CA016312

Vancouver
Registry

Court of Appeal for British Columbia

BETWEEN:

MELVIN UNRUH (an infant

by his guardian ad litem, Gail Unruh)

PLAINTIFF

(RESPONDENT)

AND:

STEVE WEBBER

DEFENDANT

(APPELLANT)

Before: The Honourable Mr. Justice Hutcheon

The Honourable Mr. Justice Taylor

The Honourable Mr. Justice Cumming

W.S. Berardino, Q.C. Counsel for the Appellant

and T.A. Sigurdson

J.N. Laxton, Q.C. Counsel for the Respondent

and R.D. Gibbens

Place and Date of Hearing:	Vancouver, British Columbia November 15, 16 and 17, 1993
Place and Date of Judgment:	Vancouver, British Columbia March 2, 1994

Written Reasons by the Court:

CA016412

Vancouver Registry

Court of Appeal for British Columbia

MELVIN UNRUH (an infant by his guardian

ad litem, Gail Unruh

v.

STEVE WEBBER

REASONS FOR JUDGMENT OF THE COURT:

Judgment Appealed From

1 This is an appeal from the judgment of Mr. Justice Meredith pronounced 6 November 1992, awarding the plaintiff/respondent damages in the sum of $3,761,090.81 plus costs for personal injuries sustained during a hockey game. This decision is now reported at 98 D.L.R. (4th) 294.

2 The appellant appeals the finding of liability against him. The appeal and cross-appeal raise, as well, a number of issues with respect to the quantum of damages awarded by the trial judge.

Facts

3 On 7 March 1990 teams from the Arbutus Club and Aldergrove played an exhibition game in preparation for the Midget "AA" Provincial finals. "Midget" refers to the league for players from seventeen to nineteen years of age. The best players in the age group in Aldergrove and at the Arbutus Club play on the "AA" teams.

4 The respondent, Mel Unruh, played for the Aldergrove team. The appellant, Steve Webber, played for the Arbutus Hockey Club. The game took place at the Arbutus Club.

5 Mel Unruh, was seventeen and one-half years of age on 7 March 1990. Steve Webber was, according to his coach, probably the biggest player in the league at 220 lbs. and 6' 2 1/2". Mel Unruh was known as the "runt" on his team; he was approximately 160 lbs. and 5' 10".

6 At approximately 9:22 in the second period, Unruh was injured. The incident occurred near the Aldergrove goal line. The puck went into the area to the right of the Aldergrove goaltender, close to or at the boards. Unruh went after the puck at almost top speed with Webber close behind. Webber hit Unruh from behind when Unruh was just over the goal line, about six to eight feet from the end boards. Unruh had not reached the puck when Webber hit him. Unruh went head-first into the boards and broke his neck.

7 In 1984, because of its concern over the incidence of spinal injuries, the Canadian Amateur Hockey Association, whose rules govern this game, introduced Rule 53, "Checking from Behind":

> Rule 53 Checking from Behind
>
> (a) At the discretion of the Referee, a Minor or Major penalty shall be assessed any player who intentionally pushes, body checks, or hits an opposing player from behind in any manner, anywhere on the ice.

(b) A Major penalty plus a Game Misconduct penalty shall be assessed any player who injures an opponent as a result of "Checking that player from Behind".

(c) Where a player is high sticked, cross-checked, body-checked, pushed, hit or propelled in any manner from behind into the boards, in such a way that the player is unable to protect or defend himself, a Major penalty plus a Game Misconduct penalty shall be assessed.

(Note: Referees are instructed not to substitute other penalties when a player is checked from behind in any manner. This rule must be strictly enforced).

8 Webber received a five-minute major penalty for checking from behind.

9 Unruh was rendered a C4 quadriplegic. The learned trial judge found that Unruh will be confined to a wheelchair for the rest of his life. He has no use of his legs and practically none of his arms and hands. He is dependent on others in practically everything he does and requires almost constant care. His mental faculties, his hearing, and his eyesight are unimpaired.

10 Many issues were argued on the appeal and the judgment is divided in this way:

1. Liability

11 In holding Webber liable the learned trial judge said:

> I conclude that the defendant Webber intentionally pushed or checked the plaintiff Unruh from behind, that Unruh was propelled head first into the end boards of the hockey rink and thus broke his neck. I do not suggest for an instant that Webber meant to inflict any injury. The push or check was thoughtless, not vicious. But Webber was, by his own admission, well aware firstly, that the push or check from the rear was banned under the rules and secondly, that a player employing the tactic might well cause a devastating spinal cord injury of the sort suffered by Unruh.
>
> I hold therefore, that Webber was duty bound to avoid contacting Unruh from the rear, especially in the proximity of the boards, as he could foresee that disastrous results might well ensue. Webber was negligent and is liable accordingly in damages for the injury suffered by Unruh.
>
> I think the account of Mrs. Singbeil most accurately describes what happened, even though she may not have observed or remembered every detail. I choose her evidence because she was as well placed to see the incident as anybody, because she is an experienced spectator and follower of the game, because she was called as a witness for the defendant, not the plaintiff, and finally, lest it be thought she was biased, because her evidence accords

with much of the evidence of most of the other eye witnesses in vital particulars.

Shortly after the game Mrs. Singbeil gave a written statement.... In it Mrs. Singbeil says that Webber checked Unruh from behind and in the result, Unruh fell into the boards hitting the top of his head "sharply". (pp.294-5)

* * *

Mrs. Singbeil said that Unruh's head met the end, not the side, boards. This accords with the evidence of all the eye witnesses save only Webber. Webber had Unruh's head in contact with a spot where the side boards meet the corner curve. I conclude that Unruh's head contacted the end boards about where Mrs. Singbeil says it did.

The eye witnesses for the plaintiff and several of the eye witnesses for the defendant testified that Webber hit Unruh on or just over the goal line. The goal line is just over ten feet from the end boards. It follows the hit must have taken place about six to eight feet or a little more from the end boards.

The preponderance of the testimony establishes that almost certainly Unruh had not reached the puck when Webber hit him.

I think it probable that Webber pushed Unruh in the back either with his stick or with his hands. Mrs. Singbeil apparently did not see a push. However, a number of other eye witnesses swore they saw it. In particular, the Aldergrove players on the ice at the time, Blount, Charlton and Burns. A push was also reported by the onlookers Wendy Flint and Walter Charlton, and by the linesman John Masse.

