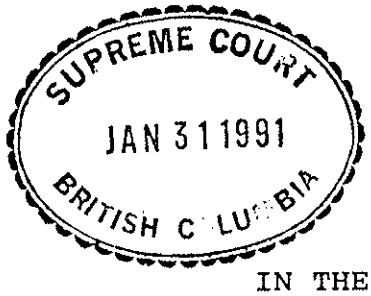

No. C884654
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: BRADLEY HARRISON PLAINTIFF AND: RAYMOND GLENN BIGGS, RENE CAM, NORMAN COLLIER RONALD GOWE, and DARREN ROUW DEFENDANTS AND: NEIL MacDONALD, CURRY HOFLIN, DAN CAM, BRIAN HUSAK, STEPHEN IAN BIENVENUE and EUGENE OLSEN THIRD PARTIES	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE R.A. McKINNON

Counsel for the Plaintiff:	J.N. Laxton, Q.C. and Ms. M.R. McMillan
Counsel for the Defendants:	
Raymond Glenn Biggs	W.S. Berardino, Q.C. and Ms. K.M. Gill
Renee Cam	D.V. Whitworth, Esq. and A. Wilkinson, Esq.
Norman Collier	In Person
Ronald Gowe	In Person
Darren Rouw	G.J. Nash, Esq. and Ms. P.M. Tugwood
Counsel for the Third Parties:	
Neil MacDonald	In Person
Curry Hoflin	R. Logie, Esq. Ms. M. Bittel
Dan Cam	Ms. M.M. MacKinnon and R.B.T. Goepel, Esq.
Ian Bienvenue	G. Blanchard, Esq.
Eugene Olson	D. Maglio, Esq.

DATES AND PLACE OF TRIAL: October 22,23,24, 25,26,29,30,31 November 1,2, 1990 Vancouver, B.C.

The plaintiff claims damages for injuries sustained at Terrace, B.C. when he fell through a store window after a confrontation with friends during a stag party. The plaintiff was then wearing a ball and chain contraption, endemic to prospective bridegrooms in the Terrace area.

The tragic consequences of this encounter will probably never be adequately measured. Mr. Harrison lost most of the use of his hands and has only limited use of his arms, thus rendering him "competitively unemployable". His marriage, scheduled for the week following the incident, never did take place, and this lawsuit has cost him most of the friendships of his youth.

The style of cause reflects the considerable differences of opinion on liability, with the notable exception that all defendants and third parties take the initial position that none is liable. They maintain that Mr. Harrison was the author of his own misfortune when he inexplicably threw himself into the window. Alternately, if he was forced into the window during a confrontation, he was at least partly responsible because his actions in resisting a "harmless" local prank were unreasonable and could not be contemplated by others. In the event liability flows from this incident at least two defendants claim the third parties are equally liable.

BACKGROUND

The plaintiff was to be married April 9th. 1988, and in a rite of passage, common at least to the Terrace area, his friends organized a stag party complete with a ball and chain. The defendant Biggs, who was to be the plaintiff's best man, was the principal organizer, assisted by MacDonald and Gowe. These three had known Mr. Harrison for many years, having attended school together and generally closely associated with one another, particularly Mr. Biggs. The plaintiff described this latter association as "like brothers", inseparable with each knowing the thoughts of the other. This is significant only to demonstrate that Biggs was well aware of the aversions of the plaintiff and one of these was a strong aversion to stag parties. The plaintiff's mother recalled a telephone conversation with Mr. Biggs shortly after the incident where she admonished him for having the stag. Mr. Biggs does not deny this call nor does he deny that Mrs. Harrison said words to the effect: "why did you have this stag, you know Brad hates stags."

Notwithstanding this knowledge, organization for the stag proceeded and Mr. Gowe, also a good friend, contributed the ball and chain. This comprised a metal cylinder filled with a weight to which chains were attached. Two separate lengths went to ankle bracelets which were fastened with the use of a padlock on each ankle. These two chains then went to a single chain approximately

five feet long to which the cylinder was attached. The entire contraption weighed twenty-eight pounds and the recipient could move about only by carrying the cylinder and shuffling within the length of the ankle chains. It was apparent that someone the size of the plaintiff, 6'2", 250 lbs., could move about relatively easily, provided he was "at rest", not pressed and needed only to walk short distances, but he could not run or move quickly. Mr. Gowe had made several sets in the past and most defence witnesses testified to a veritable stag season in Terrace where one would often see prospective bridegrooms similarly encased, usually at the Skeena Hotel.

On April 2nd, 1988 Mr. Harrison was lured by his then fiancee to a shopping mall, ostensibly to have a cup of coffee but actually to be shackled and taken to his stag party. In order to lend a unique flavour to the event, organizers had persuaded a uniformed member of the R.C.M.P., Eugene Olson, to enter the cafe and convince the plaintiff to go to the parking lot, where he was surrounded by a group. A fairly lengthy struggle ensued as the plaintiff did not willingly submit to this procedure. His fiancee considered that his struggle was not in keeping with the spirit of the event, and others, such as the defendant Biggs, thought he put up too much resistance. I accept that most persons at the scene would expect at least token resistance. This spirited resistance however, would not in my view place any except perhaps his closest

friends on notice that he seriously objected to the process. The shackling took almost twenty minutes and was graphically portrayed in the photographs filed as an exhibit.

