Date: 19961203
Docket: CA020937
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COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

WILLIAM ZAPF

PLAINTIFF/RESPONDENT
(APPELLANT BY CROSS-APPEAL)

AND:

WILLIAM MUCKALT

DEFENDANT/APPELLANT
(RESPONDENT BY CROSS-APPEAL)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Madam Justice Proudfoot

W.M.B. Holburn, Q.C., J.D. Stewart	Counsel for the Appellant
J.N. Laxton, Q.C., R.D. Gibbens and D.C. Harbottle	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia October 24 and 25, 1996
Place and Date of Judgment	Vancouver, British Columbia December 3, 1996

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Huddart

The Honourable Madam Justice Proudfoot

Reasons for Judgment of the Honourable Donald:

NATURE OF APPEAL

[1] The plaintiff broke his neck while playing in a Junior A hockey game. He is now a quadriplegic. He and the defendant, a member of the opposing team, were chasing the puck in the plaintiff's end when as a result of a shoulder check by the defendant the plaintiff was propelled head first into the end boards.

[2] The learned trial judge found that the defendant hit the plaintiff from behind in violation of a strict rule of the game designed to reduce the risk of spinal cord and other serious injury in amateur hockey (Rule 53(c) of the Canadian Amateur Hockey Association). She held that the defendant breached the standard of care required of him in the circumstances and awarded the plaintiff damages on the scale appropriate for catastrophic injuries.

[3] The defendant appeals against liability and says that no fault should have been assessed against him or, in the alternative, fault should have been equally divided. The plaintiff cross-appeals on certain aspects of the damage award.

ISSUES

[4] The errors alleged on appeal are that the learned trial judge:

1. Imposed too high a standard of care: she found liability on carelessness when the standard is recklessness or intentional harm.

2. Disregarded relevant factors:
   (a) the manner of the check;
   (b) the defendant's intention in administering the check;
   (c) the plaintiff's participation in the contact.

3. Made reversible errors of fact in finding that:
   (a) the defendant checked the plaintiff from behind;
   (b) the defendant breached Rule 53(c).

4. Failed to divide fault equally on the basis that the plaintiff contributed to his own loss.

[5] The errors alleged on the cross-appeal are that the learned trial judge:

5. Used the wrong test in determining whether future care costs should be assessed according to Alberta, the plaintiff's home province, or British Columbia, his preferred place of residence.

6. Used the wrong test in deciding what allowance should be given for the cost of making the plaintiff's residence wheelchair accessible.

7. In giving directions for tax gross-up:
   (a) refused to determine the tax deductibility of certain

home care services;

(b) deducted the price of a new house from the tax gross-up calculation.

8. Failed to assess the opportunity cost lost by the plaintiff in the pre-trial period.

9. Confused compensable contingencies with non-compensable contingencies.

CONCLUSION

[6] I would dismiss the appeal. The determination of standard of care was largely a question of fact for the trial judge on her appreciation of difficult evidence. She did not misconstrue or overlook importance evidence in deciding liability. No palpable or overriding error of fact has been shown. On the standard of care set by the trial judge, no question of contributory negligence arises.

[7] Turning to the cross-appeal, I find no error in the trial judge's selection of Alberta as the appropriate jurisdiction for calculating future care costs, although I would have approached the question differently. Nor do I think the trial judge erred in awarding a one time only allowance for renovations to provide wheelchair accessibility. Regarding tax gross-up, the trial judge's assumption that home care expenses would be deductible was not unreasonable since expert evidence before her operated on the same assumption and, in any event, a ruling on the point would not be binding on Revenue Canada. The trial judge correctly deducted the cost of a house from the tax gross-up calculation. Her prediction that the plaintiff would purchase a house within a year is supported by the evidence. On the ground relating to past earnings loss, I think the plaintiff was fairly compensated. This is not the appropriate case to introduce the opportunity cost concept into personal injury compensation.

[8] The only ground in the cross-appeal that should succeed is the last. In my respectful opinion, the evidence does not support a set-off of negative contingencies against the value of employer contributions to employment benefits and, accordingly, the award for loss of future earning capacity should be increased to reflect the value of those contributions.