Mrs. Flint said this:

Q. Would you describe what you saw.

A. Okay. Mel Unruh was heading in the direction of the puck. Mr. Webber was in pursuit. When they got very close to the goal line, just over the goal line, I saw Mr. Webber following directly behind Mel and with two

hands on his stick, hit him from behind up on the upper back area. (pp.297-8)

12 The learned trial judge commented that Mrs. Flint was among the witnesses to be believed. He continued.

> Unfortunately, the account given by Webber himself cannot be believed. He had Unruh facing out from the boards in possession of the puck and turning. Webber said that his right hip contacted Unruh's left hip and Unruh went into the boards at a point between the side boards and the curved corner. If his account were true, his check may well have been acceptable hockey. But given the account of the incident by the other witnesses, the account given by Webber is simply not to be believed. (p.299).

* * *

13 At p.303 he said:

> Webber, an experienced hockey player, was well aware of the risks involved in checking or pushing from behind. He gave this evidence:
>
> *Q. You are aware though that if you push somebody from behind head first into the boards there is a real risk of injury?*
>
> *A. Yes.*
>
> *Q. And you were aware that the injury that could be caused could be a very serious injury?*
>
> *A. Yes.*
>
> *Q. And you were aware that the injury that could be caused could include even a broken neck?*
>
> *A. Yes.*
>
> *Q. So you knew that special care had to be taken when you are approaching somebody from behind when they're close to the boards?*
>
> *A. Yes.*

Q. And you would also know, Mr. Webber, that if you had a choice between allowing an opposing player to get away with the puck or the choice of stopping him by using a careless check from behind which might cause him to go head first into the boards, you should let him get away?

A. I would use a different way of trying to stop him, yes.

Q. I take it that you knew that the rule against checking from behind was because players in that situation are generally unable to protect themselves?

A. Yes.

14 And, at p.304, concluded:

Counsel for the defendant summarizes his submission as to the applicable law as follows:

In summary, there is no liability for an injury suffered during a sporting contest unless the act causing the injury was either intentional, in the sense that the defendant had a "definite resolve to cause serious injury" or was reckless in that he realized the substantial risk of injury, and nevertheless deliberately set out to run that risk. The imposition of a penalty for a breach of the rules is not a determining factor.

In this case the fact is that the defendant realized the substantial risk of injury and ran the risk. He was reckless.

Obviously, Unruh did not accept the risk of an illegal check from behind. The rule infraction was intentional not unintentional as paragraph 5 alleges. As I have said, the check was intentional although the consequences doubtless were not. Under these circumstances the legal principles of negligence must apply.

15 Mr. Berardino, who was not counsel at the trial, on behalf of the appellant expressly accepted the findings of fact made by the trial judge. He contended, however, that the trial judge erred in failing to identify and apply the proper standard of care, given that the accident

occurred in the course of a competitive, bodily contact sport. He submitted that the judge, in effect, has held that an infraction of the rule against checking from behind in and of itself was sufficient to ground liability and he argued that Webber, in the agony or heat of the moment, was guilty of no more than an error in judgment which, in the circumstances, could not attract liability.

16 On the question of the proper standard of care Mr. Berardino referred to ***Wooldridge*** v. ***Sumner*** (1962), 2 All E.R. 978 (C.A.). In that case the plaintiff, a film cameraman, was attending an equestrian event and was standing at a point within the competition area. The defendant, an experienced competitive rider, was galloping his horse in an effort to win. He went somewhat off course and collided with the plaintiff; hence the lawsuit. At pp.988-90, Diplock L.J. said:

> What is reasonable care in a particular circumstance is a jury question, and where, as in a case like this, there is no direct guidance or hindrance from authority, it may be answered by inquiring whether the ordinary reasonable man would say that, in all the circumstances, the defendant's conduct was blameworthy.
>
> The matter has to be looked at from the point of view of the reasonable spectator as well as the reasonable participant; not because of the maxim volenti non fit injuria, but because what a reasonable spectator would expect a participant to do without regarding it as blameworthy is as relevant to what is reasonable care as what a reasonable participant would think was blameworthy conduct in himself. The same idea was expressed by Scrutton, L.J., in *Hall v. Brooklands Auto-Racing Club*, [1932] All E.R. Rep. at p.213; [1933] 1 K.B. at p.214.
>
> "What is reasonable care would depend on the perils which might be reasonably expected to occur, *and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils.*"
>
> A reasonable spectator attending voluntarily to witness any game or competition knows, and presumably desires, that a reasonable participant will concentrate his attention on winning, and if the game or competition is a fast-moving one will have to exercise his judgment and attempt to exert his skill in what, in the analogous

context of contributory negligence, is sometimes called "the agony of the moment". If the participant does so concentrate his attention and consequently does exercise his judgment and attempt to exert his skill in circumstances of this kind which are inherent in the game or competition in which he is taking part, the question whether any mistake he makes amounts to a breach of duty to take reasonable care must take account of those circumstances.

The law of negligence has always recognised that the standard of care which a reasonable man will exercise depends on the conditions under which the decision to avoid the act or omission relied on as negligence has to be taken. The case of the workman engaged on repetitive work in the noise and bustle of the factory is a familiar example. More apposite for present purposes are the collision cases where a decision has to be made on the spur of the moment.

"...A's negligence makes collision so threatening that, though by the appropriate measure B could avoid it, B has not really time to think and by mistake takes the wrong measure. B is not held to be guilty of any negligence and A wholly fails."

(*Admiralty Comrs. v. S.S. Volute*, [1921] All E.R. Rep. at p.197; [1922] 1 A.C. at p.136). A fails not because of his own negligence; there never has been any contributory negligence rule in *Admiralty*. He fails because B has exercised such care as is reasonable in circumstances in which he has not really time to think. No doubt, if he has got into those circumstances as a result of a breach of duty of care which he owes to A, A can succeed on this antecedent negligence; but a participant in a game or competition gets into the circumstances in which he has no time or very little time to think by his decision to take part in the game or competition at all. It cannot be suggested that the participant, at any rate if he has some modicum of skill, is by the mere act of participating in breach of his duty of care to a spectator who is present for the very purpose of watching him do so. If, therefore, in the course of the game or competition at a moment when he really has not time to think, a participant by mistake takes a wrong measure, he is not, in my view, to be held guilty of any negligence.

Furthermore, the duty which he owes is a duty of care, not a duty of skill. Save where a consensual relationship exists between a plaintiff and a defendant by which the defendant impliedly warrants his skill, a man owes no duty to his neighbour to exercise any special skill beyond that which an ordinary reasonable man would acquire before indulging in the activity in which he is engaged at the relevant time. It may well be that a participant in a game or competition would be guilty of negligence to a spectator if he took part in it when he knew or ought to have known that his lack of skill was such that, even if he exerted it to the utmost, he was likely to cause injury to a spectator watching him. No question of this arises in the present case. It was common ground that Mr. Holladay was an exceptionally skilful and experienced horseman.

