
CANADA / JUDGMENT

Reimer v. Bischoff

2017 BCCA 4

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 4 Reimer v. Bischoff

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Reimer v. Bischoff,

2017 BCCA 4

Date: 20170110

Docket: CA43236

Between:

Donna Reimer

Respondent

(Plaintiff)

And

Jesse Paul Bischoff

Appellant

(Defendant)

And

Helen Elaine Cheesman

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated
October 15, 2015 (Reimer v. Bischoff, 2015 BCSC 1876, Vernon Registry 50890).

Counsel for the Appellant:

A. Murray, Q.C.

Counsel for the Respondents:

K. Burnham

Place and Date of Hearing:

Vancouver, British Columbia

December 12, 2016

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2017

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Savage

Summary:

In a motor vehicle accident trial where the sole issue was damages, the trial judge awarded the respondent damages for jaw pain, future cost of Botox and migraine medication, and loss of past and future income. The appellant argues that those awards are not supported by the evidence.

HELD: appeal allowed in part. There is a thin, but sufficient evidentiary basis to support the judge's finding that the jaw pain was caused by the accident. The Botox award is set aside as no admissible medical evidence supported that award. As to the award for migraine medication, the judge erred in not considering his findings that migraines from both accident and non-accident causes will diminish over time, thus requiring additional adjustments for contingencies.

However, in the balance, this Court would not disturb the trial judge's contingency reduction for this award. The award for past and future income is reduced by 25%, as the judge erred in not accounting for how, as was the respondent's practice pre-accident, part-time workers would be

hired from time to time in any event of the accident based on fluctuations in business volume.

Reasons for Judgment of the Honourable Mr. Justice Harris

Introduction

- [1] This is an appeal of three components of a damages award arising out of a motor vehicle accident. First, the appellant appeals an award for the cost of future care items for the treatment of a temporomandibular joint ("TMJ") injury on the basis that there was no admissible evidence that the injury was caused by the motor vehicle accident. Second, the appellant appeals an award made in respect of the future cost of Botox treatment and migraine medications on the basis that those awards rest on palpable and overriding errors of fact. Third, the appellant appeals the award of past and future income loss, again alleging palpable and overriding errors of fact.
- [2] The respondent was injured in a motor vehicle accident on June 19, 2011. The respondent was injured in a rear-end accident caused by the appellant. The forces involved in the accident were significant. The respondent's vehicle was a total loss. Liability was admitted. The trial was restricted to the issue of quantum of damages.
- [3] At the time of the accident, the respondent was 55 years old. She was self-employed. She ran a copy franchise.
- [4] There is no dispute that the accident caused the respondent substantial injuries. The trial judge found that she suffered chronic dizziness and balance issues, soft tissue injuries to her neck, shoulder and low back, jaw and ear pain and associated headaches, aggravation of pre-existing migraines, emotional stress and mood disorder, symptoms of post-traumatic stress disorder, fatigue, and cognitive deficits caused by the cumulative effect of her other injuries, particularly a vestibular injury. The judge rejected a claim that the respondent had suffered a mild traumatic brain injury as a result of the accident.
- [5] Prior to the accident, the respondent's only significant health issue was a 20-year history of migraine headaches associated with her menstrual cycle. The migraines usually lasted two to three days a month during which she experienced photosensitivity, nausea and sensitivity to movement.
- [6] Insofar as the respondent's prognosis is concerned, the judge found that her TMJ injuries and remaining soft tissue injuries would resolve with proper treatment; the psychological difficulties including mood disorder, fatigue and migraine headaches would improve over the long run with proper counselling and pharmacological assistance, but the outlook was poor for balance, dizziness and memory problems.
- [7] The trial judge awarded the following:

Non-pecuniary damages:

\$100,000

Past Loss of Income/Loss of Capacity to Work:

\$ 30,000

Future Loss of Income/Loss of Capital-Earning Capacity:

\$ 60,000

Future Care Costs:

\$ 84,000

Special Damages:

\$ 8,044

Total:

\$282,044

- [8] It seems clear from the reasons for judgment that the primary issues the judge had to grapple with concerned the accuracy and reliability of the respondent's evidence concerning her injuries and their severity. In particular, the judge had to decide whether the plaintiff had suffered a mild traumatic brain injury. He concluded that she had not, based substantially on his rejection of her evidence about whether she had lost consciousness at the time of the accident.
- [9] Given the centrality of what were effectively the live issues at trial, it is not perhaps surprising that the reasons for judgment are brief in respect of those components of the damage award in issue on this appeal. I propose to refer to those reasons in connection with each alleged ground of appeal.
- [10] Each ground of appeal alleges, in one form or another, that the awards rest on palpable and overriding errors of fact, principally because there was no evidence necessary to support the award or, failing that, the judge did not assess the amount awarded in light of applicable contingencies. It is unnecessary to rehearse in detail the standard of review engaged by this appeal. Obviously, we apply a deferential standard to findings of fact which are capable of being supported by the evidence before the trial judge, considered in their totality: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 29-37; *Friedl v. Friedl*, 2009 BCCA 314, at paras. 28-29; *Ediger v. Johnston*, 2013 SCC 18 at para. 29.

Did the Judge Err in Awarding Future Care Costs in Respect of the Respondent's Jaw Injury?

- [11] The judge's finding that the respondent suffered jaw pain is based principally on an opinion provided by Dr. Blasberg. Here is what the judge found:

- [47] Dr. Blasberg, an oral medical specialist, assessed the plaintiff on March 27, 2014 and diagnosed her as suffering from a myofascial pain of her masticatory (jaw) muscle with referral contributing to jaw pain, dental pain, ear pain, and temple headaches.
- [48] Dr. Blasberg also diagnosed the plaintiff as suffering from arthralgia of the right TMJ which is characterized by pain and tenderness in the joint capsule and/or synovial lining of the TMJ.
- [49] Dr. Blasberg was of the view that her failure to immediately complain about specific jaw pain is not unusual when there are injuries to the head. With proper treatment as laid out in his report, he was of the view that "There were no clinical findings identified that would prevent Ms. Reimer from fully recovering from these jaw conditions. While in my opinion it is more likely than not that Ms. Reimer will fully recover, she might not, continuing to experience jaw pain, ear pain and headache requiring self-management and professional advice and treatment." I accept Dr. Blasberg's evidence that professional treatment would take between 12 and 24 months.
- [12] Dr. Blasberg's opinion that the jaw pain was caused by the accident was based principally on his assumption, confirmed in cross-examination, that the respondent had suffered ear and jaw pain together from almost immediately after the accident in June 2011, until the date he examined her in 2014. Dr. Blasberg relied on the respondent's report to him that she had suffered those symptoms from immediately after the accident. In his report he stated:

I assumed that Ms. Reimer was experiencing ear pain and jaw pain beginning shortly after the motor vehicle accident as a result of injury to the jaw muscles. She stated that jaw pain and ear pain occurred together. I assumed that the ear pain was due to the injuries associated with the jaw muscles. There were no clinical records reviewed that included any examination of the jaw structures shortly after the motor vehicle accident to contradict my assumptions. Ms. Reimer at her examination pointed to the ear, temple and jaw angle on the right as the pain she was experiencing days after the motor vehicle accident. I assumed that the focus of medical attention was directed toward the ear and the headaches rather than the jaw structures. I assumed that a history of migraines, direct trauma to the head at the time of the motor vehicle accident and a traumatic brain injury with issues that took precedence over directing attention to jaw structures.

[Emphasis added.]

- [13] The trial judge commented on the respondent's evidence at para. 26:

The plaintiff gave direct evidence concerning her temporomandibular joint ("TMJ") or jaw pain. She stated that she told Dr. Blasberg that she suffered from right jaw pain beginning shortly after the accident on a daily/nightly basis and this pain continued up to the present time. There is, however, no note of jaw pain in records of the plaintiff's family doctor prior to December 2012, no record of any dental visits until September 2012, and no report of complaints to her dentist on eight subsequent visits between September 12 and December 13, 2012. I accept the fact that the plaintiff does not have to provide the same litany of complaints to every medical professional.

Some complaints are more important than others and purely because the plaintiff does not mention these complaints on a consistent basis should not automatically adversely affect the weight to be given to her evidence. However, here there is no evidence of complaints for several years after the accident.

[14] He went on to comment on her evidence generally:

[38] I accept that the plaintiff has had difficulties with her memory but her memory difficulties do not explain all the inconsistencies in her evidence and the documentary evidence, particularly the conflict between her testimony and the evidence of the various doctors. I am very hesitant to give a great deal of weight to the plaintiff's evidence save and except where it has been corroborated by other independent witnesses.

