Indexed as:
Zapf v. Muckalt

Between
William Zapf, Plaintiff, and
William Muckalt, Merritt Centennials and John Doe, Defendants

[1995] B.C.J. No. 1882

Vancouver Registry No. C933928

British Columbia Supreme Court
Vancouver, British Columbia

Humphries J.

Heard: April 24-28, May 1-3, 8-12, 15-19, 23-26, 29-31,
June 1-2, 5-7 and 22-23, 1995.
Judgment: filed September 1, 1995.

(67 pp.)

[Ed. note: A Corrigendum was released by the Court September 14, 1995. The correction has been made to the text and the Corrigendum is appended to this document.]

Torts-- Negligence -- Standard of care, particular persons and relationships -- Hockey players -- Defences -- Consent, assumption of risk -- Implied consent, sports and games -- Damages -- General damages -- General damages for personal injury -- Pain and suffering, loss of amenities and other nonpecuniary damages -- Impairment of earning capacity -- Future care and treatment.

The plaintiff sought damages for injuries he incurred as a player in a Junior A hockey game on November 2, 1992. The plaintiff, who was 18 years old at the time of the accident, collided with a player from the other team and went head-first into the end boards. He was rendered a quadriplegic by the accident.

HELD: The plaintiff was entitled to the maximum general damages permitted by the Supreme Court of Canada, as this was a catastrophic injury. The figure was to be calculated by an actuary. On the issue of liability, the court concluded that the plaintiff was hit from behind. Even considering the maxim volenti non fit injuria, a hockey player did not accept the risk of being hit from behind. He did expect to be hit, as he had seen the defendant, but did not expect to be hit from behind with such force as to propel him forward at such a speed that he was unable to get his hands up. Given the standard of

play expected in the Junior A league, and the overwhelming emphasis placed on the prohibition against checking from the rear in the area of the boards, it was unacceptable to make contact in the manner which was done here. By administering a check to the plaintiff's back in these circumstances, the defendant was at worst reckless, at best careless. Either was sufficient to found liability. In assessing the plaintiff's loss of capacity to earn income, the court accepted that there was a substantial possibility that the plaintiff would have become a member of the Edmonton Police Force, as he had wished to do. The court also assessed general damages, special damages, cost of future care, and a tax gross-up.

Statutes, Regulations and Rules Cited:

Income Tax Act.
Negligence Act.

Counsel for the Plaintiff: John N. Laxton, Q.C., Dwight C. Harbottle, Robert D. **Gibbens** and Maris R. McMillan.
Counsel for the Defendants: W.M.B. Holburn, Q.C., J. Dale Stewart and Darcie A. Laurient.

HUMPHRIES J.:--

T A B L E O F C O N T E N T S

LIABILITY

Overview of the Evidence and the Theories of the Parties

1 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.

2 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.

3 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.

4 All witnesses agree on the general line of travel of the defendant. He skated straight down the ice toward the puck and the point of collision. Where the witnesses differ is on the movements of the plaintiff. Four Nanaimo players, Hardy (coach), Lemon (assistant coach), Jones (player on the bench), and Murphy (goalie on the ice) testified for the plaintiff. All testified that the plaintiff was skating almost straight down the ice ahead of and to the right of the defendant, and that his skating lane was approximately parallel to the defendant's and that he did not at any time change direction. The Nanaimo players say that the defendant continued his path right up and into the back of the plaintiff, colliding from behind extremely forcefully with the plaintiff at the goal line, his right shoulder connecting with the plaintiff's left shoulder blade area, causing the plaintiff to be propelled head first into the boards so quickly he did not have time to get his hands up to protect himself. These witnesses say the defendant's manoeuvre was an illegal check from behind.