The practical result of this analysis of the application of the common law of negligence to participant and spectator would, I think, be expressed by the common man in some such terms as these: "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety". The spectator takes the risk because such an act involves no breach of the duty of care owed by the participant to him. He does not take the risk by virtue of the doctrine expressed or obscured by the maxim volenti non fit injuria.

17 Mr. Berardino referred as well to ***Wilkes*** v. ***Cheltenham Car Club***, [1971] 2 All E.R. 369 (C.A.). In that case the plaintiffs were spectators at a motorcycle scramble. They were in the spectators' enclosure which was alongside a straight stretch of the course about 150 to 200 yards long. The spectators were lined against the "spectators rope" which was about three feet high, beyond which was a stretch of "no man's land" ten feet wide. On the other side of the no man's land was a two and one-half foot high "wrecking rope" running along the course which was designed to stop any motorcycle from intruding. During one of the races the defendant, who was driving at a speed of some 25 to 30 m.p.h. along the straight on his motorcycle running parallel to, and at a distance of 12 to 18 inches from, the wrecking rope, suddenly veered to one side, crossed the ropes and landed with his cycle amongst

the spectators, injuring the plaintiffs. There was no explanation of how the accident had, or could have, occurred. The evidence was that unless a motorcycle took the wrecking fence at an angle of 90 degrees with the front wheel raised it would be stopped by the rope. At the time the accident occurred the defendant was lying eighth in a field of some thirty riders. The course had been approved by officials of the Auto-Cycle Union. The trial judge found that the organizers of the scramble were not to blame for the accident, a finding which was not challenged on appeal. However, the judge held that the defendant was driving at a greatly excessive speed and that he lost control of his motorcycle either because of inadequate skill on his part to race at that speed or because of reckless driving. The defendant appealed.

18 In allowing the appeal, Lord Denning M.R. said, at pp.370-71:

> Let me first state the duty which lies on a competitor in a race. He must, of course, use reasonable care. But that means reasonable care having regard to the fact that he is a competitor in a race in which he is expected to go 'all out' to win. Take a batsman at the wicket. He is expected to hit a six, if he can, even if it lands among the spectators. So also in a race, a competitor is expected to go as fast as he can, so long as he is not foolhardy. In seeing if a man is negligent, you ask what a reasonable man in his place would or would not do. In a race a reasonable man would do everything he could do to win, but he would not be foolhardy. That, I think, is the standard of care to be expected of him. We were referred to *Wooldridge v. Sumner* (supra). It is, I think, different. It concerned a horse show where horses were to display their paces, but not to race. The riders ought not to give their horses their heads so as to go too fast. On that account the decision was criticised by Dr. Goodhart. His criticism may be justified. But he points out that it is different in a race when a rider is expected to go 'all out' to win. In a race the rider is, I think, liable if his conduct is such as to evince a reckless disregard of the spectators' safety; in other words if his conduct is foolhardy.
>
> The judge in this case found that the rider was reckless. This is how he put it:

"... I am satisfied that the second defendant, Ward, left the ground because of greatly excessive speed in the circumstances and over that stretch of undulating ground; I am satisfied that he lost control of his motor-cycle due either to inadequate skill on his part to race at that speed on that ground or, alternatively, due to reckless driving. I draw the inference that he was determined to get ahead at all costs on that stretch and regardless of the consequences."

I must say that I can see no evidence to support those findings of the judge. There was no evidence whatever of greatly excessive speed. It was not even suggested by the plaintiffs. The rider was only going at 20 to 25 miles an hour along the straight and 10 miles an hour when he went into the spectators. There was no evidence of want of skill. He had ridden motor cycles a lot and had been 'scrambling', i e riding and racing over rough grounds, for three years. No doubt he 'lost control' of his motor cycle, else he would not have gone over the wrecking rope. But loss of control is just one of the things that may happen in a motor cycle 'scramble'. It takes place over rough ground with undulations and hazards liable to cause the most skilful rider to go out of control or to have a spill. It is no more negligence than it is when a horse at a point-to-point runs out at a jump.

19 Edmund Davies L.J. said, at p.374:

But, in all the perplexing circumstances of this case, was it right to hold the second defendant guilty of negligence? Lord Denning MR has already referred to the decision of this court in *Wooldridge v. Sumner* (supra) and I respectfully share his difficulty in accepting the view there expressed that a competitor in such events as this is to be held liable only if he acts in reckless disregard of the spectators' safety. For my part, I would with deference adopt the view of Dr. Goodhart that the proper test is whether injury to a spectator has been caused 'by an error of judgment that a reasonable competitor, being the reasonable man of the sporting world, would not have made'. But the decision is, if I may say so, most valuable in pointing out those special features which are inherent in competitive events and which everyone takes for granted. I have here particularly in mind the observation of Sellars LJ that:

'... provided the competition or game is being performed within the rules and the requirement of the sport and by a person of adequate skill and competence, the spectator does not expect his safety to be regarded by the participant.'

Nevertheless, although in the very nature of things the competitor is all out to win and that is exactly what the spectators expect of him, it is in my judgment still incumbent on him to exercise such degree of care as may reasonably be expected in all the circumstances. For my part, therefore, I would hold him liable only for damage caused by errors of judgment or lapse of skill going beyond such as, in the stress of circumstances, may reasonably be regarded as excusable.

Applying that test here, what follows? This was an extraordinary accident, none of the witnesses called had ever known its like, and the second defendant himself could not explain it. Does that mean he is bound to fail? In my judgment, no. He gave an account up to the moment when, he being then but 12-18 inches from the wrecking rope and riding straight ahead, *something* caused his vehicle to veer left and head straight for the rope. Nobody was able to challenge or criticise him up to that moment. It is true that theories have been canvassed (eg that he *may* have hit something hard which caused him to lose control); but none can be proved, either by the defendant or by anyone else. Disaster suddenly arose without a tittle of evidence to indicate that he was then driving in any way unusual even for a 'scramble', and the mystery as to why he lost control remains complete. To say that in these circumstances, the doctrine of res ipsa loquitur (relied on by the plaintiffs and held applicable by the judge) demands that the second defendant *must* be held liable seems to me to be wrong.