FACTUAL BACKGROUND

[9] The facts are fully set out in the reasons of the trial judge reported at (1995), 11 B.C.L.R. (3d) 296 and (1996), 20 B.C.L.R. (3d) 124 (supplementary reasons). I cannot improve upon the narrative she gave in her overview of the evidence at 299-300:

> On November 2, 1992, the plaintiff, Bill Zapf, became a quadriplegic as a result of injuries occurring in a hockey game between two Junior A teams, the Nanaimo Clippers and the Merritt Centennials. The game was played in the Merritt arena. The injury occurred in the second period as a result of contact

between Mr. Zapf and Mr. Muckalt. Mr. Zapf has sued Mr. Muckalt and the Merritt Centennials.

The puck had been dumped into the Nanaimo end from the Merritt blue line. The plaintiff, a defenceman for Nanaimo, had just given a solid check to a Merritt player, resulting in the Merritt player leaving the ice. The plaintiff skated hard for the puck in the Nanaimo end. The defendant, a winger for Merritt, either replacing the injured player or on a line change, jumped on the ice from the Merritt bench and also skated hard for the puck. The two players collided at or near the goal line closest to the Nanaimo goal at the south end of the rink. Mr. Zapf went head first into the end boards. No penalty was called.

Mr. Zapf was removed from the ice to the Kamloops hospital and the game continued. The Nanaimo players were angry and altercations erupted with the referee. The Nanaimo coach, Mr. Hardy, was thrown out of the game at the end of the period. The Nanaimo players turned on Mr. Muckalt and he was finally removed from the game for his own protection.

[10] The trial judge described the competing positions of the parties in this way at 301:

The plaintiff's theory is simple: the plaintiff was projected forward at such a speed and so unexpectedly that he was unable to get his hands up to protect him; therefore he must have been hit from behind; he cannot have stumbled to the side and then forward into the boards. Counsel for the plaintiff says that the fact of a hit to Mr. Zapf's shoulder blade is enough to found liability. Such a hit in such a location on the ice could only be negligent or reckless or intentional. The plaintiff says the defendant's story is unbelievable and contradicts his own witnesses in that very few witnesses say they saw the plaintiff swerve and none saw him round the bottom of the face-off circle, skating toward the side boards.

The defendants say the preponderance of evidence shows that the hit was one in which the two players mutually engaged, shoulder to shoulder, and was a legal hit within the contemplation of the game and expectation of the players. In the alternative, if the defendant did contact a portion of the plaintiff's back, it was an unintentional result of a manoeuvre contemplated within the rules of the game.

[11] The trial judge heard from many witnesses. She found that she could not reconcile the variations in the testimony about what happened. The plaintiff said he was going for the puck; the defendant said that the plaintiff decided to play the man instead of the puck and curled around to check him when the

contact occurred. The crucial findings of fact are in the following passages:

1. The relative positions of the two players: the plaintiff was ahead of the defendant at all times.

I accept that Zapf was ahead of Muckalt as the two players skated down the ice, and that Zapf could have reached the puck ahead of Muckalt. Muckalt was gaining on Zapf, so was going at a faster speed. The paths of the two players converged at or near the goal line, with Zapf still slightly ahead of Muckalt. According to Zapf's own evidence, he knew Muckalt was behind him and angled very slightly to the left.

I also accept that at the point of contact, Zapf was facing the end boards and had not turned his torso around to face the side boards. I accept the evidence of the vast preponderance of the witnesses that as Zapf neared the area between the bottom of the face-off circle and the goal line, he set himself for a check, both players were facing the end boards straight on, and both were balanced.

2. The force of the hit: it was sufficient to propel the plaintiff head first into the boards.

The undisputed physical evidence is that the hit between the plaintiff and the defendant was hard and the plaintiff was immediately propelled head first into the end boards without getting his hands up. Mr. Barret said the plaintiff went into the boards like a ramrod; Mr. Jepsen said it was as if he had hit a wire; Mr. Ferguson said it was as if his legs hit a little wall. Mr. Muckalt admits the hit was a hard one and that his own momentum was slowed greatly by it.