5 The exception is Mr. Jepsen, another witness called by the plaintiff. Mr. Jepsen lives in Merritt and is a fan of the Merritt Centennials. He said the plaintiff and defendant were shoulder to shoulder through the face-off circle, jostling each other for possession of the puck. He could not say if the last contact between the two was to the back of Mr. Zapf's shoulder, but said there was no change in direction of either player prior to contact, a point which becomes important when considering the defendant Muckalt's evidence.

6 Mr. Lemon, the Nanaimo Assistant Coach, says it was his impression the defendant was going to hit the plaintiff in retaliation for the plaintiff's earlier hit on the Merritt player. There is no other evidence to substantiate this and this was not put to the defendant on cross-examination.

7 The defendants called seven Merritt players, including the defendant Muckalt and Ferguson, the assistant coach; six spectators including Brian Barrett, the owner of the team; Rasmussen, the referee, and Tremblay, the linesman. All Merritt witnesses agree that the plaintiff was ahead and to the right of the defendant, and all of them, with the exception of Brian Barrett, say the plaintiff's skating path was either down the slot between the two face-off circles or through the west half of the face-off circle in an angled path toward the puck. Mr. Barrett's description of the path of the plaintiff coincides with that of the plaintiff and his witnesses. The defendants' witnesses say that as the two players reached the goal line, the plaintiff either swerved to check the defendant, or set himself up to administer and receive a shoulder-to-shoulder check. The two players collided shoulder to shoulder, both facing 90 degrees to the end boards, and the plaintiff stumbled awkwardly into the end boards head first. All of the defendants's witnesses said no penalty should have been called, and in fact, none was called, the referee and linesman agreeing the hit was shoulder-to-shoulder, participated in by the plaintiff himself.

8 Mr. Muckalt's own version differs from the other defence witnesses in that he says Mr. Zapf ceased going for the puck and turned and skated across the bottom of the face-off circle, bringing his left shoulder into Muckalt's right shoulder and front. Muckalt says Zapf then turned back towards the end boards and stumbled head-first into them.

9 The referee Rasmussen's version is quite similar to Muckalt's. He says Zapf pivoted his body on his left foot until it was facing the side boards, pushed off with his right foot and came in contact with

Muckalt's chest and shoulder; he says Zapf was off balance when the contact occurred, twisted back around to the right and then went head first in to the boards.

10 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.

11 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.

12 Needless to say, all of this happened in a split second, at high speeds, and there is unfortunately no instant replay. During the trial, counsel for both sides asked each witness to re-enact his description of the collision through demonstrations in and outside the courtroom. Although much time was spent doing the demonstrations and then describing them for the record, they were, for the most part, unhelpful and confusing, as no account could be taken of the high speeds of the players or the fact that the incident occurred on ice and on skates.

Miscellaneous Evidentiary Issues

13 Before analyzing the evidence and determining the facts, I wish to deal with a number of issues that arose during the evidence.

i) Previous Conduct of the Plaintiff and Subsequent Conduct of the Defendant

14 Over the strong objection of plaintiff's counsel, evidence was led that Zapf was an aggressive player who would play the man rather than the puck, and who had accumulated a large number of penalty minutes in the previous season. I have not considered this evidence in determining whether Mr. Zapf initiated or participated in the check. Twenty-two witnesses testified as to their recollections of the incident on November 2, 1992, and this is the only incident with which I am concerned. As well, the evidence that Muckalt has since been voted Most Sportsmanlike Player in the League is of no assistance in determining what happened on that night. I must consider the evidence I have heard respecting the incident on the night in question and make my findings based on that.

ii) Statements of Jones and Murphy

15 Mr. Jones and Mr. Murphy were playing for Nanaimo on the night of the incident and were called as witnesses for the plaintiff.

16 Prior to any evidence being called, a number of arguments were made respecting the production of previous statements given to the Canadian Amateur Hockey Association's adjuster by witnesses which the plaintiff wished to call. Not surprisingly, plaintiff's counsel wished to know what these players had signed on previous occasions, although counsel had thoroughly interviewed them all. As

well, the witnesses themselves expressed reluctance to testify until they had had an opportunity to read their previous statements, although none said they had difficulty recalling clearly what had occurred without reading their statements.