20 And Phillimore L.J. at pp.375-76, expressed himself thus:

The duty owed by a competitor to a spectator was last considered by the Court of Appeal in *Wooldridge v. Sumner* (supra). In considering whether conduct by a competitor which leads to injury to a spectator is to be termed negligent it is obvious that the conduct must be looked at in all the circumstances. Anyone who attends a cricket match as a spectator must accept the risk of a batsman hitting a six into the crowd. There must always be

a risk at a race meeting, whether the race is between horses or cars or motor cycles, that a competitor who is riding or driving entirely properly may as a result of some unforeseen event be forced to leave the course, or at all events to collide with any barriers at the side of it. I confess that I find myself attracted to the sort of test propounded by Sellers LJ:

'If the conduct is deliberately intended to injure someone whose presence is know, or is reckless and in disregard of all safety of others so that it is a departure from the standards which might be reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused.'

Perhaps the words of Diplock LJ might also provide a useful approach. He said:

'The practical result of this analysis of the application of the common law of negligence to participant and spectator would, I think, be expressed by the common man in some such terms as these: "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety".'

It is however, important to remember that the test remains simply that of negligence and that whether or not the competitor was negligent must be viewed against all the circumstances -- the tests mentioned in *Wooldridge v. Sumner* (supra) are only to be applied if the circumstances warrant them.

21 In***Condon*** v.***Basi***, [1985] 2 All E.R. 453 (C.A.) the plaintiff was injured in a football match in the following way as described by the referee who officiated at the game:

After 62 minutes of play of the above game, a Whittle Wdrs [Wanderers] player received possession of the ball some 15 yards inside Khalsa F.C. half of the field of play. This Whittle player upon realising that he was about to be challenged for the ball by an opponent pushed the

ball away. As he did so, the opponent [the defendant] challenged, by sliding in from a distance of about 3 to 4 yards. The slide tackle came late, and was made in a reckless and dangerous manner, by lunging with his boot studs showing about a foot-18 inches from the ground. The result of this tackle was that the Whittle Wanderers No 10 player [the plaintiff] sustained a broken right leg. In my opinion, the tackle constituted serious foul play and I sent [the defendant] from the field of play.

22 In dismissing the defendant's appeal Sir John Donaldson M.R. said, at pp.453-54:

> It is said there is no authority as to what is the standard of care which governs the conduct of players in competitive sports generally and, above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the position. This is somewhat surprising, but appears to be correct. For my part I would completely accept the decision of the High Court of Australia in *Rootes v. Shelton*, [1968] ALR 33. I think it suffices, in order to see the law which has to be applied, to quote briefly from the judgment of Barwick CJ and from the judgment of Kitto J. Barwick CJ said (at 34):
>
> 'By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.'
>
> Kitto J said (at 37):
>
> '...in a case such as the present, it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff joining in the activity. Unless

the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purposes of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.'

I have cited from those two judgments because they show two different approaches which, as I see it, produce precisely the same result. One is to take a more generalised duty of care and to modify it on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of the duty of care. That seems to be the approach of Barwick CJ. The other is exemplified by the judgment of Kitto J, where he is saying, in effect, that there is a general standard of care, namely the Lord Atkin approach that you are under a duty to take all reasonable care taking account of the circumstances in which you are placed. (see *Donoghue (or M'Alister) v. Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11); which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside.

For my part I would prefer the approach of Kitto J, but I do not think it makes the slightest difference in the end if it is found by the tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event, there is liability.

23 He continued, at p.455 endorsing the views of the trial judge:

The judge said that he entirely accepted the 'value judgments' of the referee. He said:

> ' [The tackle] was made in a reckless and dangerous manner not with malicious intent towards the plaintiff but in an "excitable manner without thought of the consequences".'

The judge's final conclusion was:

> 'It is not for me in this court to attempt to define exhaustively the duty of care between players in a soccer football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant's duty of care towards the plaintiff. He was clearly guilty, as I find the facts, of serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game.'

For my part I cannot see how that conclusion can be faulted on its facts, and on the law I do not see how it can possibly be said that the defendant was not negligent.

24 Counsel referred as well to the decision of this Court in***Herok*** v.***Wegrzanowski*** (7 October 1985), Vancouver CA003074 (B.C.C.A.). In that case, the trial judge described how the injury occurred:

> The game started at 10:30 p.m. During the first period the puck found its way into the Bruins' end of the rink. Webster had possession at a point along the boards to the left of the Bruins' goal. Herok was trying to check the puck away using his stick. Eventually Herok succeeded. He then passed the puck towards the Mariners' goal in the direction of a team-mate. Because he was tired and this was the end of his shift, he headed for the Bruins' bench. It was near his blue line on the same left side of the rink. Webster was then behind Herok and slightly to his left.
>
> The incident occurred when Herok was about two feet in front of Webster skating towards the Bruins' bench. Webster swung out with his stick as Herok skated away. Because of their differences in height Webster did not take care to see where his stick would land. It was a desperate

last minute attempt to recover the puck and was done carelessly without regard for the consequences.

Webster's stick caught Herok from behind fracturing his left cheek-bone and injuring his left eye. He went down immediately. Subsequent medical treatment could not save the sight of that eye. Because of this incident, Webster received a seven minute penalty for slashing. He left the rink and did not play the remaining of the evening.

25 The trial judge put the issue before him in the following words:

> Both Herok and Webster impressed me as sincere and compassionate individuals. Webster is not a bully nor overly aggressive. What happened was unintentional. The question remains, was it negligent?

He then said:

> What this all boils down to is an assessment of the standard of care expected of Webster in these circum-stances. Looking at the nature of the league in which the parties were participating, it is reasonable to assume the players accepted the consequences of an unintentional injury arising from a body check, or being struck with a puck. Occasionally a stick might fly up into the face of another player while the two were facing each other. These were the assumed risks.
>
> But it is a question of degree as to how much inadvertence in the use of a hockey stick amounts to negligence. There is no doubt a hockey stick is a dangerous weapon. Then there was the difference in stature between Webster and Herok. Webster was almost a foot taller than Herok. He knew or ought to have known that he must use special care with his stick when fighting for a puck with a player of a smaller size such as Herok. He may not have intended to catch Herok in the eye as the plaintiff skated away, but he should have been aware of the damage the stick might cause if he did not take reasonable care. In this league, the use of the stick was restricted to checking the puck. Any stick contact by a player with an opposing player was to be kept below the waist.

Everyone instinctively recognized that a player chasing after a puck would occasionally strike another player with his stick at or below the waist level. It was unavoidable. But they also understood that given the choice between allowing an opposing player to get a break-away or the choice of "stopping him by the use of a hockey stick carelessly directed above the waist, it was better to allow the break-away than to risk the possibility of injury which a stick might cause."