3. The point of contact: the defendant's right shoulder contacted the plaintiff's left shoulder blade area.

As for the point of contact between the two players, neither the plaintiff nor the defendant would necessarily be in the best position to describe the incident as a whole, but each would, in my view, be certain at least of the part of their body which came in contact with the other person's and their evidence on this point would be the most reliable. The plaintiff testified that he felt the contact to his back left shoulder blade; the defendant testified that he felt the contact to the side and front part of his right shoulder. I have no basis to disbelieve either, and the plaintiff was particularly credible on this point. I find that those were indeed the points of contact, and that the plaintiff was therefore hit from behind, not shoulder to shoulder.

4. The plaintiff's awareness of impending contact: the plaintiff braced himself expecting to be hit as he reached the puck.

I have made a second more significant factual finding different from the facts in Unruh [Unruh v. Webber (1994), 88 B.C.L.R. (2d) 353 (B.C.C.A.)]. That is that Zapf was aware of Muckalt's presence and set up to give and receive a check by bracing himself as they neared the goal line. In meeting this check, Muckalt came in contact with a portion of Zapf's back. Does the fact that Zapf initiated or participated in the contact remove this situation from the test set out by the Court of Appeal in Unruh?

* * *

Given that I have found that the plaintiff was aware of an impending check, and was intending to participate in it, should liability flow from the fact that he was hit from behind?

* * *

Both players were skating toward the end boards very fast. Muckalt was coming up behind Zapf at a high speed. They prepared to check each other. In my view, whether or not Zapf braced himself first is not of great significance because Muckalt was immediately ready to meet the check. What is important is that Zapf was expecting to be hit. He was, of course, not expecting to be hit from behind with a force that would send him forward at such a speed that he was unable to get his hands up.

5. The defendant's awareness of the risk of hitting a player from behind: the defendant knew that serious injury could result.

On the issue of checking from behind, Mr. Muckalt testified as follows:

> Q. ...Now, you know that great caution is required in approaching the opposing player from behind who is near the boards:
>
> A. Oh, I would, I would agree if someone - if you're behind someone and then had their back turned to you and they're, I don't know how far you said away from the boards, or wherever, it doesn't matter, that you have to caution [sic], yes. I mean there's no question there's been serious injuries from hitting from behind...
>
> Q. ...Given the choice of injuring the other player, by hitting him from behind, or letting him get away with the puck, you should let him get away; is that true or not?
>
> A. If that's your only other option is to let him get away instead of hitting him from behind, if those are the only two options of hockey,

yes, you'd let him get away.

With respect to the other options available to him, Mr. Muckalt testified as follows:

> Q. Mr. Muckalt, I only want you to tell me if those options were available to you at the time that you approached Mr. Zapf, that is, the option of stopping, the option of turning and the option of riding him into the boards. I suggest all three options were available to you, but you didn't choose any of those option....Is that correct or not: Were those options available to you?
>
> A. I could have tried I guess.

Mr. Muckalt added, however, that Mr. Zapf initiated contact and he was prepared to receive it, and chose the option of engaging in body contact with Mr. Zapf because Mr. Zapf came in his line for the puck.

6. Whether the defendant's contact with the plaintiff's back was inadvertent: it was not inadvertent.

I have concluded that Mr. Zapf was hit from behind. As for the submission of defendants' counsel that if the contact did take place from behind, it was unintentional, this was not supported by the evidence given by Mr. Muckalt. He did not suggest the contact was accidental; he testified that Mr. Zapf turned sideways and hit him in the front side of the shoulder, a version I have found inconsistent with the rest of the evidence, although I have accepted that Mr. Muckalt correctly described the portion of his body involved in the contact.

7. The rules of hockey: hitting from behind is strictly forbidden and not a risk assumed by Junior A players.

According to R. 53 of the Canadian Amateur Hockey Association, a penalty should follow from the simple fact that contact occurred and Zapf was propelled into the boards. It says:

> 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).

Rule 53(c) appears to me to be a rule of absolute accountability: it does not matter how the contact occurs; it need not be negligent, intentional or reckless; it could be completely accidental. If a player is propelled in any manner into the boards in such a way that he is unable to protect or defend himself, a penalty follows from the fact of contact and the consequences. According to the Court of Appeal in Unruh, this rule was enacted by the Canadian Amateur Hockey Association in 1984 because of its concern over the incidence of spinal injuries.

* * *

In the case at bar, it was not seriously contested that a hockey player, particularly at the Junior A level, does not accept the risk of being hit from behind. Such a hit is outside the acceptable standard of play of the game.