17 During cross-examination, perhaps not the letter but the spirit of Mr. Jones' and Mr. Murphy's testimony was put in issue by the contents of the statements taken by the adjuster which were then put to them. Both contended on the stand that the check was an illegal hit from behind, whereas both statements referred to the incident as being accidental and unintentional. The flavour of Mr. Jones' statement particularly was quite different from his testimony; Mr. Murphy's less so, as the statement itself was somewhat ambiguous.

18 Counsel for the defendant, in rigorous cross-examination, told these witnesses that he would be calling the adjuster who took the statements, particularly in relation to a drawing which Mr. Jones claimed not to remember which appears to depict Mr. Zapf following a path not unlike that described by Mr. Muckalt and quite different from the diagram he drew at trial. The adjuster was not called and the diagram remained marked as an exhibit for identification only.

19 Counsel for the plaintiff asks me to draw an adverse inference from this. In view of the fact that I have not been asked by the defendants to find that the incident occurred as reflected in the diagram or the statements, but am asked merely to find that the stories changed and to evaluate the witnesses' credibility accordingly, I need not draw an adverse inference as to facts. I must assess the credibility of these witnesses in the context of the evidence as a whole, without considering that the adjuster was not called. Nevertheless, I am of the view that it was improper and unnecessary to attempt to pressure the witnesses by the threat that the adjuster would be called.

iii) Mr. Costello's Evidence

20 During the trial, the plaintiff made an application to have adduced for its truth a transcript of the evidence of Mr. Costello, a representative of the Canadian Amateur Hockey Association, which had been given at trial in the case of Unruh v. Webber, 98 D.L.R. (4th) 294, a decision which will be discussed in more detail later in these reasons. Mr. Costello had testified as to the concerns of the league respecting checking from behind and the measures it took to ensure it did not occur. I understood from the defendants' submissions on this issue that an argument might be made respecting the subtleties of checks from behind, the defendants arguing that the transcript of evidence of Mr. Costello, given in Unruh, should not be accepted for its truth in these proceedings. From my notes of that argument, the defendants anticipated an issue arising as to specific types of contact from behind: shoulder to shoulder blade as opposed to a push with hands or stick. In the end, no argument was made on this issue. I did not allow Mr. Costello's evidence to be received in its entirety, although I gave the plaintiff leave to apply with respect to facts which might be contained in the evidence, upon notice to the defendants, rather than have to subpoena another witness at some expense. The plaintiff elected not to pursue this.

iv) Bio-mechanical Engineer and the Mechanism of Injury

21 The defendants indicated in their opening that they intended to call a bio-mechanical engineer to explain the reaction of bodies in motion. They did not call this witness and the plaintiff asks that an adverse inference be drawn from this failure.

22 It is my understanding that adverse inferences arise against a party who bears the onus on the relevant issue and fails to call available evidence on it. Since the plaintiff here bears the onus of establishing the reaction of bodies in motion, I am not prepared to draw an inference adverse to the defendants because of their failure to call this witness.

23 Notwithstanding that the engineer was not called, the defendants relied on the evidence of the plaintiff that he hit the boards chin first and the written report of Dr. Vondette, a phsyciatrist called by the plaintiff. This expert initially described the mechanism of injury as one of extension, saying that this physical reaction would be a natural consequence of the plaintiff's version of the accident, that is, a blow to the back. Upon learning from the x-rays that the plaintiff's head could not have moved in such a fashion, but instead went straight into the boards, the defendants submitted that the plaintiff could not have suffered a blow to the back. In direct examination, Dr. Vondette, changed his opinion respecting the mechanism of injury at trial, without notice to the defendants, to agree with Dr. Wing, the defendants' witness, that the force exerted on the plaintiff's head was axial loading, that is straight on top the top of the head, with a slight flexion component, rather than extension or whiplash type force.

