedly low jury award for non-pecuniary damages) and at para. 70 of his dissent in *White v. Gait*, 2004 BCCA 517 (where he agreed with the majority that the jury's non-pecuniary damage award was too high and could not stand).
- [157] In British Columbia, because we do not allow the jury to have information regarding the conventional approach to non-pecuniary loss it would, indeed, be unfair to criticize it for failing to conform with that approach.
- [158] Nonetheless, no system of justice can countenance arbitrary decision making. The compromise that the Court has reached is the one endorsed in *Little*: we allow juries a margin of deviation from conventional awards made by judges. To prevent their awards from being wholly arbitrary, however, we adopt the comparative approach and treat massive deviations from conventional awards as errors.
- [159] I agree that it is disrespectful of juries to overturn their assessments because they do not conform with established norms when we systematically deprive them of information reflecting those norms. The solution adopted by the courts is to give enhanced deference to jury assessments. Somewhat ironically, then, the fact that juries are deprived of an essential tool in assessing damages lies behind our reluctance to interfere with their assessments.
- [160] In my view, these considerations explain the comparative approach adopted by our Court. We recognize that it is the jury that is empowered to assess damages, and therefore defer to its assessment. We further recognize that the jury has no information with respect to conventional damage ranges and grant it extra leeway to make up for its lack of appropriate tools.
- [161] The comparative approach could, as I will indicate, be improved by providing juries with greater guidance on existing norms. While juries must be permitted to depart from those guidelines, the degree of leeway afforded to them, both on the high and low sides, could be reduced.
- [162] Unless we are prepared to give juries greater guidance, however, it seems to me that the current comparative approach is an appropriate compromise. It affords adequate respect for the efforts of jurors, while, at the same time, offering litigants some protection against arbitrary awards. The suggestion that the comparative approach is illogical or lacking in utility should be rejected.

The Need to Revisit Brisson

- [163] That said, the resulting system is unwieldy and open to criticism. It is not rational for us to deny jurors information that we then use to evaluate their awards. The respondent invites us to remedy the situation by jettisoning the comparative approach. My colleague rightly rejects that suggestion. A three-judge division of this Court cannot overturn established precedent.
- [164] It seems to me that abandoning the comparative approach would not, in any event, be the most appropriate way to eliminate the irrationality of the current system. Rather, a preferred approach would be to stop treating the conventional approach to non-pecuniary damages as something to be kept secret from the jury.
- [165] I acknowledge that course of action is not available to a three-judge division of this Court as it would require us to overrule the binding precedent of *Brisson*. Still, it is my hope that in the near future, there will be a re-evaluation of *Brisson*.
- [166] To understand the background of *Brisson*, it is necessary to begin with *Foreman*. In that case, the plaintiff was injured in a motor vehicle accident. The defendant elected trial by jury. The plaintiff sought, instead, to have damages assessed at a summary trial, but the chambers judge considered that the case was unsuitable for summary disposition. This Court found that the chambers judge made no error in exercising his discretion to refuse to grant summary judgment.
- [167] Justice Lambert (with whom Justice Braidwood concurred) observed that while the only issue before the Court was the appropriateness of the chambers judge's decision, the real issue between the parties was whether the matter should proceed to a jury trial:
- [30] It became apparent, indeed explicit, during argument that the reason the plaintiff wished to have a summary trial was to avoid the risk that a conventional jury trial, as elected by the defendant, would lead to a markedly lower assessment of damages than the assessment which would be made by a trial judge sitting without a jury. So, while the issue before this court was whether the chambers judge was wrong in deciding that the case was not suitable for a summary trial, the real dispute was about whether the trial, in which the only issues would relate to the assessment of damages, should be conducted before a judge and jury, or before a judge alone. In short, we heard an argument about whether the case should be tried by a jury, framed, somewhat irrelevantly, in terms of whether it would be tried summarily by a judge.
- [31] The reason why this question is so hotly contested is because the plaintiff is said to believe that there is a high degree of risk that a jury will award damages, particularly damages in relation to non-pecuniary losses, that are wholly inconsistent with awards being made by judges sitting alone in comparable cases. For that reason such jury awards are perceived to be unjust.