8. The standard of care in these circumstances:
Given the standard of play expected in this league, and the overwhelming emphasis placed on the prohibition against checking from the rear in the area of the boards, it is unacceptable to make contact in the manner in which it was done here. Where a player is approaching another player from behind at a high speed near the boards in a situation where a physical altercation for possession of the puck is inevitable, he must ensure that any check he administers is done shoulder to shoulder. He cannot be negligent, reckless or careless in the check.

9. Assessment of defendant's conduct against that standard:
By administering a check to Mr. Zapf's back in these circumstances, Mr. Muckalt was at worst reckless, at best careless. Either is sufficient to found liability in all the circumstances of this case.

[12] The facts surrounding the damages issues raised in the cross-appeal are more conveniently dealt with in the discussion of the separate topics.

ANALYSIS

1. STANDARD OF CARE

[13] The defendant argues that liability could only be found if he exhibited a reckless disregard for the plaintiff's safety or intended to cause him harm.

[14] In my respectful opinion, this is an attempt to resurrect a legal controversy put to rest by this Court in two previous hockey cases, Herok v. Wegrzanowski (7 October 1985), Vancouver CA003074 (C.A.) and Unruh v. Webber, supra. The question is whether carelessness is enough for liability in a contact sport.

[15] Defendant's counsel cited cases from various jurisdictions in Canada, the U.S. and England to support a test that requires intentional or reckless infliction of harm during a game in order to establish liability. The law of this Province is in the following passage from Unruh, supra, at 367-8 where in that case this Court referred to Herok, supra:

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.

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.

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.

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.

[16] On the two occasions that this Court addressed the topic, it has rejected the narrow approach to the standard of care where only intentional or reckless infliction of harm will ground liability and left it to the trial judge, on his or her appreciation of the evidence, to decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case.

[17] In this case the trial judge understood and applied that test and accordingly I would reject the first ground of appeal.

2. DISREGARD of RELEVANT FACTORS

[18] The defendant alleges that the trial judge erred in failing to give due regard to the conduct of the two players in deciding whether the standard of care was breached. This argument has three aspects: the manner of the check; the defendant's intention in administering the check; and, the plaintiff's participation in the contact.

(a) The Manner of the Check

[19] This point focuses on the following passage in the reasons at 309:

> In passing, I note that there is no evidence at all to substantiate the suggestion by plaintiff's counsel that Muckalt used his hands to push Zapf. However, the manner of the check is not important; the fact that it was administered to the plaintiff's back is.

[20] This is said to manifest indifference to important facts surrounding the hit. I do not think it does. Understood in context the above remarks mean only that liability is not affected whether the defendant shoulder checked or pushed the plaintiff with his hands. This foreshadowed her later application of the Unruh test which does not require intentional dirty play.

(b) The Defendant's Intention in Administering the Check

[21] The defendant submits that the trial judge fixed her mind on the fact that the contact came from behind to the exclusion of other findings bearing heavily on the question of fault. I summarize the argument in this way: both players were going for the puck. The plaintiff set himself to give and receive a hit. The defendant intended to make contact shoulder to shoulder, a legal hit. The fact that it turned out to be shoulder to shoulder blade, an illegal hit, is too close a call for liability in a fast, aggressive game like hockey. The standard set by the trial judge left no reasonable margin for error.

[22] The trial judge did not believe the defendant's version of the event where he described the plaintiff turning into him and away from the puck to deliver a check. She found that at all times the defendant was behind the plaintiff and both were facing the boards. Further, she found that the defendant could have avoided the contact. In my view, these determinations remove the foundation of the argument that the trial judge failed to consider the defendant's intention to administer a legal check.

(c) The Plaintiff's Participation in the Contact

[23] Two passages from the reasons below have troubled me. They appear earlier, but for convenience I will quote them again.

> I have made a second more significant factual finding different from the facts in Unruh. That is that Zapf was aware of Muckalt's presence and set up to give and receive a check by bracing himself as they neared the goal line. In meeting this check, Muckalt came in contact with a portion of Zapf's back. Does the fact that Zapf initiated or participated in the contact remove this situation from the test set out by the Court of Appeal in Unruh?
>
> [emphasis added]
>
> * * *
>
> Both players were skating toward the end boards very fast. Muckalt was coming up behind Zapf at a high speed. They prepared to check each other. In my view, whether or not Zapf braced himself first is not of great significance because Muckalt was immediately ready to meet the check. What is important is that Zapf was expecting to be hit. He was, of course, not expecting to be hit from behind with a force that would send him forward at such a speed that he was unable to get his hands up.