26 In dismissing the appeal from the trial judge's finding of negligence, Taggart J.A. said, at p.6:

The appellant said that ... it was only where the injury sustained in the course of play was caused intentionally by a player that liability for the injury sustained by the other player would be imposed. Put another way, the appellant says unintentional acts in the course of play which cause injury will not attract liability.

I think the appellant puts his case too high. It will, as the trial judge said, be a question of degree in the circumstances of each case whether the duty of care owed by one player to another is breached. I think, given the circumstances of this case, it was open to the trial judge to reach the conclusion he did.

27 Lambert J.A., concurring, added at p.7:

The appellant puts his position this way: as long as the act is done unintentionally, and as long as the act is done in the course of the play in the hockey game, there is no liability. The risk of all careless conduct in the course of the play in the hockey game is assumed by the players.

In my opinion those propositions are not universally correct. Of course, it is not every careless act causing injury that will give rise to liability. It is only careless acts quite outside the risks assumed that could be a foundation of such liability. But, that is a question of fact for each case.

28 As we understood the argument of counsel before us, there was little difference between them as to the applicable standard of care. Both cited, and quoted

extensively from, the authorities to which we have referred.

29 Mr. Laxton, in a concise written summary, stated his position thus:

> 2. The element of risk, to the extent it is normally accepted as part and parcel of the game by reasonable competitors, acting as reasonable men of the sporting world, is one of the circumstances that may be considered under the "standard of care" issue.
>
> 3. The standard of care test is - what would a reasonable competitor, in his place, do or not do. The words "in his place" imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue.

We would adopt this as an accurate summary of the law on this issue.

30 Mr. Berardino argued that the breach of the rules was "neutral." That, in our opinion, cannot, in the light of the authorities, be so. While of course by no means conclusive, it is, nonetheless, a factor properly to be considered and taken into account along with all the other circumstances.

31 Mr. Berardino's principal contention was that the accident occurred in the heat of the moment, with no time for Webber to think of the other options open, and was but an error in judgment. We pause to observe that this view of the matter represents a marked departure from the position taken by Webber at the trial, a version of the incident totally rejected by the trial judge. In our view this submission cannot be supported on the evidence. The evidence is that notwithstanding the speed of the game and the "heat of the moment," Webber had enough time to avoid the accident by stopping, by turning, or by simply riding Unruh into the boards. That this is so emerges from the evidence of Mrs. Singbeil, a person obviously knowledgeable of the game of hockey, whose account the trial judge found "most accurately described what happened." She said:

Q. From what you could see, was this check from behind, was it avoidable?

A. I felt that it could have been avoided either by stopping or changing direction or by putting the arm around Mel and riding him into the boards. It would have been a holding penalty but they do it.

Q. But a holding penalty is better than the accident that occurred?

A. Yes.

32 As we have already noted, Webber also agreed (a) that great caution was required in approaching an opposing player from behind who was near the boards and (b) that given the choice of injuring the plaintiff by hitting him from behind or letting him get away with the puck, he should have let him get away. It seems clear that Webber did not act as a reasonable competitor, in his place, would have acted when he hit Unruh from behind.

33 The trial judge's finding of liability did not turn upon the breach of the rule alone. The learned trial judge specifically found that Webber was "reckless." We are not persuaded that he was wrong. On the contrary, his finding was amply supported by the evidence.

34 For these reasons the appeal on liability must be dismissed.

2. "Portfolio Mix"

35 Counsel for the appellant contends that the trial judge erred in making the assumption for the purpose of determining the amount needed for income tax "gross-up," that the fund for future care would be invested entirely in bonds, with a view to producing interest income only, and argues that the judge should have proceeded on the assumption that 35 percent of the fund would be invested in shares generating dividend and capital gain income, on which a lower level of taxation would apply.

36 The judge stated his conclusion with respect to the "portfolio mix" as follows:

I must decide whether an investment portfolio consisting of bonds only or of part bonds and part equity stock would be appropriate. It seems to me that in the interests of security the portfolio would be in bonds alone.

A financial expert whose evidence was relied on by the defendant had assumed that 35 percent of the fund would be in shares, and the judge plainly rejected that view. While a financial expert might assume that the risk of loss involved in investing in the stock market is well justified for the ordinary investor by the chance of greater after-tax returns from dividends and capital gain, the judge nevertheless regarded that risk as inappropriate to the case of a disabled person who would be wholly reliant for his lifetime care on the preservation of this lump-sum compensation fund.

37 The trial judge concluded that the plaintiff ought, in the long run, to obtain through bond interest income the 2½ and 3½ percent net return on investment established by statute for the purposes of the discounting process, an assumption on which those rates have, indeed, been set under s.51 of the ***Law and Equity Act***, R.S.B.C. 1979, c.224. If a better net return could be obtained with equal protection against capital loss through stock market dealings or a bond portfolio managed with a view to capital gain as well as interest, then the discount rates should, no doubt, be increased, and the amount awarded in these cases thereby reduced. But the trial judge was of the view that increased risk would be involved in putting any portion of the award on the market and that the risk involved could not be justified.

38 Nothing said in argument persuades us that the judge erred in reaching this conclusion.

3. House Purchase

39 To reduce the investment income subject to tax, the defendant submitted that the plaintiff would use some of his money to buy his own house. A house purchase would affect the tax gross-up in that it would involve a withdrawal of funds, suggested to be $250,000.00, from moneys otherwise invested to earn money. The house would be a non-taxable investment.

40 At the time of the trial and at the time of the appeal, Unruh was living with his mother and father in a house owned by them which had been modified to accommodate some of the consequences of Unruh's physical disabilities.

41 In his factum, the defendant asserts that the "evidence is clear that Mr. Unruh wants to move into his own place." The evidence, however, is not that clear. I quote the passage in direct examination relied on by the defendant:

> Q Okay. Would you like to move out on your own?
>
> A Yes.
>
> Q Why would you like to move out on your own?
>
> A Well, I'd like to move out on my own because I -- nobody wants to live at home all their life. I'd like to have, like, a normal as possible life, and have my own place, you know, more privacy. I think it's just -- you know, it's a tough question to answer. Why would anybody want to move out on their own?

42 Further, the evidence of Dr. Baruni and Miss Schulstad does not bear out the claim in the appellant's factum "that the rehabilitation therapists say [his own place] would be the preferred course of action." Dr. Baruni said no more than the choice was Unruh's to make. Miss Schulstad testified that most young men of Unruh's age want to get away from their parents. Both were answering questions in cross-examination and were not recommending any course of action.