Once the plaintiff was shackled, the group proceeded to Mr. Gowe's residence where food and drink had been arranged. Mr. Olson was not involved beyond luring the plaintiff from the restaurant, and at least one defendant and several third parties were not present at the shackling. The plaintiff conceded that although he was not initially a willing participant he did consent when it became obvious further struggle was useless. He was even prepared to enjoy the evening and by all accounts appeared to do so until taken to the Skeena Hotel. There is some dispute as to whether he requested removal of the shackles at the Gowe residence, but I am satisfied he made this request of Biggs at least once without success. Biggs and Gowe each had keys to the padlocks and were able at any time during the evening to release the plaintiff.

The group remained at Gowe's from approximately 5:00 PM to 8:00 PM when they decided to adjourn to the Skeena Hotel. This was apparently the traditional "watering hole" for stags and was generally the bar favoured by most in the group. The plaintiff had by then consumed four bottles of beer but was relatively sober, as were the others. I am satisfied there was no excessive consumption of liquor by any of the litigants and that alcohol was not a factor

in the ensuing events. Mr. Collier did not consume any alcohol that evening and while the others consumed varying amounts, none was intoxicated nor even significantly impaired. Mr. Harrison was quite moderate in his consumption considering the event, and even rejected drinks, planning to quietly leave the party about 11:00 PM after having the shackles removed.

There does not appear to have been any planning about the move to the Skeena Hotel. The plaintiff and several others thought the party was to begin and end at the Gowe residence. He testified that so long as he remained at Gowe's he felt relatively secure, but became very anxious when the move to the hotel was announced. I accept his evidence on this issue which is supported by the attempt to enlist friends at Sonbadas Restaurant to help free him. He was driven to the Skeena Hotel by Curry Hoflin and Glenn Biggs and enroute tried to persuade them to stop at this restaurant without success. Hoflin and Biggs both admit they suspected an attempt by Harrison to evade them and so refused to stop. Indeed this was precisely what Harrison intended to do had he been able to get inside the restaurant.

I accept that by the time the group arrived at the hotel, Harrison had made it plain by both words and actions that he wanted to be released. He had by then heard several comments about sending him on a one way ticket without funds and was considerably

alarmed about this possibility and that of injury while shackled. No one paid the slightest attention to his demand and so the plaintiff formulated a plan of action. He limited further alcohol consumption to one and a half rye and coke and a partial "shooter", and kept active by playing pool. He intended to slip away at the first opportunity, walk several blocks to his apartment and gain entry by ringing a fellow tenant, since his keys had been taken from him during the shackling earlier in the evening. Once inside he planned to disable the electronic system permitting entry and thereby avoid recapture.

At this juncture the implied criticism of the plaintiff by the defendants and third parties permeates the scene. They wonder why a big strapping male resident of Terrace would object to this attention paid to him by his peers. This was a night designed for fun and frolic and they left the impression that no self-respecting male could possibly reject this attention, and if he did, he ought not to be allowed to get away with it. It is hardly surprising, therefore, that when Harrison was discovered to be missing from the hotel shortly after 8:00 PM, a posse was quickly assembled to drag him back. I do not accept Mr. Biggs' version that they merely wanted to go find him, talk to him and try and persuade him to return. I accept that no one in the posse had a clear understanding of what exactly they were to do but the main

objective was to bring Harrison back to the hotel, using force if necessary.

Biggs, Collier, and Rouw immediately upon discovering that Harrison was missing got into Collier's truck and drove towards the apartment where they believed he would go. Neil MacDonald and Rene Cam headed in the same general direction but on foot, with Cam quickly taking the lead. Collier spotted Harrison near his apartment building and drove his vehicle into a lane by this building at an angle, cutting him off. This action was so closely timed with Cam's contact with Harrison that the plaintiff actually collided with the right front bumper area of the truck. There is some dispute about the direction Cam was going since the plaintiff said he was grabbed from behind while Cam claims he was facing Harrison. There is no dispute that Cam and Harrison came into contact and ended up at the truck.

Biggs and Rouw immediately got out of the vehicle but then there is considerable dispute about events which followed. Rouw testified that he merely stood back and had no contact with anyone. Harrison thought he saw Rouw grab onto him but he could not be sure. Biggs claims that Rouw did have contact with the plaintiff but I have determined that he did not. I accept that Rouw's involvement was precisely as he described it. He did not know the plaintiff well but went along with Biggs and Collier for

the express purpose of bringing Harrison back to the hotel. On leaving the truck and observing the scuffle with Cam, he stepped back and remained away from the scene the entire time. Cam stated in evidence that Rouw had a "stunned" look on his face which I find is consistent with the evidence he gave. Rouw was not present at the shackling, knew nothing of the plaintiff's aversion to stags and when it became obvious that Harrison was not cooperating, he took no part in the proceedings.

Biggs and Cam, however, wrestled with Harrison for a time and during this struggle Harrison demanded to be left alone and released from his shackles. Collier remained in the truck and was either just out of it or in the process of leaving it when Harrison went through the window. MacDonald did not arrive on the scene until after the injury thereby refuting the notion that the race goes to the swift.

There is considerable dispute as to the sequence of events following contact with Harrison by Biggs and Cam. The latter maintain that when they appreciated Harrison's agitated state, Biggs yelled that everyone should "back off" leaving Brad alone. They were then all in front of Harrison's apartment building, and particularly in front of a Salvation Army Thrift Store window. They maintain that to their amazement, Harrison then

turned and with both hands raised above his head punched the store window and immediately fell onto the broken glass. It is not contended that Harrison deliberately fell onto the glass, rather that he deliberately punched the window in anger and probably did not even consider that it might break. It is this action in deliberately punching the window that ought to relieve them from liability say the defendants.