- [168] Justice Lambert went on to discuss reforms in various jurisdictions that ameliorate the situation by allowing juries to be given some guidance with respect to conventional damages.
- [169] I do not intend to cover the same ground covered in the judgment in Foreman. In my view, the judgment is balanced and well-reasoned.
- [170] After the judgment in Foreman, Justice L. Smith presided over the civil jury trial in Brisson. She was asked to instruct the jury on conventional non-pecuniary damage ranges. She agreed to do so. Her reasons are unpublished, but are quoted, in part, in the judgment of this Court in Brisson at paras. 11 and 12.
- [171] In addition to the normal instructions on non-pecuniary damages, she advised the jurors that, in her opinion, depending on their assessment of the evidence, the range might be anywhere from \$15,000 to \$50,000. She was careful to instruct them that they were not bound by that range.
- [172] The jury awarded non-pecuniary damages of \$55,000. The defendant appealed, arguing that the judge erred in giving the jury instructions on the range of damages. The Court was divided on the issue, with the majority allowing the appeal.
- [173] Justice Thackray gave the principal judgment. He considered that the jury should not be instructed on ranges of non-pecuniary damages. He noted, at para. 26, that "judge-made awards are not inherently superior to jury awards". He also considered, at para. 19, that any change in the court's practices needed to be premised on "evidence that civil jury awards are causing injustice". He considered such evidence to be lacking. Finally, he noted s. 6 of the Negligence Act, R.S.B.C. 1996, c. 333, which states:
- 6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.
- [174] He said, at para. 57, that any "judicial guidance fetters a jury's right to independently make this decision".
- [175] Justice Huddart, dissenting, considered instructions on ranges of non-pecuniary damages to be appropriate, commenting:
- [86] If the civil jury system is to be retained, as I believe it should be, trial judges need the capacity to focus a jury's decision-making on a range of general damages an appellate court is unlikely to find excessively low or excessively high.
- [176] Justice Southin expressed somewhat tepid agreement with Justice Thackray's reasons, stating, at para. 70, that she agreed with the disposition, and did "not disagree with the substance of his reasons". Her primary focus, however, was on the propriety of a division of the court reforming an established practice. Referring to Justice Huddart's dissenting judgment, she said:

- [72] The profound difference between us is as to the propriety of a single judge of the court below taking it upon herself not to follow the long established practice of that court and the propriety of a three judge panel of this Court sustaining such judicial individualism.
- [177] The judgment in *Brisson* clearly represents the law of British Columbia. That said, I am not convinced that the reasons provided by Justice Thackray are persuasive. While "judge-made" awards are not inherently superior to jury awards, judges have the advantage of having access to information on conventional damage awards. Juries are denied such information.
- [178] Justice Thackray's demand for "evidence" that jury awards are inconsistent or that a lack of consistency is unjust does not appear to me to be well-founded. The inconsistency of jury awards is commented on in numerous cases, and most trial judges who have conducted civil jury trials will have some anecdotal experience of both the variability of awards and the consternation that jurors express at the lack of guidance on non-pecuniary loss ranges.
- [179] I am also unpersuaded by the suggestion that because damages are an issue of fact, no judicial guidance is appropriate. Civil juries are routinely instructed on how to go about making findings of fact and are given comprehensive guidance (and evidence) on how to assess pecuniary loss. There is no reason to expect that guidance on non-pecuniary loss would usurp the role of the jury.
- [180] Notably, some other jurisdictions allow juries to receive guidance on non-pecuniary damages. In Canada, the Saskatchewan Court of Appeal recognized the propriety of such guidance in *Rieger v. Burgess*, [1988] 4 W.W.R. 577 at 630-35; 66 Sask. R. 1 at 44-48 (paras. 134-143). The procedures used in that province are discussed in *Foreman*, as are reforms in other jurisdictions.
- [181] There has also been legislative reform in Canada, and a proposal for such reform in British Columbia. In its 1984 Report on Review of Civil Jury Awards, the Law Reform Commission of British Columbia included the following recommendations:
- 4.(1) The trial judge sitting with a jury be permitted, if the judge considers it of assistance to the jury, to advise it of the general range of relevant awards made for non-pecuniary losses similar to those in issue based on submissions of the parties made in the absence of the jury.
- (2) If the jurisdiction in (1) is exercised, the jury should be charged that the issue of damages is for them to decide and that they are not bound by the general range of relevant awards.
- [182] No legislation adopting the recommendations was enacted.
- [183] In 1987, the Ontario Law Reform Commission issued its Report on Compensation for Personal Injuries and Death. The report noted at pp. 108-9 the traditional approach that juries should not be instructed on ranges of non-pecuniary damages (at pp. 108-9), and then said:

[W]e believe that it is impossible to reconcile this approach with the requirement of rational analysis, rational explanation, and consistency of damage awards. It is true that empowering the judge to give guidance to the jury will reduce the independence, or at least the power, of the jury. But reduction of the jury's independence or power is not necessarily objectionable. Indeed, the history of trial by jury has witnessed the development of several devices for controlling the jury.

Against the advantages of jury independence must be weighed the need for fairness, consistency, and rationality in damage awards, and the expense and inconvenience--some might say the absurdity--of compelling the trial judge to enter judgment for an amount that he knows is contrary to law, and must be set aside on appeal, with the consequent necessity of another jury assessment with, perhaps, the same defects as the first. We believe, therefore, that complete deference to jury awards is no longer appropriate.

Accordingly, it is recommended that, in the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.

It is further recommended that, in order to advance the goals of fairness and rationality, counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages. We believe that any excess by counsel in this regard can and should be dealt with by the trial judge in the same way in which he would deal with any inappropriate behaviour, that is, pursuant to the judge's overriding discretion to control proceedings of the court.

[Footnotes omitted.]

[184] As a result of the recommendation, Ontario adopted legislation in 1989. The Courts of Justice Act, R.S.O. 1990, c. C.43 includes the following provision:

118. In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages.

[185] The giving of guidance is discretionary, and the instructions appear to be fairly limited (see, for example, the charge quoted in *Ayub v. Sun*, 2016 ONSC 6598 (Div. Ct.) at para. 68). Similar legislation exists in Prince Edward Island: *Judicature Act*, R.S.P.E.I. 1988, c J-2.1, s. 53(2).

[186] The absence of similar legislation in other provinces is, to some extent, explicable. Civil juries are not available in personal injury actions in all provinces. For example, in Manitoba, civil juries are available only in actions for defamation, malicious prosecution, unlawful arrest, and false imprisonment (see *Riedle v. McCaskill*, 2013 MBQB 222 at para. 5). Quebec does not have a system of civil juries. Even in provinces where civil juries are available in personal injury actions, they may be rare.

- [187] In British Columbia, as a result of the COVID-19 pandemic, civil juries are currently suspended (Supreme Court Civil Rules, Rule 12-6(0.2)), with the suspension set to expire on October 7, 2022 (Supreme Court of British Columbia COVID-19 Notice No. 55, dated August 24, 2022).
- [188] During the suspension of civil juries, the Attorney General decided to embark on a consideration of more permanent reforms of the law. He requested the British Columbia Law Institute to carry out research and present options for reform. The resulting paper, entitled *Civil Juries in British Columbia: Anachronism or Cornerstone of the Civil Justice Process?*, was published in August 2021. The report notes, at pp. 45-46 that one possible reform would be to allow the jury to be charged on the appropriate range of non-pecuniary damages, though, in keeping with its role in preparing the paper, the Law Institute makes no recommendations.
- [189] As I understand it, the Attorney General is, first, considering whether civil juries should be continued in their current form, should be retained for only certain causes of action, or should be abolished. Only after that broad decision is made will specific reforms be considered.
- [190] In my view, the law as settled in *Brisson* is unsatisfactory. It leaves jurors without guidance and makes effective review of decisions on non-pecuniary damages impossible in most cases. There is a suggestion, in some cases, that juries routinely award unrealistically low sums for non-pecuniary damages. If that is true, there is a pressing need for reform in this area.
- [191] I express no view as to whether a five-judge panel of this Court could properly institute the necessary reform. Legislation may be needed. The judgment of Justice Southin in *Brisson* considered it inappropriate for a court to introduce such a change in the law, though the Saskatchewan experience indicates that some judges are not of that view.

Conclusion

- [192] I agree with the majority's disposition of this appeal, except that I would further reduce the award of non-pecuniary damages to \$200,000.

"The Honourable Mr. Justice Groberman"

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Prepared on 29 October 2026 · Esheria