[24] I was at first attracted to the argument that on the trial judge's view of the plaintiff's conduct as described above, the plaintiff must have consented to the risk of contact as part of the give and take of a rough game. But looking at the judgment as a whole, I am satisfied that the trial judge found liability on a reasonable basis. The plaintiff was not checking the defendant when he left his feet and went head first into the boards. In order to do that the plaintiff would have had to stop and put his shoulder into the defendant, none of which the trial judge found. The plaintiff was bracing himself for the inevitable contact that would occur when he reached the puck. He anticipated a physical struggle for possession of the puck once he reached it, but that could not justify a prior hit from behind by the defendant. Contrary to the submission by the defendant, there was no finding that the plaintiff "initiated" the contact, that would have been physically impossible on the other facts as the trial judge found them. The above reference to the initiation of a check was phrased in the form of a question, it was not a conclusion of fact.

3. REVERSIBLE ERRORS OF FACT

[25] The defendant alleges that the trial judge made palpable and overriding errors of fact in two respects: (a) in finding that the contact was shoulder to shoulder blade rather than shoulder to shoulder; and (b) in finding a breach of Rule 53(c).

(a) The Point of Contact

[26] The trial judge indicated the difficulty facing her when she introduced the discussion on the "mechanics of collision" at 308:

> This is, of course, the factual issue on which the case turns. It is impossible to reconcile all the evidence or to disregard the many inconsistencies and differences simply by deciding to believe or disbelieve certain witnesses. There were numerous witnesses called, each of whom say something different, and none of whom, other than the parties themselves, were motivated to fabricate or lie.

[27] There was evidence to support the finding of the trial judge on the point of contact between the two players. The defendant's argument would have us substitute our impression of the evidence for the trial judge's and even if I were inclined to read the evidence differently, which I am not, the authorities do not permit us to interfere.

(b) Breach of Rule 53(c)

[28] The defendant submits that Rule 53(c) implies a requirement that the offending player intend the result. I respectfully agree with the trial judge's opinion that the violation does not depend on the state of mind of the player who hits from behind and with her view that the infraction is committed if the other player is "propelled in any manner from behind into the boards, in such a way that [he] is unable to protect or defend himself": (Rule 53(c)). The Rule speaks of results not intention. It will be remembered that the plaintiff did

not have time to get his hands up before hitting the end boards with his head.

[29] The referee did not call a penalty but the trial judge rejected his testimony on the movement of the players. He gave a description of the incident roughly similar to the defendant's version, neither of which the trial judge accepted.

4. CONTRIBUTORY NEGLIGENCE

[30] The defendant argues in the alternative that if he was at fault, the trial judge should have assigned equal blame to the plaintiff.

[31] This point was not advanced with much force at trial. I found the argument on appeal unpersuasive. I cannot accept that the plaintiff, simply by bracing himself for contact that would occur when he reached the puck, contributed to his loss.

[32] For the above reasons I would dismiss the appeal. I turn next to the cross-appeal.

5. WAS THE WRONG TEST USED IN DECIDING THE PROVINCE FOR ASSESSMENT OF FUTURE CARE COSTS?

[33] The trial judge assessed costs of future care on the basis that the plaintiff would incur those costs in Alberta. The award on this head would have been significantly larger if she chose British Columbia because of higher prices and a 6% sales tax.

[34] The plaintiff testified that he wanted to live in British Columbia even though he grew up in Alberta. Had he not been injured he would have pursued a career in Edmonton as a member of the police force. He said he found the cold weather hard to tolerate in his disabled condition. His mother testified that she felt it was important for the plaintiff's emotional well-being to make a fresh start away from his home town. She said that in Edmonton he would be reminded of what he was; in Vancouver he could focus on what he could be.