The plaintiff denies that he hit the window with any deliberation. He says he was caught up in a struggle which ended in front of the window. He turned to elude his pursuers, who had refused to release him, and was either pushed, or tripped over his chains falling into the window. The defendants contend that this version is not credible given subsequent events. They point to statements given to police shortly thereafter which they say are consistent with the defence position and comments by the plaintiff sometime later that doctors had told him the severe loss of blood may have affected his memory immediately before the event.

I do not accept the defendants' version and while the plaintiff does not have a precise recollection I prefer his evidence wherever there is any conflict. The statements given the police do not contain the assertions one would expect to find if the plaintiff had struck the window as alleged. They do make passing reference to the plaintiff striking the window. If

carefully read perhaps one could discern that what was intended to be conveyed was that it was a deliberate act. Indeed, several of the parties actually said it was a deliberate act but only when closely questioned by police. The narrative given before the questions makes no reference to a deliberate act. The police constable conducting the interview specifically asked about "intention". These statements fall far short of convincing me that the defendants believed this version when giving the statements.

Mr. Collier, who had a good view of events, told the police in his statement that Harrison turned toward the window and it looked like he lost his balance and fell. In cross examination he said he did not tell the police that this action was deliberate (as he maintained at trial) nor did he comment about Biggs yelling at everyone to "back off" because "they didn't ask me these details and I didn't feel any need to tell them, I didn't think it was important."

I do not accept that Biggs ever asked anyone to "back off"; rather, I am satisfied that on contact with Harrison, Biggs and Cam wrestled him to a position in front of the window. He was then highly agitated, a fact that should have been obvious to everyone and particularly to Biggs and Cam. I am satisfied that in this agitated state he turned to escape his pursuers and fell against the window. I do not know precisely where his hands and

arms were during contact with the window but it would appear from the injuries that both were up high and extended. Harrison said:

> "I was really upset, I reached out and grabbed Glen and said just fucking leave me alone, just fucking leave me alone. I pulled away from all the hands clutching me. I turned and the window was there. My arm was up and I saw the glass break. I closed my eyes and when I looked again I was looking straight down. Glen and Rene picked me up and set me down on the sidewalk. I had my left arm up in a V, raised."

The plaintiff suffered massive lacerations to both arms. Veins, muscles, and arteries were severed with major loss of blood. There is no question whatever that without the immediate medical intervention of Biggs and Cam he would have died within a relatively short time. It is perhaps an ironic twist of fate that the two men alleged to have been responsible for the injuries were themselves responsible for saving the plaintiff's life. Notwithstanding other comments which I make about the conduct of Biggs and Cam that evening, I can only express admiration for the way in which they quickly took charge and provided life saving aid to the plaintiff. In other circumstances they might well have received commendations for their efforts.

Mr. Harrison was taken by ambulance to Mills Memorial Hospital in Terrace where he was given blood transfusions and ligation to both left and right brachial arteries. His condition

was so critical that he was then placed in a pneumatic anti-shock garment and transferred by air ambulance to Vancouver General Hospital. He underwent further surgery there and then a long period of recovery, involving more surgery and extensive rehabilitation. His situation today is described by Dr. R.J. Warren as follows:

> "At this time, Mr. Harrison is able to function as an independent person, looking after himself, driving his own car with certain aids, and living without the need for constant care. Nevertheless, his arm and hand function is not normal, and is as good as it is largely due to the patient's diligence at therapy and the fortunate results of his many surgeries."

LIABILITY

The theories of liability range from the "large pool" involving everyone, including the former fiancee to the "narrow pool", restricted to all or some of the persons actually at the scene of the injury. I heard reference to the general principles applicable to tort law such as duty, conforming to the required standard, causal connection or proximate cause, actual loss and conduct of the injured party. On none of these principles could liability extend beyond the group present at the injury.

The plaintiff became vulnerable to injury from the shackles only when pursued from the Skeena Hotel. To that time he

had accepted, albeit grudgingly, the confinement and actually decided to enjoy himself. No one involved in the shackling process except his closest friends were aware of Harrison's aversion to stags and even that was not particularly relevant until much later in the evening. Shackling bridegrooms in Terrace was a common sight. Whatever an outsider might think about this process, it was an accepted part of that community and had never resulted in injury, at least to the knowledge of these participants. Mr. Nash urged me to find that the shackles were the cause of the injury, therefore all involved in the shackling should be liable. I have for the reasons indicated rejected that approach and reiterate that although the plaintiff objected to the shackles, he did accept them for a reasonable period of time. The claims against all third parties are dismissed.

I have determined that the shackling of the plaintiff became unreasonable when he left the Skeena Hotel Bar. It ought to have been abundantly clear to Biggs and Rene Cam at that juncture that the joke was over and release was required. They particularly knew of the plaintiff's concerns which ought to have then crystallized in their minds. The appropriate course of action was to send Biggs or Gowe over to the apartment, alone with the keys and release the plaintiff.

The plaintiff's claim against Gowe relies upon his involvement as an organizer, manufacturer of the shackles, possessor of the keys and generally his knowledge of the plaintiff. He might have been more considerate and released Harrison on leaving the house but apart from that I cannot see where he has breached any duty to the plaintiff. He did not pursue Harrison from the bar and took no further part in events except to release the shackles after the injury. I, therefore, dismiss the claim as against Ronald Gowe.

The defendant Rouw was several years younger than the plaintiff and his group and did not know Harrison very well. He knew him through a relative and said that he saw him perhaps two or three times a year. He was not aware of any concerns about stags nor did he observe anything untoward during the evening. He was not present at the shackling and was merely an extra body in the posse. None of this may have been particularly relevant had he taken an active part in Harrison's apprehension, although it might have affected his degree of responsibility. I have determined, however, that he merely rode along and took no active part, and therefore dismiss the claim against him.