43 The trial judge made a finding that Unruh would not make an immediate house purchase. We can not say that the finding is in any way contrary to the evidence. Accordingly, we do not accede to this ground of appeal.

4. Van Modifications

44 Counsel for the plaintiff seeks by cross-appeal an increase in the award for the conversion of vans purchased in the future to replace the one that Unruh had already acquired.

45 The trial judge noted that the claim for the purchase and cost of conversion of the van already acquired for Unruh came to $72,000.00, but allowed as special damages only $52,016.00, being the amount actually spent or committed by the time of the award. This consisted of the $25,038.00 spent for the purchase of the vehicle and $26,978.00 spent to render it wheelchair-accessible. The remaining $20,000.00, claimed but not yet committed, was for options which would enable the plaintiff to drive the vehicle himself. In disallowing this last part of the claim, the judge noted that it was "about equal to the probable cost of a vehicle the plaintiff would have purchased had he not been injured." Thus, the judge disallowed the portion of the claim relating to options which would enable the plaintiff to drive the van himself, not on the basis of evidence that the plaintiff ought not to drive, but because that amount was about what the plaintiff would have spent for a vehicle, in any event, had the accident not occurred.

46 In assessing the award to be made for the present cost of conversion of future replacement vehicles every five to seven years, the judge relied on the Harris report entered by the defendant, but allowed as special damages costs already incurred which were higher than suggested by Ms. Harris, saying:

> The present value of that contingent expense amounts to $91,476. That figure I conclude should remain even though the actual van apparently acquired by the plaintiff is different from the van proposed in the Harris report.

Counsel for Unruh takes the position that the capital allowance of $91,476.00 provides only $18,000.00 per replacement to render the vehicle wheelchair-accessible, despite the fact that the trial judge "accepted evidence that the total cost of the various modifications to the van would be $46,978.00" per replacement van. Counsel seeks an increase of $147,266.00 in the award, so as to provide for an extra $28,978.00 (i.e., $46,978.00 minus $18,000.00) in conversion costs every five to seven years.

47 The judge accepted $18,000.00 as the reasonable cost of future conversions every five to seven years, as proposed in the report of the defendant's expert, Ms. Harris. He did not accept the sum of $49,978.00 claimed by the plaintiff, that is to say, the $26,978.00 already

committed on the plaintiff's behalf for wheelchair accessibility conversion for the van he had purchased plus the $20,000.00 claimed for further conversions to render it driveable by the plaintiff himself. The report of Ms. Harris, which the judge accepted, says the total cost of van and conversion should be $40,000.00, of which the cost of conversion is put at $15,000.00 to $18,000.00, for both wheelchair accessibility and disabled driver modification. There can be no doubt that the judge would normally be entitled to accept the evidence of Ms. Harris, but the argument for Unruh on the cross-appeal is that having allowed as special damages the plaintiff's actually-committed cost of $26,000.00 for wheelchair conversion, and not having disapproved an extra $20,000.00 for disabled driver conversion, the judge was bound then to award the sum of these figures as the cost of converting replacement vehicles acquired every five to seven years in the future.

48 The judge's finding with respect to the initial conversion cost was not based on expert evidence as to the necessary cost of the work and materials, but simply on the fact the plaintiff had incurred, or committed to, this larger expense, and could not, presumably, be said to have acted unreasonably in having done this instead of making the enquiries which would have led to the less costly alternative.

49 On the basis of the figures contained in the Harris report, and the judge's findings as to the amount which the plaintiff would in any event have paid for a vehicle had there been no accident, the sum awarded under this heading cannot be regarded as unreasonable, and ought not to be disturbed.

5. Contingencies

50 Counsel for Unruh asserts on the cross appeal that in assessing loss of future earning capacity the trial judge erred by accepting evidence given by an economist called for the defence with respect to the impact of unemployment and availability of "fringe benefits," and by overlooking lost overtime earnings.

51 The evidence which the judge accepted was that of Gerald Taunton, an economist called for the defence who produced tables showing 1986 census figures for average earnings in British Columbia by sex, age and educational

attainment, updated to reflect changes in wage levels to 1992. The tables demonstrate average full-time, full-year earnings, non-wage benefits and total employment income, and then apply allowances for non-participation in the labour force, unemployment, part-time work and premature death. The contentions now advanced are based largely on a recent work, ***Assessment of Personal Injury Damages***, by Professor C.J. Bruce of the University of Calgary, which was not referred to at trial.

52 With respect to unemployment, counsel for Unruh contends that the tables used, by averaging total lifetime unemployment evenly over the working life, understate the amount of unemployment insurance benefits received. This is said to result from the fact that the waiting period before eligibility for benefits operates on the averaging basis used in the tables so as to eliminate unemployment insurance benefits in most years, even though the worker is presumed, of course, to be unemployed for a number of days in every year. Counsel says that the average person is not unemployed in every year, but experiences occasional protracted spells of unemployment in some years, and none at all in others, so that the qualifying period rarely results in any period of unemployment going wholly uncompensated.

53 This point was not made in the examination or cross-examination of Mr. Taunton, or of any other witness. It is impossible to say how it might have been responded to had it been dealt with in the evidence at trial.

54 It must, however, be observed that there is a ceiling on the duration of unemployment insurance benefits. If lifetime unemployment were assumed to be in one or two lengthy spells, much might go uncompensated on that account. The ceiling is influenced by the amount of prior contributions, so that periods of unemployment early in a person's working life, or closely following each other, may attract much less compensation than periods later in life of the same length with longer intervals between them. These are some of a number of considerations which make it impossible to say that, had the objection been put forward at trial, a larger award for loss of future earning capacity would have resulted. But, in any event, averaging necessarily imports artificialities. The course now proposed, requiring a departure from the averaging concept, might well also call into question other consequences of

averaging which work to the benefit of the plaintiff. For all of these reasons, we are not persuaded that effect can be given to the objection in question at this stage in the litigation.

55 With respect to the "non-participation" contingency allowed in Mr. Taunton's tables, Unruh's counsel contends that while the approach adopted by the trial judge involves a deduction from earnings for periods of sickness and disability, it gives no consideration to income which would be received by an employee as a result of disability coverage, provided either by an employer or by the state. It is to be noted, however, that the income figure used in the table includes "non-wage benefits" arising from employment, which may well include premiums paid by employers for such coverage. It is, moreover, unclear whether the average employment earnings stated are before payment of employee contributions to such plans. If the ultimate figure for future earnings is arrived at on the assumption that the plaintiff receives as income what would in fact be paid as disability insurance premiums by employer and employee, then the result, where averages are used, might well be the same, or perhaps even better from the plaintiff's point of view, than would an award of average lifetime benefits received from such plans.