24 It would be fortunate if the difficult factual issues in this case could be resolved by an analysis of the mechanism of injury. However, physical reactions are dependant on the exact positions, relative speeds, and transfers of momentum of the players at the moment of collision. I note as well that Mr. Zapf is somewhat taller than Mr. Muckalt and, at the time of the incident was 40 pounds heavier. I have no expert evidence before me respecting probable physical reactions, that is head or body movements, for any of the scenarios described by various witnesses. I do not wish to speculate on such an important issue. I must consider only the evidence before me in reaching my conclusions.

Facts

25 Counsel for the plaintiff says I must decide to believe either the plaintiff or the defendants. He asks me to make a number of findings of fact, some of which are designed specifically to show that the defendants's version cannot be true. He says I should therefore accept the plaintiff's version. I agree with counsel for the plaintiff that Mr. Zapf's demeanor on the stand was straightforward and credible, whereas Mr. Muckalt's manner was more defensive and self-serving. Unfortunately Mr. Muckalt was subjected to cross-examination designed to show him as a callous unfeeling person, which made it difficult to determine if his manner was due to a desire to evade telling the truth or simply to a normal human reaction to being accused in this manner. In any event, my job is not so simple, or indeed so simplistic, that I can choose to ignore all the other witnesses and base my findings solely on the testimony of the parties themselves. I must consider the totality of the evidence and determine the facts from that.

26 The defendants called a number of credible witnesses from the spectators who testified that they clearly saw a shoulder to shoulder check initiated by the plaintiff. Counsel for the plaintiff invites me to take judicial notice of the fact that there is a style of hockey which is played by skilful players, particularly Russians, which allows the players to give "hidden hits" that appear to be legal checks but are in reality something else. Counsel also suggests that the lack of spectator witnesses who could confirm the plaintiff's theory of the accident is explainable by the fact that the game took place in Merritt, where it would be difficult to find witnesses who would speak up for a member of the opposing team.

27 As for the referee, counsel for the plaintiff asks me to conclude that he missed the penalty call, realized he had done so and formed a resolution to cover the fact that he had missed the call by filing false reports and continuing to lie about what he had seen at each subsequent meeting. It was suggested that the motivation for this was to ensure that the referee's chances of advancing in the ranks of officials to a possible career in the NHL were not compromised. There was no evidence to support any of this and it was not put to the referee in cross-examination.

28 I found these tactics to be unproductive and unhelpful in trying to sort out the very difficult factual differences in the testimony of a number of completely credible witnesses. Each recalls the incident in a different way, some of the differences being more significant than others. There is no way in which the evidence of the various witnesses, even those testifying for the same side, can be reconciled with each other on all details. These hurdles can be explained only by the frailties of eye-witness evidence, the speed of the game, the locations of the witnesses, differences in perception and recollection, and the passage of time.

29 Mr. Tremblay, the linesman, for instance, was a plausible witness, and testified that as he watched the puck proceed to the Nanaimo end, he was considering an icing call, but upon deciding that Mr. Zapf could play the puck, waved off the call and did a quick reverse turn. He says Mr. Zapf made a quick turn toward the corner and contacted Mr. Muckalt shoulder to shoulder. However, the plaintiff points out that the linesman's job was to watch the puck, and once he had decided to wave off the icing call, he turned his attention to getting back up the rink. It is possible his attention was not fully on the players at the point of collision. Mr. Minnis, a Merritt player and defence witness, was also in my view a believable witness, and he testified that Mr. Zapf initiated a hit on Mr. Muckalt and was not checked from behind. However, he said that as Mr. Zapf initiated the hit, Mr. Muckalt was still a couple of feet behind him, and he might be out by six inches in his estimate of where the bodies contacted each other. Mr. Brigden, a spectator and defence witness, testified as well that he saw the contact as shoulder to shoulder, although he said Mr. Zapf may have been slightly ahead at the point of contact.