[15] It is common ground that the respondent did not testify at trial that she suffered right jaw pain beginning shortly after the accident on a "daily/nightly basis". It is common ground that the judge's finding in that respect is in error. She did not testify that she suffered any jaw pain prior to the date of her examination by Dr. Blasberg. She testified that she been referred to Dr. Blasberg in March 2014 for a "stabbing ear pain" which she experienced "a short while" after the accident. She said that she had told her doctor about it within the first couple of months after the accident. She did not testify about what she told Dr. Blasberg, but she did say that he felt different parts of the jaw, pressed in behind her ear and when he did so she could feel the same type of pain.

[16] Based on the above, the appellant argues that the only evidence that the respondent suffered ear and jaw pain together shortly after the accident is Dr. Blasberg's statement in his medical opinion, which is an assumption on which the opinion is based. The appellant argues from the proposition that an opinion must be based on proven facts, that the fact of jaw and ear pain onset shortly after the accident has not been proven. Accordingly, no weight can be given to the opinion, particularly since the judge himself concluded that he could not give a great deal of weight to the plaintiff's evidence unless it had been corroborated. Here, there was no corroboration of any complaints to any practitioners of jaw and ear pain for a considerable time after the accident. Paragraph 26 quoted above suggests that the trial judge had indeed rejected the plaintiff's evidence that she suffered jaw pain shortly after the accident, but then relied on an opinion which rested on the unproven assumption, or evidence that he had dismissed, in awarding damages in respect of the TMJ injuries. In short, the judge reached a conclusion in making the award that was inconsistent with his earlier finding, but in any event, for which there was no admissible evidence.

[17] The appellant also points to a concession made by Dr. Blasberg that the respondent's jaw problem possibly (but not probably) could be related to root canal surgery done a few months before he examined her. The respondent points out, however, that there is evidence of the respondent suffering tenderness in her jaw before the root canal surgery when she was examined by a Dr. Longridge in September 2013. Also, it appears that there is no other possible explanation of her jaw problem unrelated to the accident.

- [18] The respondent contends that the judge was entitled to rely on the opinion of Dr. Blasberg, notwithstanding the admitted deficiencies in the evidence and the lack of corroboration in the contemporaneous medical reports of complaints consistent with the assumption on which the opinion rests. She points out that Dr. Blasberg explains in the opinion why a patient may not recognize that the symptoms relate to a jaw problem because the focus is placed elsewhere.
- [19] In my view, the appellant proffers a strong argument that the trial judge made a palpable and overriding error in accepting Dr. Blasberg's opinion that the accident caused the respondent's jaw problem. I agree with the general proposition that facts constituting an assumption for an opinion must be proven, if the opinion is to be given weight. The question here is whether there is any evidence capable of supporting the assumption on which the opinion rests.
- [20] I begin by observing that the judge's general comment about the respondent's credibility is that he was "very hesitant to give a great deal of weight to the plaintiff's evidence save and except where it has been corroborated by other independent witnesses". The judge does not say that he gives no weight to her evidence. Moreover, the focus of his comments in para. 26 is on whether the respondent suffered jaw pain shortly after the accident. I take his comments to be a rejection of her evidence on that point. The question is, then, whether that finding can be reconciled with the judge's acceptance of Dr. Blasberg's opinion.
- [21] In my opinion, there is a basis upon which they can be reconciled. Dr. Blasberg assumes that the respondent suffered ear pain shortly after the accident, of which there was evidence, and further, that the ear pain could be explained by a jaw problem. The respondent was not cross-examined on her complaints of ear pain. The medical opinion explains how jaw pain may not be a focus of complaint, given a constellation of other symptoms and perhaps more pressing concerns. It seems to me that the judge accepted the general proposition, put by the doctor, that it may be difficult for patients to distinguish a jaw issue from an ear problem, given the locality of the pain. The unchallenged evidence that the respondent felt the same type of pain (i.e., "stabbing ear pains") when Dr. Blasberg pressed on the relevant area in assessing jaw issues supports this view.
- [22] I take it, then, that the trial judge must have been prepared to accept that the respondent suffered from ear pain, and then accepted the opinion that the ear pain was related to a jaw problem. Dr. Blasberg was not cross-examined on whether reporting ear pain alone was a sufficient basis to ground his opinion. It is also pertinent that the respondent did complain of ear pain some two years after the accident to Dr. Stewart and Dr. Longridge, both of whom directed the respondent to see a jaw or oral specialist. Dr. Stewart and Dr. Longridge's reports were before the root canal surgery, which is the only other explanation for the jaw pain in the evidence. Given the evidence of Dr. Blasberg that a patient may "overlook" jaw pain or "confuse" it for ear pain, combined with the pre-root canal surgery evidence of the respondent's ear pain complaints of a similar nature, there is just sufficient evidence for me to say that it was open for the trial judge to accept that the jaw injury was caused by the

accident.