[35] The plaintiff submits that the trial judge wrongly applied a "medical necessity" test on this question when the proper test is "reasonableness". The trial judge said this in her reasons at 325-6:

> Unless there is a medical necessity involved, the Court should not be called upon to decide where the plaintiff should live. Neither Mr. Zapf's wish to move nor his mother's wish to prepare her son to face his future realistically are medically necessary reasons to move to B.C. His mother's concern is one that could be dealt with by a move within Alberta or to another province where the cost of living is not as high as it is in B.C. As for Mr. Zapf's concern, there was no medical evidence before me to suggest that Edmonton is not equally as healthful for him as British Columbia would be.
>
> The defendants should not have to bear the higher costs of setting the plaintiff up in British

Columbia merely because of a life choice the plaintiff might make. Although the plaintiff was playing for a B.C. team at the time of the injury, having been traded previously from an Alberta team, he has no other connection to B.C. He knows no one in Vancouver except his sister, who is going to university here and whose plans post-graduation are uncertain. The plaintiff obviously intended to remain in Edmonton if he had not been injured, as he always wanted to be a member of the Edmonton Police Force. He has many friends there and a substantial support system from which he can move on to the next stage of his life.

[36] I think that the proper test is reasonableness and that psychological and emotional factors influencing the choice of where to live must be considered: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 238 and 245. Medical necessity is too stringent a test.

[37] I would not, however, disturb this part of the judgment. The plaintiff had no roots in Vancouver. He had been in B.C. for only a year, at first in Fernie, then in Nanaimo, when he was injured. His sister attended U.B.C. but she had no certain plans to remain in Vancouver. On the other hand, the plaintiff grew up in Edmonton and his parents are there. The evidence makes it more probable than not that he would remain in Edmonton. I think it unlikely that he would leave familiar surroundings and the emotional support of family and friends for Vancouver where he would be a virtual stranger Ä unless his medical advisors recommended that and there is no evidence that they did.

6. ACCOMMODATION CHANGES

[38] While the plaintiff was in hospital recovering from the injury his parents renovated their home to make it wheelchair accessible. The plaintiff spent only a few weeks there after discharge because he then went to a rehabilitation centre in Houston, Texas. He returned to Edmonton a short time before trial. The trial judge predicted that the plaintiff would purchase his own home within a year of judgment. The plaintiff wanted to recover the cost of renovating the parents' home plus an allowance for making accommodation changes to a home he expects to buy.

[39] The trial judge dealt with the issue in this way at 318:

> In my view, the defendants should not have to pay for two sets of renovations. While it is true that renovations would not be required but for the accident, the plaintiff elected to add a complete apartment in his parents' house in which he then spent very little time, almost immediately moving to Houston. The defendants should either have to pay for renovations in the house which I am satisfied the plaintiff wishes to purchase in the near future (see page 65 [pp.334-35] of this judgment) or should pay for the set of renovations already done, but not

both.

[40] As part of settling the final order the plaintiff was given the choice of accepting $50,000.00, the anticipated cost of renovations, or a sum sufficient to cover the changes to the parents' home. Counsel for the appellant advises that the plaintiff took the first option.

[41] The plaintiff argues that the initial expenditure was reasonable at the time the decision to renovate was made and that that is the operative time for determining compensation not later, when as things turned out, the renovations had little utility.

[42] With respect I do not think the question of timing, as it arises in this case, involves a point of principle. Whether an allowance should be given for more than one set of renovations is bound up in the facts and I think the result must largely depend on the trial judge's overall appreciation of the case.

[43] I digress to mention a fresh evidence motion brought by the plaintiff. In an affidavit containing the new information, the plaintiff's father deposes that the plaintiff has lived at his parents' home since his return from Houston, a period of almost two years, and that the plaintiff could not afford to move out.

[44] In my opinion, this evidence fails to satisfy the requirements for admission of fresh evidence.

[45] If the plaintiff is correct in his argument that the reasonableness of an expenditure must be assessed at the time it is made, rather than in hindsight, what happened while the appeal was pending is irrelevant. Also, the evidence tends to weaken the assertion that the plaintiff intends to go to Vancouver, although impecuniosity is cited as the reason for staying home. Without knowing how much, if any, of the judgment was advanced to the plaintiff before appeal (there was no order of this Court staying the judgment below) we cannot assess the value of the evidence.