Biggs and Collier knew the plaintiff well and were particularly familiar with his moods. Cam was less well acquainted but still was a "friend" of the plaintiff and knew him

relatively well. I am satisfied these three formed a common intent on leaving the bar to bring the plaintiff back, using force if necessary. Collier at page 17 of his examination for discovery stated:

Q. 145 You'd all decided to chase Brad Harrison and stop him getting to his house?

A. Yes

Q. 146 And you intended, did you not, as a group to take him back to the Skeena Hotel if you could stop him?

A. Well basically find out why he's acting the way he was.

Q. 147 Did you not intend to take him back to the Skeena Hotel?

A. Yes

Q. 148 And it was clear that Mr. Harrison did not want to go?

A. Yes

Q. 149 He wanted to go home?

A. Yes.

Collier maneuvered his truck in such a way as to cut the plaintiff off from his intended path, which permitted Biggs and Rene Cam to restrain him. The wrestling match in front of the truck took only a short period, during which time Collier parked his truck and either made ready to leave it or was in the process of leaving it when the injury occurred. Collier had assisted in stopping Harrison, thus permitting Biggs and Cam the opportunity to grab and hold him. He was also ready and willing to assist if required and was as much a part of the struggle to return him to the hotel as Biggs and Cam. Certainly the plaintiff perceived the numbers as daunting and believed he was up against four people.

It should have been apparent to these three when Harrison was spotted near his apartment that further pursuit was unwise. Cam on contacting Harrison was aware of his highly agitated state and Biggs and Collier ought to have realized this when approaching Harrison. They should then have realized that confrontation of any kind was out of the question and created a risk of harm. Harrison had run a number of blocks carrying the cylinder and chain and was extremely winded. In that state he could easily have tripped or otherwise injured himself, quite apart from the ultimate injury suffered.

I am satisfied that the plaintiff was extremely tired from his run and when confronted by the group felt trapped. Biggs'

and Cam's physical contact with him, designed to drag him back into the truck, lent an air of desperation to an already emotional scene. He turned to escape, but was then immediately in front of the window. This turn, made at a time when the plaintiff was in a highly emotional state and encumbered by this device, led to his fall into the window. I reject any notion that the act of striking the window was a deliberate act on the part of the plaintiff. I reject as well the contention by the defendants that the plaintiff's acts were "irrational".

It may be strange to the young males of Terrace that one of their peers would not enjoy such attention, but that does not permit the pressing and persistent conduct exhibited by these three. I reiterate that continued shackling became unreasonable when Harrison left the hotel. Biggs, particularly in light of his long friendship with the plaintiff, would know that the act of leaving signified Harrison had had enough. The other two should have known then as well but if not then certainly they knew when Harrison was confronted and made pleas/demands for his release.

The injury sustained was in my view reasonably foreseeable but even if it were not, it is of a type referred to in ***Hughes v. Lord Advocate,*** [1963] 1 All E.R. 705; ***Hoffer*** v. ***Assiniboine South School Div.,*** [1971] 4 W.W.R. 746. The defendants owed the plaintiff a duty of care in light of his physical

constraints. Their conduct in pursuing him after it became clear he had had enough fell below the standard of reasonable persons. This conduct placed the plaintiff in a situation of confrontation which led directly to his injuries. This persistent conduct could not have been foreseeable by those present at the shackling and no liability can extend to the third parties. See ***Overseas Tankship (U.K.) Ltd.*** v. ***The Miller Steamship Co. Pty. and Another (Wagon Mound #2)***, [1966] 2 All E.R. 709. I have considered the relevant provisions of the **Negligence Act** R.S.B.C. 1979 c. 298 and hold that the three defendants Biggs, Rene Cam, and Collier are equally liable as joint tortfeasors.

DAMAGES

The plaintiff was 28 years old at the time of this injury, and one week away from marriage. His fiancee was then 23 years old. According to the plaintiff they had decided upon a fifteen year plan. They would both work in order to build a home in the Terrace area and then after an extended holiday, commence a family. The Defendants contend that it was unlikely the plaintiff would have been able to keep his job, given his work record and particularly his extended absences. Several also suggested it was unlikely his marriage could have lasted and elicited evidence from his former fiancee to this effect.

Blanche Olson, the former fiancee, gave a perfectly reasonable explanation for her termination of the engagement in September, 1988. She said that she had come to realize she simply did not love the plaintiff and doubted if she ever had. The plaintiff's long period of recovery permitted her a second chance to assess the situation and she found his temper and immaturity such that she was persuaded to break off the engagement. She confirmed, however, that she fully intended to marry him had the injury not intervened. It would be speculation of the highest order to predict a marriage failure. They were a relatively young couple who, but for the injury, might well have worked out any difficulties. Ms. Olsen testified to events as recent as July, 1990, presumably to demonstrate the plaintiff's immaturity, which I did not find particularly helpful and merely pointed to some residual bitterness. Mr. Harrison is still very upset over his marriage loss which is a direct consequence of his injury.

Considerable evidence was led in an attempt to persuade me that it was more probable than not that Harrison would lose his job with Eurocan. I did not find this evidence persuasive in that regard. His fiancee was not aware of any problems at work, and the plaintiff, while admitting to some problems due to "immaturity" in his early employment, considered the years since 1985 to be reasonably good. Mr. Leech, the industrial relations manager for Eurocan, was vigorously cross-examined but would not state the

plaintiff had been given a "last chance". He considered his many medical absences to be a problem and one that could lead to termination but the tenor of his evidence left me to conclude that Mr. Harrison was a long way from losing his job. He was reasonably well placed in the seniority list and any layoff would have to be so massive as to close the mill if it reached Mr. Harrison. Mr. Leech stated that the prospects of the plaintiff remaining to age 65 were very high, "so long as he met employment standards". He also described the four stage grievance process which only commences after discussion and written warnings. So far as I can discern, Mr. Harrison never even reached the grievance stage.