- [23] In my opinion, it would clearly have been open to the trial judge to reject the claim that the respondent's jaw problem was caused by the motor vehicle accident. The opinion might well have been rejected by the trial judge in light of his general comments about the reliability of the respondent's evidence. Nonetheless, there was just enough evidence to support an assumption underlying the opinion, which the judge must have considered to be a sufficient basis to accept it. As a result, I would not accede to this ground of appeal.

Did the Judge Err in Awarding the Cost of Future Care for Botox and Migraine Medications?

- [24] The respondent has a 20-year pre-accident history of migraine headaches, associated with her menstrual cycle as I referred to above. The trial judge's findings on this point are the following:
- [51] It is acknowledged that the plaintiff had low grade headaches continuously for three months after the accident. One year post-accident she had hormone therapy which resulted in her having migraine headaches as a result of her menstrual cycle once every four months. She still reports, however, that she has migraine headaches two to three times per month that are not related to her menstrual cycle.
- [52] Dr. Dost accepts that the accident has exacerbated the plaintiff's migraine headaches. Dr. Cameron opined that the plaintiff is suffering from post-traumatic migraine headaches and suggests that "she also is probably suffering with intermixed musculoskeletal headaches following this accident as a result of the head trauma that she sustained at the time of the accident".
- [53] I am satisfied that the plaintiff still suffers migraine headaches that were a direct result of the accident. Although the plaintiff had a history of migraine headaches prior to the accident, the evidence indicates that these migraines increased in severity and frequency after the accident, and her attempts to mitigate these migraines have not completely returned her to her pre-accident condition.
- [25] After addressing other claims, the judge dealt with future cost of care in one paragraph:
- [109] All the remaining future costs of care have been recommended by medical professionals including the occupational therapist and all in my view are reasonable. For future costs of care I award the sum of \$84,000.
- [26] Included in the future cost of care award is \$34,768.90 for Botox treatment. That award represents 75% of the cost of for Botox treatments annually for life. The 25% discount reflects the respondent's submission that there should be an adjustment to account for menstrual migraines, which are not related to the accident. Also included in the award was \$24,015 representing 75% of the annual cost of migraine medications, Topiramate and Replax, over the course of the respondent's life.

- [27] I observe in passing that the cost of future care report did not include a claim for the cost of Botox. The claim for the cost of Botox arose during submissions at trial.
- [28] As the trial judge commented, the management of the respondent's menstrual migraines involved hormone treatment that reduced their frequency, but did not eliminate accident-related migraines. Overall, the management of the respondent's accident-related migraines involves daily use of Topiramate to prevent the migraine headaches, supplemented by Replax to mitigate the symptoms when they occur. The appellant argues that there was no properly admissible medical evidence that these medications were taken because of the accident, and submits that the respondent would be taking the migraine prevention medication in any event of the accident.
- [29] The parties do not dispute that determining the cost of future care involves identifying medically justified and recommended treatment responding to injury caused by an accident that sustains or improves the mental or physical health of the plaintiff.
- [30] It is quite clear on the record that the judge fell into error in concluding that the cost of Botox treatment had been recommended by a medical professional. The respondent had testified that she had in the past used Botox for cosmetic reasons, and found that it provided relief from her migraines. The use of Botox to treat migraine was confirmed to her by a Dr. Donat, and the respondent testified that its use to treat migraines had been recommended to her by Dr. Donat and Dr. Buttars. Neither of those opinions was in evidence in an admissible form for their truth. The only admissible medical evidence concerning Botox was an opinion that if the other preventive treatments should become ineffective, then a trial with Botox might be recommended. There was no evidence about the likelihood of the existing or alternative preventive treatments, Topiramate and Replax, ceasing to be effective.
- [31] I am satisfied that there was no medical evidence before the court capable of justifying the cost of Botox treatment. Moreover, the possibility that Botox would be recommended in the future was entirely speculative. In any event, the award made for the cost of Botox treatment is a form of double recovery because it duplicates the cost of treatment provided by the preventive and treatment medications for which compensation had already been provided.
- [32] In my view, there was no evidentiary foundation for the award of the future cost of Botox treatment and no basis on which to assume, even on a discounted basis, that treatment of the migraine headaches by using Botox would ever be medically recommended for the respondent.
- [33] I would set aside the award for the future cost of Botox treatment.
- [34] I turn now to consider the award for the future cost of the preventive and treatment migraine medications. There is no doubt that these treatments are medically justified. Here, the appellant's essential argument is that these treatments would be needed in any event of the accident. The appellant further submits that the award did not adjust the award for the trial judge's own finding that the migraines caused by the accident would improve over time.