[46] The plaintiff also proffered the evidence on the issue of when, for tax gross-up purposes, the plaintiff is likely to buy a home. The later the purchase the higher the gross-up because the fund necessary to buy a house will attract tax for a longer period.

[47] I do not find the new evidence helpful in resolving any of the issues in the case. The appeal created a state of uncertainty and, what the plaintiff did while it was pending, does not tell us much about what he would do if he got his full judgment. I would refuse the application to adduce fresh evidence.

[48] I do not find any error in principle in the trial judge's award for accommodation expenses. I defer to her sense of the evidence as to what was reasonable in the circumstances.

7. TAX GROSS-UP ISSUES

(a) Refusing to Determine Tax Deductibility of Home Care Expenses

[49] If home care services are not deductible as a medical expense deduction under s.110(1)(c) of the Income Tax Act then a tax gross-up must be included for that component of the future care award.

[50] The expert evidence assumed deductibility and the trial judge based her judgment on that evidence. Accordingly, no tax gross-up was calculated for this item. The trial judge declined the invitation to express an opinion on the application of the Act because, she said at 331: "... I have no basis on which to do so."

[51] The trial judge cannot be criticized for her refusal. Income tax interpretations are for the Tax Court; the trial judge was asked to venture a non-binding judicial opinion. Further, it was up to the plaintiff to supply her with sufficient materials on which to base a prediction as to the likely tax treatment of the item and this was not done. Since the actuarial opinion treated these expenses as deductible, there was some support in the evidence for her operating on the same assumption.

(b) Deduction of the Price of a New House from the Future Income Award

[52] This part of the award is attacked on two points: (i) timing and (ii) the component from which the deduction was made.

[53] For gross-up purposes the trial judge predicted that the plaintiff would buy a house within one year and that the $150,000.00 figure she set for the expenditure should be taken from the allowance for future income. The plaintiff submits that the trial judge's projected time of purchase was too early to be realistic. Her prediction had the effect of significantly lowering the gross-up. The plaintiff also argues that the trial judge erred in treating this expense as a future item on the ground that such purchases are normally made from accumulated earnings. According to the plaintiff, the proper characterization of a home purchase by a young quadriplegic is solace because a young man of 20 years of age would not normally have the ability or the inclination to buy a home. Therefore, the deduction should come from the non-pecuniary award (for which no gross-up is necessary). The trial judge said this at 335:

> The general principles of damage assessment are clear. The plaintiff must be prudent and reasonable; he cannot inflate his damages. The moneys which will be used for house purchase in the near future should not be characterized to artificially inflate the tax gross-up. In my view the moneys for the purchase of this house would come out of his future earnings, as it would for any one else. It is not "solace" in the sense in which the term is used to describe non-pecuniary consolation.

[54] In my view, the cost of buying a home does not fall under general damages for pain, suffering, loss of enjoyment and amenities of life. I find no error in the trial judge's allocation of this expense on the basis that the house would be purchased from the award for loss of capacity to earn income. Nor do I see that she was plainly wrong on the evidence in her prediction of when the plaintiff would buy a home. He was obviously eager to get out on his own.

8. SHOULD THERE HAVE BEEN AN AWARD ON THE CONCEPT OF "OPPORTUNITY COST?"

[55] This is a past loss of earnings issue. The question is whether the trial judge should have awarded an amount to compensate the plaintiff for the loss of opportunity to work, rather than to play hockey, in the pre-trial period of approximately three years. The trial judge assessed past loss of earnings for summer employment only, $2,000.00 a year, the balance of the time she said the plaintiff would have played hockey for no remuneration.

[56] In support of the opportunity cost principle the plaintiff cites S.M. Waddams, The Law of Damages, 2d ed. (Toronto: Canada Law Book, 1995) at 3-42:

> Where the plaintiff was not working or working at less than full capacity by choice, it would seem that the plaintiff should be entitled to compensation on the basis of what could have been earned if the plaintiff had chosen to work full time. A carpenter who spends time playing amateur golf presumably does so because he values the pleasure derived from golf more highly than the income that could have been earned by practising his trade. If he loses an arm, so that he can practise neither golf nor carpentry, it would seem that he should be compensated according to the earnings that he could have made as a carpenter. Similar considerations apply to persons who render services gratuitously, such as a member of a religious order who teaches at a college without pay.