Position of the Puck and Paths of the Players

30 Counsel for the plaintiff asks me to find that the puck was located in a precise spot along the boards in order to show that the defendant did not tell the truth on his examination for discovery when he constructed a "not to scale" sketch of the incident. In my view, this is a pointless exercise. It is probable, considering all the evidence, that the puck was within two feet of the end boards, between the side boards and the goal, slightly closer to the net. However, this does not allow the definitive findings the plaintiff contends for when Exhibit 69, the defendant's drawing, is considered. That drawing was made on a diagram of a hockey rink that bears only a superficial resemblance to the Merritt arena and to the diagram that was used at trial. The defendant drew an area representing the location of the puck that could cover 10 to 20 feet. To attempt to discredit the defendant's story through this drawing was unnecessary. It is clear when the defendant Muckalt's story is compared to that of the other witnesses for the defendants, including Brian Barrett, that the movements of the players could not be as he testified.

31 Mr. Muckalt said Mr. Zapf, who had been skating for the puck, abandoned his path to it and approached Muckalt from the side. He says Zapf was facing the side boards at the point of contact, making contact with Muckalt on the front and side of his (Muckalt's) right shoulder, then falling to the side and then stumbling to the front to go headlong into the boards. The evidence of Mr. Rasmussen,

the referee, was fairly similar to Mr. Muckalt's testimony, and he said as well that, as a result of turning and pushing off his right foot, Mr. Zapf was off balance immediately prior to contact.

32 Mr. Barrett seemed to me to be a credible witness on this particular issue, and appeared to be attempting to remember the incident to the best of his ability. He testified that he watched the game from the far end of the arena and so had a good view of the angles of the players, although he was a great distance away from the point of collision itself. He said:

> ...both players were skating hard towards the end boards, approximately -- Mr. Zapf was approximately two feet ahead of Mr. Muckalt at the start and a gap of approximately two feet, and that gap was maintained throughout with both skating towards the end boards, the gap between the two players, and at the time of contact both players were almost side by side at that point.

33 He testified that up to the point of contact, Mr. Zapf was going straight to the end boards. He said the contact was a hard hit, that the force was substantial. He agreed that his evidence and Mr. Zapf's evidence as to the direction of the two players prior to the collision were very close. Although Mr. Barrett was reluctant to say he disagreed with Mr. Muckalt's version, their evidence clearly differed. Mr. Barrett did not see Mr. Zapf swing around the bottom of the face-off circle and skate towards the side boards into Mr. Muckalt's path.

34 Although many of the defence witnesses had the plaintiff coming at more of an angle down the slot, the great majority of the witnesses for both parties testified that neither player changed direction, turned or swerved as they approached the end boards, and both were facing straight towards the end boards at the moment of collision. This is directly contrary to Mr. Muckalt and Mr. Rassmusen's evidence that Mr. Zapf turned at the bottom of the face-off circle and skated sideways into him. As well, nearly all the witnesses for both parties testified that both players were balanced immediately prior to contact, which runs contrary to Mr. Rasmussen's recollection that Mr. Zapf was off balance just prior to contact.

35 Although I cannot accept the evidence of Mr. Muckalt respecting the movements of the players up to the point of collision, it does not follow that I must accept the evidence of the plaintiff in its entirety. The plaintiff says he headed in toward the puck and never altered his course, except for a very slight angling to the left so he could more efficiently pick up the puck on his backhand. He denies that he took the initiative and attempted to check the oncoming Muckalt. He also denied that it is common for a defenceman to let a forechecker get close and initiate contact to bump him off the puck. He said he has seen this happen rarely, but it is stupid, "chicken shit," not a smart play, and he never did it himself in his career as a defenceman.