In 1985 the plaintiff transferred from the steam plant to the paper mill, thereby changing union locals. He was, he said, able to start fresh as there was no "cross talk" between the locals and he determined to build a better reputation. Indeed, apart from medical absences he seems to have accomplished that goal. An incident in July, 1987 alleging continued absenteeism was wrongly attributed to him by counsel for the defendants when in fact it was an allegation against his uncle, Del Harrison. The plaintiff testified that by April of 1988 his medical problems had almost resolved and after returning from his honeymoon he intended to return to work. His physician confirmed the medical prognosis. He also intended to remain with the company to age 65 and I heard evidence of considerable benefits, including the right to work only

three months of the year after 25 years service. I can see no basis for concluding anything but that the plaintiff would have continued with Eurocan for his remaining years of employment.

Mr. Harrison's recollection of events immediately following his injury is understandably hazy. He recalls treatment given him at the scene, the ambulance ride to Mills Memorial Hospital and various procedures, such as cutting away his shirt. He also recalls voices assuring him he would be fine although he had by then suffered almost total blood loss and but for skilled medical intervention would have succumbed to the injuries. Once his condition stabilized he was transported by air ambulance to Vancouver and taken to Vancouver General Hospital where at 5:00 A.M. on April 3rd a team of vascular surgeons commenced surgical repair to his arms.

The repair process was graphically described in the medical report of Dr. David Taylor, one of the vascular surgeons and while he reported considerable "success", it is conceded by all that Mr. Harrison was left severely disabled. During his stay at V.G.H. he was attended daily by his parents, who provided considerable nursing services. Mr. and Mrs. Harrison senior both have nursing experience and were able to perform many of the functions normally requiring a nurse or attendant. They managed this care on a shift basis, with mother attending while father was

medical prognosis is for further similar surgery. The initial injury and the many surgical procedures have left extensive scar tissue which is particularly noticeable if the plaintiff is lightly clothed. He has been embarrassed on occasion when people stare at his arms but generally seems to have coped reasonably well.

The plaintiff suffered bouts of depression and even today, although much improved, has periods of anger and bitterness. These are not particularly pronounced and in fact according to his psychiatrist, Dr. Bunton are in the circumstances, "remarkably muted". In his report of November 1st, 1988 Dr. Bunton stated:

> "I would comment that Mr. Harrison's diagnosis would be an adjustment disorder with mood involvement and that the distinctive and reacting factors would be the circumstances of his disturbed physical function, interruption of his life by prolonged hospitalization and the desertion of his fiancee. I feel he is quite correct to see these events as derived from the incident on April 2, 1988. I feel he has resilience to emerge from his present despondency and to rehabilitate himself in accordance with the physical legacy from his injuries but that he will retain a considerable mistrust of close relationships with consequent curtailment of his social life into the future."

Time since that diagnosis has proven it reasonably accurate. Mr. Harrison maintains a relatively cheerful outlook on life with only occasional bouts of hostility and/or depression. Some of this was recorded in a report dated July 24th, 1990 by Dr. Aranas, a Terrace

psychiatrist to whom the plaintiff was referred by his general practitioner.

Mr. Harrison has made considerable progress but requires further surgery and rehabilitation to reach his optimum level. Dr. C. Acob, a rehabilitation specialist at G. F.Strong, and other medical experts have concluded, however, that he will not recover much beyond his present level and will remain "competitively unemployable". Dr. A.C. Pinkerton, a rehabilitation specialist employed by one of the defendants to conduct an independent examination of the Plaintiff made the following assessment in his report dated September 20th, 1990:

> "Bradley Harrison has made a remarkable recovery from very severe injuries to his upper limbs, but he is left with permanent impairments with restriction of movement, gross and fine motor function and sensory impairment. Although further surgery to improve the cosmesis of his scars may be possible and tendon transplants may give him some opposition of the left thumb, this will not in any way alter his overall functional abilities or vocational choices. He also still has pain particularly in the right elbow, and this, in my opinion, will persist. In addition to the restrictions in his vocational choices, he will also be limited in his recreational and social activities."

In assessing the effect upon his daily routine Dr. Pinkerton made the following observations:

> "He is independent in grooming and dressing with some adaptations. He uses special mitts in the shower in order to wash himself. He

> cannot manage buttons without the aid of a button hook and he has rings on his zippers. He uses a cuff for his electric razor and beard trimmer and buys jeans of a larger size so that they are more easily put on and taken off. He cannot tie his shoelaces. He was apparently originally left-handed, but was changed to be right-handed when in grade one at school. He now has become left-handed again and says that his writing has improved considerably in the past two years. A sample of his writing was obtained and this was seen to be quite legible. For cooking, he needs pots with handles on two sides. He has an electric mixer and can opener and a power screwdriver. He can't, however, do home maintenance work as he used to. He has to be careful with dishes to separate things that are hot and cold and to be careful when dealing with sharp objects."
> "He is able to drive, but is restricted to having a V-grip on his steering wheel and power windows and locks."