56 Since these matters were not explored in evidence at trial it is impossible for us to say that undercompensation has resulted from the approach accepted by the trial judge so far as the "non-participation" contingency is concerned.

57 With reference to "fringe benefits," counsel makes the point that the "non-wage benefits" included in the tables used by Mr. Taunton are at a lower level than those stated in the book by Professor Bruce. Professor Bruce says that fringe benefits have increased in recent years, and that Statistics Canada figures, on which Mr. Taunton's tables are said to be based, exclude profit sharing, bonus plan payments, and severance pay. This is not a matter of logic, or approach, but of fact. It would not be proper for us to accept factual statements made in a text- book which was never cited to the witnesses at trial, in preference to those made in evidence by a witness whose testimony the trial judge accepted.

58 Unruh's counsel takes the position that overtime does not appear to have been "included as a positive contingency at all," but there is nothing before us to show that earnings figures used by Mr. Taunton exclude overtime earnings.

59 We would not give effect to the arguments advanced on the cross appeal under this heading.

6. Actuarial Calculations Not Directed to Date of Pronouncement of Judgment

60 The actuarial calculations used by the trial judge were directed to the beginning of the trial in September 1992. Judgment was pronounced on 2 November 1992 and it is submitted on behalf of Unruh that the calculations need to be adjusted to reflect the time value for money on various heads of the damage award.

61 This is a matter that should have been raised with the trial judge before the formal order was entered. At the time that the trial judge was preparing his reasons, Mr. Justice Shaw awarded interest on loss of future earning capacity at the registrar's rate for a period of seventeen days: ***Summers*** v.***Boneham***(30 October 1992), Vancouver B910575 (B.C.S.C.). Shortly after judgment was pronounced in this case, Mr. Justice Low made a similar award for a five month period on lost income and future care costs: ***Gillis v. Krali*** (25 November 1992), Vancouver B89147 (B.C.S.C.).

62 Mr. Justice Low explained his award of interest:

> In the present case, I used actuarial figures calculated as of March 16, 1992, more than five months prior to the date of judgment. Theoretically, the plaintiff should have had the monies for future damages in hand as of March 16th. Those monies should have been earning interest from that date so the funds created could accomplish their purposes. The plaintiff should not be deprived of interest while awaiting judgment.

63 The only objection taken by the defendant to the claim is that the plaintiff had not raised the matter in the trial court and ought not to be allowed to raise the matter on appeal. That is a sensible rule if the new matter required the taking of evidence that ought to have been led at the trial. However, both Mr. Justice Shaw and Mr.

Justice Low used the registrar's rate of interest and did not require actuarial evidence. Mr. Berardino objects to that course on the basis that the actuarial evidence would yield a lower return.

64 Assuming that to be accurate, we would allow interest at the registrar's rate for the period in question, less one-half of one percent.

7. Residual Earnings

65 The trial judge reduced the award for loss of future earning capacity by $100,000.00. After considering the evidence and the submissions on behalf of the plaintiff that Unruh would earn no income in the future, and those of the defendant that Unruh would earn as much as $477,000.00, the trial judge stated:

> I would fix $100,000 as the amount that the plaintiff will probably earn post-accident. This is a little more than 20% of the figure postulated in Mr. Taunton's calculations. Admittedly this is a pure guess.

66 But what was described as "pure guess" was based on these findings:

> But the plaintiff has three things going for him: firstly, he will, as Dr. Anderson says, want to become productive; secondly, the advent of the computer and the acceleration of computer technology means that he will be able to use his intelligence without the necessity of appreciable body movement; and thirdly, with the advance of computer technology it may well be unnecessary for the plaintiff to move from home to a work place.

67 We cannot say that the trial judge was in error to ascribe some earning capacity to the plaintiff, nor can we say that the amount of $100,000.00 is unduly high.

8. Cost of Future Care

68 The next contention advanced on the cross-appeal is that the trial judge erred by awarding too little for future homemaker support and attendant care.

69 In dealing with this aspect of the claim, the trial judge accepts the figure contained in the Taunton and

Harris reports, and rejects those of the plaintiff's expert, Ms. Schulstad. Referring to the Taunton-Harris calculations, the judge says:

> By far the most significant of the ongoing costs is attendant care ($48,581) and food for attendant ($2,070). These are annual expenses. The present calculated values are respectively $1,214,604 and $48,368.

The judge bases his award for the present value of future care on these figures, advanced for the defendant, rather than on the plaintiff's figures, of which the judge says:

> I decline to accept the Schulstad report because I hold the costs, where they differ from the costs in the Harris report, as unreasonable or unnecessary. It is quite true that money without limit could not compensate the plaintiff for the injury he has suffered. But there must be some balance between the plaintiff's needs and diversions and the obligation to pay by the defendant.
>
> I comment on several of the major items contained in the Schulstad report.
>
> (1) Under Homemaker Support Needs and Attendant Care Needs the Schulstad report contains the following: "full personal care and homemaking costs on a daily basis through Drake Medox is $272. Therefore the yearly cost is $272 x 365 days = $99,280. This would provide for an attendant to be available for 16 out of 24 hours per day".
>
> On the face of it, it seems to me almost absurd that the plaintiff would require services valued at almost $100,000 for the services listed even through an agency.

Counsel for Unruh asserts that the judge erred in referring to the plaintiff's cost figures as "absurd," saying that they had in fact been incurred to the date of trial, and were not high in relation to similar awards in other cases.

70 The essential difference between the two experts is that Ms. Schulstad, in her report for the plaintiff, assesses the personal care costs on the basis of services costing $17.00 an hour charged for 16 hours a day--or $272.00 a day--provided by the firm which had furnished those services since the plaintiff returned to his home, while Ms. Harris, in her report for the defendant,

recommends an agency which charges $13.31 an hour for 10 hours a day, that is to say $133.10 a day. Counsel for the defendant agreed before us that the rate of $13.31 an hour would in fact be charged for 12 hours a day, rather than 10 hours, making the cost $159.72 a day. While the charge is in each case for less than 24 hours, we were told that the service would in fact be provided in each case by a live-in attendant. The difference in yearly cost is as between $99,280.00, under the plaintiff's proposal, and $57,318.00 under the defendant's, after it has been adjusted in accordance with defence counsel's concession before us.