36 Against this, however, is the evidence of at least ten witnesses, some of whom even plaintiff's counsel admit are credible, who say that although Mr. Zapf could have reached the puck ahead of Muckalt, he did brace himself to give and receive a shoulder check.

37 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.

38 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.

Mechanics of Collision

39 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.

40 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.

41 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. 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.

Legal Analysis

42 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?

43 Counsel for the plaintiff says that, even if Zapf knew he would be hit, and even if he set himself up to check Muckalt, Zapf was entitled to believe, once in the danger zone, that he would not be hit in a way that would not allow him to defend himself. In that zone, plaintiff's counsel submits, the standard of care changes, and liability flows automatically from a hit from behind, even in these circumstances of this case.

44 The defendants' position is that even if there was contact from behind, if it was unintentional in the sense that it occurred when attempting to carry out a shoulder to shoulder check, then the plaintiff's case must fail. That is, the check itself might be delivered intentionally, but the manner in which it was carried out, involving contact from the rear, was unintentional and was a mere error in judgment. Moreover, the defendants say that the plaintiff was fully aware that contact was taking place and was participating in it.

45 The plaintiff says, first, that Muckalt never claimed to have made an error in judgment in the manner in which he administered the check. Secondly, the hit must have been delivered with such force and surprise that Zapf was propelled like a cannon, or as if he had hit a trip wire, without time to get his hands up to protect himself. The plaintiff places great stress on the elements of force and

surprise, arguing that any other scenario (a misplaced hit by Muckalt or a stumbling by Zapf) would not have produced this effect.

46 According to Rule 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).

47 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. I note as well that Mr. Zapf testified that the Junior A league has a rule of automatic icing, I presume another measure designed to prevent collisions at high speed near the boards.

48 In law, however, there must be more for liability to flow. There must be intention, negligence or recklessness. The Rule, or any penalty flowing from it, is relevant only as one aspect to consider in assessing the appropriate standard of care.

49 The case of Unruh v. Webber et al 98 D.L.R.(4th) 294 (B.C.S.C.), 88 B.C.L.R.(2d) 353 (B.C.C.A.), a decision of Meredith J., upheld by the Court of Appeal, hovered over the entire proceedings before me. In Unruh, the defendants were found liable as a result of a check from behind administered by Webber to Unruh, which rendered Unruh a quadriplegic. The trial judgment in Unruh was delivered three days after Mr. Zapf's accident. It was clear that plaintiff's counsel in the case before me was of the view that the circumstances here duplicated those in Unruh and that the defendants were hard put to manipulate their evidence and witnesses in order to prevent an inevitable and identical finding. However there are important factual differences between this case and Unruh that must be examined.

50 In Unruh, the trial judge found that the defendant "intentionally pushed or checked the plaintiff from behind, that Unruh was propelled head first into the end boards of the hockey rink and thus broke his neck...I think it probable that Webber pushed Unruh in the back either with his stick or with

his hands". According to the evidence accepted by the trial judge, this occurred while Unruh was a few feet out from the boards with his head down, attempting to play the puck at his feet. The trial judge found liability, holding that the defendant was "duty bound to avoid contacting [the plaintiff] from the rear, especially in the proximity of the boards, as he could foresee that disastrous results might well ensue".

51 In that case a minor penalty was called. The argument at the Court of Appeal focussed on whether the trial judge had erred in identifying the proper standard of care, in that, according to the defendant, he had held in effect that an infraction of the rule against checking from behind in and of itself was sufficient to ground liability. The defendant argued that the accident occurred in the heat of the moment, with no time to think of other options and was but an error in judgment.

52 The Court of Appeal noted that the trial judge based his finding of liability not only a breach of the rule but on a finding that the plaintiff was reckless. The Court held that a breach of the rule is not necessarily determinative of the issue, but is one of the circumstances which may be considered in determining the appropriate standard of care. That standard is: "What would a reasonable competitor in the defendant's place do or not do?" The Court accepted 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.