- [35] On my review of the evidence, it is clear that the respondent suffers from both menstrual and accident-related migraines. The hormone treatment is effective in controlling menstrual migraines for a three-month period, but accident-related migraines occur regularly and frequently. There was no evidence that if the accident had not happened, the hormone treatment would have been sufficient to avoid migraines for three months at a time, with migraine medication needed only every fourth month. The evidence is unclear whether the respondent likely would be on the preventive medication regimen in any event of the accident, but it is clear that she would be on that treatment to avoid or mitigate the accident-related migraines. In these circumstances, I cannot say the judge erred in making an award for migraine medication.
- [36] The trial judge imposed a 25% reduction to account for the fact that some of the medication would be attributable to the prevention and treatment of menstrual migraines. He does not consider his finding was that the respondent's accident-related migraines would improve over time. Equally, he did not factor in a contingency to reflect the fact that the respondent's menstrual migraines would likely diminish and cease over time in light of her age. These contingencies have opposing effects on the award; increasing the relative frequency of accident-related migraine with menopause, but with a diminishing frequency of accident-related migraines as the respondent's health improved. Although the judge did not factor these contingencies into the award (see, *Morlan v. Barrett*, 2012 BCCA 66), I would not disturb it since it may be a reasonable assumption that the positive and negative contingencies would cancel each other out.

Did the Trial Judge Err in his Award of Past and Future Income Loss?

- [37] The trial judge made an award of \$30,000 for past income loss and \$60,000 for loss of future earning capacity. In reaching that conclusion, he rejected the respondent's theory of her income loss attributable to the accident. That theory rested on a loss of gross profits for the respondent's business, as well as incurring additional labour expenses to run it.
- [38] The judge found as a fact that the plaintiff did not lose any business as a result of the accident. Rather, there had been a general decrease in gross revenue before the accident, beginning in 2008. Secondly, the judge accepted that the respondent had to work longer hours as a result of the accident to run her business, but he provided compensation for that in his award of non-pecuniary damages. Neither party raised as an issue in this appeal whether it was an error to provide compensation in that way. Thirdly, in explaining his award for future loss of income, the trial judge defined the respondent's loss to be her need for some part-time help in order for her to continue to operate the business as she did prior to the accident. Clearly, the judge formed the view that, because of the accident, the respondent needed part-time help, beyond working longer hours, to be able to operate her business.

- [39] The appellant contends that the income loss award can only be explained on the basis that the judge compensated for the replacement costs for the part-time employees taken on since the accident. This seems to be a reasonable conclusion. The cost of those employees to the end of 2014 was \$26,873. Making some adjustment for the costs incurred in 2015, of which there was no direct evidence, an award of \$30,000 is supportable on the evidence.
- [40] The problem with this award, according to the appellant, is that apart from the first part-time employee who was hired immediately after the accident for some months, there was no evidence that the other part-time employees were hired because of her injuries or to undertake particular tasks that the respondent was no longer able to do because of the accident. In fact, the respondent ran the business effectively on her own for close to a year after her first part-time employee left. The appellant argues that, on the evidence, the respondent was capable of doing all of those tasks necessary to run the business, although executing those tasks took longer and required the respondent to work longer in the evenings and on the weekends, matters which were compensated for in the non-pecuniary damages.
- [41] Moreover, the appellant argues that, except for the immediate few months after the accident, whether a part-time employee was engaged in the business depended on how much work there was for the company, not on the need to have someone undertake tasks the respondent could not do because of the accident.
- [42] In support of this theory, the appellant points to the pre-accident history of part-time employment within the business. The appellant says that the record demonstrates that when the work was there, a part-time employee was engaged. When the work was not there, they were let go. A part-time employee was engaged in each year between 2007 and 2010 when gross revenue ranged between approximately \$130,000-\$140,000. In the second half of 2010, business slowed significantly and at that time the part-time employee was let go because of the shortage of work. The respondent admitted that at that time there was not enough work for both of them. That same situation prevailed in the first part of 2011, the respondent acknowledged, before the accident. After the accident, for some months, she needed part-time help to run the business; a fact acknowledged by the appellant.
- [43] After letting her part-time employee go in late 2011, the respondent ran the business on her own. She did so for approximately a year until she hired her son in September 2012. The appellant's theory is that as more work was available in 2012 to 2014, as reflected by gross revenues in the range of \$122,000-\$125,000, so part-time help was hired. In short, a part-time worker was hired because of increases in the volume of business, not the accident, save for the worker hired for the immediate months after the accident.
- [44] The respondent did not testify that she hired part-time help to assist her in running the business because of her injuries or because there were particular tasks she could no longer do. Accordingly, the appellant argues that there was no evidence that part-time help after 2011 was hired because of the accident and no evidence to support the award. The appellant