71 In her evidence on this point, Ms. Harris said that her policy is not necessarily to take the lowest price quoted, but to be moderate, or "middle of the road," in choosing a service provider. There is nothing in the evidence to suggest that the agency selected by Ms. Harris would not be able to provide as good a service as that being received.

72 Counsel for Unruh produced evidence to show that the rates charged by the agency selected by Ms. Harris have increased since the trial of this action. That is not to be regarded as surprising; the discounting process applied in reducing future costs to present value assumes, and makes appropriate allowance for, inflationary increases in costs throughout the period from date of trial to the end of the plaintiff's predicted lifespan. The new evidence on this point does not, therefore, indicate any error in the award made at trial.

73 We are of the view that the choice of the trial judge as to the appropriate agency to render future care services was properly based on evidence which he was entitled to accept and that the award under this heading should be varied only to reflect the agreed increase of $9,716.30 in the annual charge made by that agency, on the basis of the number of daily hours charged.

9. Management Fee

74 We have dealt with the appropriateness of the trial judge's conclusion, for income tax purposes, that the award for future care should be presumed to be invested wholly in government or similarly secure bonds, and invested with a view to providing the necessary income by way of interest alone.

75 It follows naturally from that conclusion that there is no need for an allowance for "portfolio management," for the reason that such bonds can readily be purchased without commission, and without engaging the services of any stock broker or "portfolio manager." The trial judge accepted the evidence of the defendant's economic expert, Mr. Taunton, that "it should be possible to obtain the target rate of return on investments without initially having to resort to an investment fund manager." The judge expressed his conclusion on the point as follows:

> Given that the investment portfolio that I hold to be most prudent is investment of bonds, I decline to make any allowance for investment management fees, custodial or otherwise. It seems to me that what the plaintiff will require is a good deal of accounting advice in order to maintain what remains of the award intact.

Thus the judge disallowed the plaintiff's claim for $580,706.00, before income tax "gross-up," as a fund from which to pay annual fees for professional management of a mixed investment portfolio. The plaintiff's actuary also quoted the sum of $661,736.00 as that required to pay for management of a bond portfolio, but it becomes apparent that the portfolio referred to must be one managed with a view to capital appreciation, rather than interest income only. Such a bond portfolio, managed for the purpose of profiting by future interest rate changes, would involve the plaintiff in the sort of speculation which the trial judge plainly, and in our view, correctly rejected as inappropriate in the case of a person reliant on a lump-sum award for essential care.

76 One consequence of the judge's choice of maximum security for the fund for future care is that the defendant has to pay considerably more by way of compensation for income tax on payments from that fund than would otherwise be the case. Another is that the defendant is spared the substantial burden of fees for "portfolio management," which would become necessary if part of the fund were to be placed at risk on the market. Counsel for the defendant made the interesting observation that in this case the additional cost under the former heading comes close to being "cancelled out" by the saving under the latter. That certainly supports the wisdom of the trial judge's choice.

77 It is nevertheless to be observed that, while the judge rightly concluded that Unruh would require accounting advice to ensure that the fund is invested and re-invested in bonds of the appropriate type and duration, he appears to have made no allowance for accounting fees. The services required would not be those rendered for "custodial" purposes by a portfolio manager, but the normal services, charged at an hourly rate, rendered by a professional accountant knowledgeable in the field. It seems reasonable to conclude that Unruh would need to have such services three or four times a year, and that the average time taken to render them would be less than one working day.

78 We would add a sum under this heading sufficient to produce after-tax income of $3,500.00 a year.

10. Exercise Machine

79 The plaintiff claimed the sum of $2,500.00 for the purchase of exercise machine. The trial judge rejected the claim with the statement that the "medical evidence would suggest that this may be in fact undesirable."

80 This was a reference to the evidence of Dr. Buruni who, in cross-examination, said that exercise would lead to greater muscle tone which could lead to greater spasticity. However, in re-examination, he clearly showed his approval of an exercise machine:

Q I just have a couple of questions, my lord.

Dr. Buruni, deep venous thrombosis, is one able to deal with those problems, are they reducible?

A Absolutely.

Q And what mechanisms can one employ to reduce the problem of deep venous thrombosis?

A Number one, regular exercise of that particular limb, observation and suspecting the problem before it gets out of hand, but it is preventable.

Q Would an exercise machine help in this are?

A Absolutely.

Q And what would be entailed in a quadriplegic using an exercise machine?

THE COURT: What's the question, I am sorry?

MR. GIBBENS:

Q What would be entailed in a quadriplegic using an exercise machine, how would he used, employ it?

A Just like the other functional tasks, he would require assistance.

81 The only other evidence was that of Miss Schulstad:

Q Okay. I also notice you've made allowance for an exercise machine. Would you please explain to his lordship the rationale for that?

A I believe exercise is very important, and we have exercise machines now that an attendant can strap the client's legs into as well as the upper limbs, and this is a feature that most of my quadriplegic are using in their own homes at this time. They really can't go into a gym and use some of the equipment there, it has to be quite specialized equipment.

82 In our view, the trial judge misapprehended the evidence and we would allow the claim of $2,500.00 for an exercise machine.

11. Yard Care

83 This claim is based on a yearly cost of $900.00 and was rejected by the trial judge who very much doubted that Unruh would acquire a house and need a gardener. We have upheld the finding of the trial judge that Unruh would not acquire a house and we have no reason to disagree with his rejection of this claim.

12. Tax Gross-Up

84 The defendant has acknowledged that the trial judge erred in relying upon actuarial calculations based upon a future income loss of $422,000.00 as opposed to the $800,000.00 as determined by the trial judge. We agree that

the matter be left to counsel with liberty to apply to this Court.

SUMMARY

Appeal		Disposition
1.	Liability	Dismissed
2.	"Portfolio Mix"	Dismissed
3.	House Purchase	Dismissed
	Cross-Appeal	
4.	Van Modifications	Dismissed
5.	Contingencies	Dismissed
6.	Actuarial Calculations	Allowed
7.	Residual Earnings	Dismissed
8.	Cost of Future Care	Allowed in part
9.	Management Fee	Allowed in part
10.	Exercise Machine	Allowed
11.	Yard Care	Dismissed
12.	Tax Gross-up	Allowed - counsel to settle

85 Accordingly, the appeal is dismissed and the cross-appeal allowed in part.

86 As to costs, we would award the respondent the costs of the appeal and one-half the costs of the cross-appeal.

"THE HONOURABLE MR. JUSTICE HUTCHEON"

"THE HONOURABLE MR. JUSTICE TAYLOR"

"THE HONOURABLE MR. JUSTICE CUMMING"