Mr. Harrison described life before the injury as relatively active and rewarding. He enjoyed skydiving, biking, photography, hiking, and swimming. He also enjoyed an active social life with his fiancee. He had assisted the defendant Biggs in construction of his home and expected Mr. Biggs would assist him when the time came to build his own home. Mr. Biggs disputed that the plaintiff did much by way of assistance but did acknowledge some help. Post injury routine consists of physiotherapy sessions three times per week, laundry and some apartment cleaning weekly, visits with friends, some hiking and photography, although the latter requires considerable time and patience. Cooking, cleaning and washing take a great deal of preparation and time. One example

was the preparation of mushrooms which the plaintiff particularly enjoys. He has special knives and must watch as he can easily cut or burn himself without feeling the sensation. He cannot prepare dishes such as beef stroganoff because of the stirring required. He commented that he has discovered society is geared to hand movement and simple things such as receiving change, or dropping coins into a slot requires time and patience and often cannot be performed.

Mr. Harrison relies upon special equipment and adaptations to existing articles to obtain optimum use. He cannot for instance lift items over 45 lbs. and would not be able to change the tires on his vehicle. In the northern community of Terrace where distances are great, he believes his vehicle should be equipped with a hands free radio telephone to provide a margin of safety. In this and in a variety of other items he is supported by Ms. R.J. Shulstad, rehabilitation specialist, and Dr. C. Acob.

The plaintiff has no romantic interests, but has some friends and generally fills his day with activity of one sort or another. It is apparent that many simple tasks now take him a great deal of time to accomplish, therefore much of his day is spent doing routine chores designed to maintain his independence. He has chosen to reside in the Terrace community where he lived most of his life and where he would like to remain. He has few

employment prospects although he would like to develop his interest in photography to the point where he might be able to earn a living from it. Mr. Shalman, an expert in rehabilitation psychology and employed by the Defence to assess the plaintiff, concluded in his report of September 26th, 1990, that given his educational level and physical disabilities it was likely only relatively low paying jobs would be open to him.

GENERAL DAMAGES

Counsel for the defendants Biggs and Rene Cam agreed that if their clients were liable, the sum of $145,000 would be an appropriate award for non-pecuniary damages. Mr. Collier acting on his own behalf joined in that agreement. Notwithstanding Mr. Collier's agreement I considered it appropriate to review several cases in order to ascertain whether such a sum was reasonable in all the circumstances. In ***Whaley*** v. ***Cartusiano*** (1990), 68 D.L.R. (4th) 58 (Ont H.C.) the plaintiff, who was right-handed, lost all fine motor movements in his left hand and was awarded $100,000 In ***Stribbell*** v. ***Bhalla*** ,(unreported) May 16th, 1989 (Ont. H.C.), digested in **Goldsmith's Damages for Personal Injury and Death in Canada 1988-90**, a six year old right-handed child who sustained considerable injury to her right forearm, leading to loss of fine motor movements was awarded $120,000. The plaintiff's loss here is in my view more severe and justifies the amount agreed upon. I, therefore, award the sum of $145,000 for general damages.

PAST WAGE LOSS

The plaintiff seeks $127,203 for past wage loss while the defendants argue such a figure incorporates at least one year of abnormal income due to unusual overtime. This they say does not permit a true average which they maintain should be about $100,000. I accept that there should be some reduction and apply a 7% deduction to balance the overtime aspect. This gives a figure of $118,299 which I round to $118,300 for past wage loss.

LOSS OF FUTURE EARNING CAPACITY

The sum of $55,809 per annum is used by the plaintiff, having been obtained from the employer who took two incomes below and two above the plaintiff on the seniority roll for this average. The plaintiff concedes a $226,700 deduction representing wages earned to age 65 at the minimum wage and seeks a total wage loss to age 65 of $1,213,989. The defendants maintain that the average is incorrect and repeat the reasons advanced for the past wage loss calculation. They also argue the plaintiff's work record was unsatisfactory and he would not have worked to age 65 but more probably than not would have lost this job. In the result they argue for a wage loss of $642,872.

I accept some reduction is necessary to the average and apply the same 7%. Holiday pay has been factored into this

equation, therefore the sum of $149,345.00 representing holiday pay must be deducted as well. The plaintiff enjoyed a relatively good work history from 1983. Any "problems" thereafter related to medical absences, all of which were properly documented and accepted by the company. Some of his medical problems were caused by work related accidents and at least one was quite serious, requiring a lengthy period of recovery. I am satisfied the plaintiff would have returned to his job at Eurocan and worked to retirement at age 65.

The defendants suggested a further reduction given Canada Pension benefits available to the plaintiff. I confess some confusion on this point but believe what is intended by the argument is that because Mr. Harrison will received C.P.P. benefits from his projected minimum wage earnings in the future then a reduction now of 50% is appropriate. He was, however, in the high contributor bracket when employed at Eurocan and would go to the low bracket at minimum wage. The projection for C.P.P. benefits for him at age 65 is $309 per month, which is $268 less than if he had continued working after the injury. In the circumstances I can see no valid argument for reduction.

The future wage loss is subject to holiday pay deduction of $149,345 from the projection of $1,213,989 for a balance of $1,064,644. There will be a further reduction of 7% on the same

principle as that employed for past wage loss. This represents $74,525, giving a future wage loss of $990,119, rounded to $990,120.

FUTURE CARE COSTS

The plaintiff seeks future care costs of $231,058 plus a management fee of $41,000.00 for a total of $272,058. The defendants argue for a maximum of $60,000 with no allocation for care-related management. A "gross up" amount should be applied to the ultimate figure where the evidence adduced supports it - ***Watkins*** v. ***Olafson***, [1989] 2 S.C.R. 750. The plaintiff argues for 100% while the Defendants maintain that 50% is the appropriate figure.