[57] If the principle is applied to the present case the plaintiff argues that he is entitled to an amount to compensate for the loss of the opportunity to earn income computed at the same rate as the summer earnings.

[58] In my opinion, this is not an appropriate case to bring the opportunity cost concept into the law of this Province. I say that for several reasons. First, the notional aspect of the concept makes it most unappealing on the facts of this case. Because of the plaintiff's demonstrated keenness for the game of hockey, he almost certainly would have opted for playing rather than working at a low wage job. General damages will compensate him for his inability to play hockey.

[59] General damages will compensate the plaintiff for his inability to play hockey and an award for the work that the plaintiff would have undertaken during the three summers in

question will compensate him for the loss of that source of income. Any additional award would appear excessive on the facts of this case where there is little evidence that the plaintiff would have worked outside the summer months if he were not playing hockey.

[60] Secondly, this is a very small part of the case. The overall award exceeded $4,000,000.00. The far reaching implications of the concept are out of proportion to the importance of the issue in this case.

[61] Thirdly, the facts of this case do not contribute to a proper exploration of the implications of an award for opportunity costs nor am I confident that, on the argument before us, a considered judgment can be given. The implications to which I refer are, for example, the possibility of double recovery as a result of granting a non-pecuniary award for the lost opportunity to play hockey plus awarding compensation for the lost capacity to earn. Should the value of post-earnings loss be calculated in the same way as future loss, i.e. earning capacity as a capital asset, rather than on the historical earning pattern of the claimant? Should a defendant be required to pay compensation for past earnings to someone who chose an easy life style as though he were differently motivated? What about those who sacrifice earnings to volunteer in charitable, religious or political endeavours (see for example Turenne v. Chung (1962), 40 W.W.R. 508 (Man. C.A.)), those who forego a well-paying career to work as a homemaker, or who choose under-employment to avoid the stress of a high pressure job? How should a lost opportunity of this kind be measured? For a discussion of the issues surrounding this topic see Jamie Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992) 71 C.B.R. 445 at 480-484.

[62] These are large and difficult questions. In my view, they cannot be resolved in this case.

9. CONTINGENCIES

[63] The trial judge's ruling on contingencies was as follows at 321-2:

> The plaintiff's expert, Mr. McKellar, made his calculations on the assumption that the plaintiff would work each and every day throughout his whole working career with the only contingency being death. No negative contingencies were factored in for other causes. He calculated the value of employer benefits at 5%, which would be less than a typical adjustment for contingencies. Mr. Collisbird, for the defendants, accounted for negative contingencies by not adding any amount to his calculation for employer benefits.
>
> The plaintiff could only argue in support of Mr. McKellar's approach that there had been no lay-offs from the Edmonton Police Department. There are, however, other contingencies which are usually taken into account in reaching an appropriate figure and

Mr. McKellar testified that he left the question of appropriate contingencies to the Court. In my view, Mr. Collisbird's method of providing for negative contingencies is reasonable and should be accepted. However, during argument, counsel for the defendants agreed that the value of welfare benefits of $48,000 should not have been deleted from the calculations so they will be added in.

[64] The plaintiff says that the offset was based on an assumption incorrectly made by the actuary, Mr. Collisbird, namely that a Edmonton police officer is subject to layoffs and involuntary terminations. In cross-examination Mr. Collisbird acknowledged that these were "major contingencies" and that he was not aware of the protection available to police officers from both layoffs and involuntary terminations in the collective agreement between the City and the police union.

[65] I would accede to this ground. There being no significant negative contingencies, I can see no justification for deducting the employer contributions to the benefit package from the future loss component. The value of those contributions should be added into the award.

[66] Expert assistance may be required to adjust the award. I would propose leaving it to the parties to arrive at a figure. Any disagreement can be dealt with by written submissions.

[67] I would allow the cross-appeal only to the extent of Ground 9.

DISPOSITION

[68] For the above reasons I would dismiss the appeal and allow the cross-appeal, but only to the extent of adjusting the future loss award to take into account employer contributions to benefits.

"THE HONOURABLE MR. JUSTICE DONALD"

I AGREE: "THE HONOURABLE MADAM JUSTICE HUDDART"

I AGREE: "THE HONOURABLE MADAM JUSTICE PROUDFOOT"