submits the evidence is only consistent with part-time help being engaged after the accident, just as it was pre-accident, when there was sufficient business to demand it. In the result, the judge's conclusion that the respondent was going to need some part-time help in order to help her continue to operate a business as she had done prior to the accident has no evidentiary foundation. The absence of an evidentiary foundation undermines both the past and the future award, since the future award is calibrated to compensate for the future cost of part-time employees.

- [45] Again, there is considerable force to the appellant's argument. With the exception of the part-time employee engaged immediately after the accident for some months, there is no clear evidence that part-time employees were taken on to perform the tasks that the respondent could no longer do as a result of the accident or generally to assist her because of her injuries. Indeed, there was no clear evidence that the respondent could not do those tasks necessary to run the business. Certainly, because of her injuries, her capacity to perform her work had been diminished and she struggled to perform her tasks efficiently. The trial judge recognized as much, but compensated for the longer time it took her to do the job in his award of non-pecuniary damages.
- [46] It appears clear that the trial judge's estimate of the loss of earning capacity, both past and future, is based on all of the costs of engaging part-time assistance. The judge concluded that the respondent needed that part-time assistance to run her business. This conclusion is distinct from his finding that it took the respondent longer to perform her tasks. The question is whether the finding that the respondent needed part-time help, as a result of the accident, was open to the judge on the evidence.
- [47] The respondent had certainly been injured in ways which compromised her ability to run her business. The evidence certainly established that the respondent could be confused, made mistakes, struggled to do what needed to be done, and took much longer to do it. The respondent compensated, certainly in part, for those challenges by working into the evenings and on weekends. The trial judge accepted this. But recognizing that this is so does not mean that the respondent was able to do all that she had to do, without help, simply by working longer hours. It was, I think, open to the judge to infer from the nature of the respondent's injuries that the respondent needed some assistance during regular hours to help her run the business effectively when her capacity to discharge her tasks in a timely manner had been compromised because of the accident. In my opinion, this is an inference which is supportable on the evidence given the nature of the respondent's injuries and her associated loss of capacity (e.g., dizziness, fatigue, slowness), which affect the respondent during both regular and non-business hours. This inference underlies the finding that the respondent needs some part-time help for her to continue to operate a business as she had done before the accident.
- [48] I acknowledge that there was little direct evidence to support the judge's conclusion that part-time assistance was required as a result of the injuries caused by the accident. But in my opinion, what evidence there is is just sufficient to support the inference and the finding

that some part-time assistance was required as a consequence of the injuries the respondent suffered and, accordingly, is sufficient to withstand appellate review. It was open to the judge to find that the respondent's capacity to run her business as she had done before the accident had been compromised by the accident and assistance was required.

- [49] The question then is whether the judge erred in not applying some contingency to the quantum of the award to reflect the likelihood that part-time help would be required from time to time as the amount of work available to the business changed. The evidence demonstrated that the employment of part-time help fluctuated with the amount of work the business had. There is a compelling basis to infer that, quite apart from the accident, when the work was there, such as when business is booming, part-time help would be needed to run the business in any event of the accident. The judge did not consider whether evidence of this contingency, coupled with other contingencies such as age or general improvement in health (based on his findings about the respondent's prognosis) should lead to a downward adjustment in the award. In my opinion, this was an error.
- [50] I would accede to this ground of appeal to the extent that I would reduce both the past and future income loss awards by 25% to reflect the contingencies described above.

Conclusion

- [51] To summarize, I would allow the appeal only to the extent of:
- a) setting aside the award for the future cost of Botox treatment, in the amount of \$34,768.90; and
 - b) reducing the awards for past and future loss of income by 25%, in the amount of \$22,500.

In total, the amount of the trial award is reduced by \$57,268.90.

- [52] In my view, the outcome of this appeal reflects mixed success for the parties. I would order each party to bear their own costs.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Savage"

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