A report from R.J. Schulstad and Associates recommended a variety of aids and services for the Plaintiff. The one time cost of these items was $14,964 with an annual expense of $10,205.95 to age 65 and thereafter $9,995.95. Many of these items were accepted by the defendants but some such as a computer were disputed. The plaintiff conceded that the one time cost of $5,000 for environmental controls and the annual cost of $500 could not be substantiated. Dr. Acob reviewed the list and gave as his opinion that all but the computer (which he considered recreational) were appropriate. There is merit, however, in the defendant's submission that many of the items requested were unnecessary

because existing equipment could be modified and need not be replaced. The claim for yard work relates to the plaintiff's hopes to acquire a home and he would then require assistance in its maintenance. This may occur; however, it is difficult to know the nature of assistance that he would require. He presently does as much as he can and impresses me as a person seeking maximum independence. Ms. Schulstad concedes this item is "speculative" and I decline to accept it as a reasonable annual cost.

The computer has more than recreational value to Mr. Harrison. He does most of his own paper work and given that he has to complete many forms and applications associated with his various benefits, this represents a considerable portion of his daily activity. The amount, however, does not seem to be supported by any reference to actual costs. Ms. Shulstad merely asserts a sum of $4,000 with an annual cost of $400. I am prepared to allow a sum for this item but fix same at $3,000 with an annual cost of $300.

I have reviewed the remaining items contained in the Schulstad report and accept all but the following:

Yard work - disallowed

Environmental control system - disallowed

Touch control lamps - reduced to $150 for modification not replacement

Oil changes - the evidence persuades me that $60 every two months is unreasonable but $30 is appropriate for an annual cost of $180

Taking into account the foregoing reductions and modifications to both one time and future care costs, I award the sum of $200,000.

GROSS UP

It is now well established that since the investment income from a future care award will attract income tax, an extra sum must be awarded to offset this tax, provided the necessary evidentiary foundation is laid, in order that the award remain intact for use by the plaintiff for the purposes intended - see ***Scarff*** v. ***Wilson***, [1989] 2 S.C.R. 776.

Mr. Michael Millman C.A. for the plaintiff and Mr. G.A. Battye C.A. for the defendants offered different opinions as to the appropriate gross up, which were expressed by counsel in terms of a percentage of the future care award. In determining these sums both witnesses relied upon certain facts and assumptions. Matters such as the appropriate mix of investments, existing and proposed tax laws, effect of other income and a host of other considerations were reviewed in support of the opinion offered. They did not use the same assumptions and of course the results were considerably

different. For example Mr. Battye assumed no other income, while Mr. Millman assumed sufficient "other" income to exhaust the lower marginal rates of tax.

In ***Morrison*** v. ***Hicks et al*** (unreported) Van. Reg. #C863899, filed Nov. 9th, 1990, Shaw J. detailed the approach a trial judge should take to this issue of gross up. He cited a general principle of damage assessment found in ***Scarff*** v. ***Wilson*** (1988), 33 B.C.L.R. 290 @ page 294 where McEachern C.J.B.C. stated that damages are assessed, not calculated, and that actuaries give valuable guidance to a trial judge but in the end it is the trial judge's "common sense" that ought to dictate the result.

I am satisfied that Mr. Harrison will earn "other income" but this will be at a minimum wage scale, as indicated earlier. I also recognize that although the other portions of the award such as loss of earning capacity cannot be "grossed up" per se, the income from that head of damage can also be taken into account - see ***Scarff*** (supra). Non-pecuniary damages, however, are exempted from this calculation of "other income", since it is not a fund designed to provide a self-liquidating sum. The result, however, will place him in the high end of the tax scale.

I am of the view that the mix of investments appropriate to a person in the plaintiff's position should be apportioned, one-

third "risk" and two-thirds "risk-free". I have adopted the approach taken by my brother Shaw J. in ***Morrison*** (supra) for this and other aspects of the gross-up.

In ***Morrison*** (supra) the plaintiff was of an age that he could not enjoy any tax holiday which was available to the plaintiff in ***Scarff*** (supra). It was also determined that the portion of the future care award designated for initial expenditure should not be taken into account in fixing gross-up.

The plaintiff maintains that a sum equivalent to 100% plus is appropriate to this award, while the defendants maintain that 50 to 60% is more realistic. In ***Morrison*** the sum computed to 37.5% These figures of course are meaningless when taken in isolation. Each case depends upon its facts and the assumptions relied upon by the experts. At the end of the day however, the exercise is to ascertain the amount appropriate to offset the tax liability and while this can never be computed to a fine degree of accuracy it can be assessed in the manner described by McEachern C.J.B.C. in ***Scarff*** (supra).

I have fixed future care costs at $200,000 and accept the defendant's position that the gross-up should be 50% of this sum. I arrive at this determination somewhat differently from the defendants, relying as I have upon the ***Morrison*** case (supra) but

nevertheless have concluded that 50% of the cost of future care is an appropriate sum which translates to $100,000. The plaintiff will, therefore, be entitled to the sum of $100,000 for a gross-up award.

MANAGEMENT FEE

The fee allocated to management of the fund depends of course upon the mix of investments. Risk investment requires more professional assistance than non-risk investment. The Defendants would have the plaintiff invest in an annuity with no risk and no management, but I have rejected that for the portfolio indicated. This mix requires some professional assistance and I adopt the reasons of Craig J.A. in ***Mandzuk*** v. ***Vieira*** (1986), 2 B.C.L.R. (2d) 344 where he said at page 354:

> "In order to ensure that the fund will provide the needed care for the normal life span, most people would require professional assistance and advice regarding the management of the fund. I think that it is unrealistic to expect that the plaintiff, with his limited education and ability, could properly manage this fund to produce the necessary income. When we say that someone is capable of managing his own affairs, we are generally thinking of the normal day-to-day affairs, not the investing of hundreds of thousands of dollars in order to provide adequate income from a fund which is to be self-extinguishing after a specified number of years."

The fund to which this investment advice is directed combines the future care costs plus the future wage loss, less the initial

future care expenditures of approximately $10,000. The mix provides that only one-third need be professionally managed and I fix this management fee at $55,000.

INDEMNIFICATION

The plaintiff seeks to recover sums paid on his behalf by M.S.A. - $2,615.05, M.S.P. - $13,706.53, and Maritime Life - $34,740.78. The former two claims are supported by subrogation rights, filed as exhibits in the proceedings and I, therefore, allow these two amounts. The latter does not have any clear right of subrogation and is complicated by the ratio of ***Bloomer*** v. ***Ratych*** 69 DLR (4th) 25. This decision of the Supreme Court of Canada determined that, in the absence of subrogation, a plaintiff will not be permitted to claim compensation from a tortfeasor for damages for which collateral benefits have been received, unless the plaintiff can point to an actual loss. One method of "pointing to an actual loss" was to call evidence that the plaintiff had, in collective bargaining, made a financial sacrifice in return for the employer contributing or paying for the premiums. In the case at bar, no such evidence was led; rather, the plaintiff relied upon the proposition that the scheme was "akin to insurance proceeds" and, therefore, like subrogation was excluded from the Supreme Court decision.

This particular area is the subject of much judicial comment, commencing with the decision of Shaw J. in ***Nanji*** v. ***Habib***, May 18th, 1990 Van. Reg. #B871374. In that case it was determined that the whole of the proceeds were not deductible as they were characterized as proceeds of insurance and it did not matter that the plaintiff contributed only one-half of the premiums. The Court in that case relied upon ***Chan*** v. ***Butcher***, [1984] 4 W.W.R. 363 and Shaw J. stated at page 13:

> "...as noted above, the majority judgment of Bloomer v. Ratych did not purport to decide the question of whether insurance proceeds, properly characterized as such, should be deducted from a wage loss claim in tort. In my opinion Chan v. Butcher is binding authority that such proceeds shall not be deducted from the wage claim".

There is little in this case to distinguish it from the facts of ***Nanji*** (supra). The Plaintiff's contribution in this case to the benefits premium was one-third but per ***Chan*** (supra) so long as there is partial contribution then no deduction is applicable. I am aware of other cases which suggest that proof of a quid pro quo must be established - see ***Carano*** v. ***Brooks***, June 22, 1990 Nanaimo Registry No. CC8399, ***Ridler*** v. ***Gunther***, August 13, 1990 Prince George Registry No. 14598, ***Cooper*** v. ***Miller***, August 13, 1990 Nanaimo Registry No. SC9245. I have determined, however, to follow

the decision in ***Nanji*** (supra) and leave to another Court the determination as to the necessity to establish a quid pro quo.

This conclusion dictates that there will be no deduction from the past wage loss, and unless recovery is effected by Maritime Life, there will be double recovery to the plaintiff. If I accede to the plaintiff's request and award $34,740.78 then he stands to receive triple recovery. He now has the past wage loss awarded in full, plus the benefits already received from Maritime Life. The worst scenario for the plaintiff is that he will be required to reimburse Maritime Life, while the best scenario will see him retain both the past lost wages and the collateral benefits. In no case should he be entitled to receive an additional sum as requested by his counsel, and while I decline to deduct any sum from the past wage loss as indicated, I am not prepared to award the $34,740.78 requested.

IN TRUST CLAIM

This claim, advanced by Mr. Harrison's parents for the care provided him while in hospital and at their home is supported by the evidence as previously indicated. The plaintiff seeks $16,000 plus, based upon a reasonably conservative hourly rate, while the Defendants contend that $8,000 represents adequate compensation. I set this sum at $12,000.

SPECIAL DAMAGES

Exhibit #9 sets forth a list of special damages that was not seriously challenged and I award $5,187.02 for this head of damage.

INTEREST CALCULATION ON THE VARIOUS AWARDS OF DAMAGE

Non-pecuniary: There is an inflation factor already calculated into the award and I, therefore, set 5% from April 2nd, 1988 as a reasonable figure on this sum.

Past wage loss: Since this accrued in increments I set the interest rate at one-half the Registrar's rates for the period commencing June 1st, 1988, which was the projected date of his return to work.

Loss of future earning capacity: I direct the Registrar's rate prevailing for the period commencing October 22nd, 1990 to date of judgment on this amount.

Specials: These are to be calculated in six month increments commencing April 2nd, 1988 at the Registrar's rate prevailing at each interval.

In trust award: This is to be calculated from April 2nd, 1988 at one half the Registrar's rates then prevailing.

No interest is due on the management fee award.

I direct a Larocque order (see ***Larocque*** v. ***Lutz*** (1981), 29 B.C.L.R. 300) for the sums represented by the future care award, the loss of future earning capacity and gross up. The interest on these amounts will commence thirty days from the date of judgment at the Registrar's prevailing rate.

SUMMARY OF DAMAGE AWARDS

General Damages	$145,000
Past Wage Loss	$118,000
Loss of future earning capacity	$990,120
Future care costs	$200,000
Gross up	$100,000
Management fee	$ 55,000
MSA	$ 2,615.05
MSP	$ 13,706.53
In trust	$ 12,000.00
Specials	$ 5,187
Total:	$1,641,928.58

The plaintiff will have judgment for the amounts aforesaid. Costs were reserved for further argument.

January 28, 1991

New Westminster, B.C.