Speed and Stresses of the Game

53 There is no doubt that hockey at the Junior A level is a fast, hard-hitting game, with violent and rough body-contact expected. There is also no doubt that contact from the rear is strictly prohibited.

54 It is important to remember that at this level of hockey, the players are highly trained and skilled. This is the level from which the NHL drafts are picked. In fact, Muckalt has since been drafted by the NHL and is presently attending a hockey university in the United States on a scholarship. He is a highly skilled player.

Rules of the Game

55 Unlike Unruh, there was no penalty called in this game. This is of no significance because I have found that the contact could not have taken place as the referee testified it did. There is no doubt that the conduct the plaintiff complained of, had his evidence been accepted in its entirety, would have justified a penalty, and also, being indistinguishable from the facts in Unruh, would have resulted in civil liability as well. Nevertheless, notwithstanding that I have not accepted the entirety of the plaintiff's evidence, the facts as I have found them would also result in a penalty, based on the absolute accountability which flows from a reading of Rule 53.

Assumption of Risk

56 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?

57 I must consider the applicability in these circumstances of the doctrine of volenti non fit injuria to the standard of reasonable care expected of these players. At p. 67 of the May 10, 1995 transcript, Zapf said:

> Q: And if you were injured as a result of trying to initiate a check on Mr. Muckalt, that was the kind of risk you were prepared to accept injury arising from?
>
> A: If I was placing a check on Mr. Muckalt and I got injured, that's something I would accept, yes.

57a It is my understanding from plaintiff's counsel that they do not dispute that if the injury occurred as a result of a straight shoulder to shoulder check, the defendants are not liable. This would be an accepted risk in the game. They say a check from behind in any circumstances, however, is not. They take the position that the defendant was bound to avoid contact from the rear at all costs, once in the "danger zone," i.e., around the goal line. They say such contact could not be consented to.

[The Court did not number this paragraph. QL has assigned the number 57a.]

58 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.

59 Taking the above elements into account, the question of fact which I must decide is: What would a reasonable competitor in Muckalt's place do or not do?

60 In Herok v. Wegrzanowski (Webster) 7 October 1985, Vancouver CA003074, the Court of Appeal, in dismissing an appeal against the trial judge's finding of liability arising from an unintentional and inadvertent hit with a hockey stick, said that not all careless acts, but only those "quite outside the risks assumed" will be a foundation for civil liability. The Court did not accept the position of the defendant appellant that "unintentional acts in the course of play which cause injury will not attract liability".

61 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. 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.

62 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.

63 I conclude that a reasonable competitor, approaching another from the rear at a high speed near the boards, would not administer a check that he knew or ought to have known was likely to hit a portion of Zapf's back.

64 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. 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.

65 I am concerned that placing such burdens on players may restrict the fast-moving and physical nature of the game, whose roughness and violence appears to be a large part of its appeal, and to anyone who watches NHL hockey, it is clear that contact of the type that occurred here is fairly common and is rarely penalized. Nevertheless, I can only consider the evidence before me and the context in which I must weigh it: that is, the Junior A hockey league, the Rules applicable to it, and the appropriate standard of care for those players. This league is a dangerous one; young players are trying to establish their reputations for the NHL draft, and fast aggressive play is important. That is, however, the very reason that skill and care must be taken, and that is the reason that Rule 53 and the automatic icing rules were initiated.

66 I note that the Negligence Act was pleaded by the defendants, but was not mentioned by either party in argument and I have therefore not addressed it. As the plaintiff was acting entirely within the

rules of the game, it would not, in my view, be appropriate to apportion liability against him in these circumstances.

Vicarious Liability of the Merritt Centennials

67 The issue of vicarious liability of the Merritt Centennials was not argued, although it was referred to in passing several times and is denied in the Statement of Defence. It is clear Mr. Muckalt was playing for the team at the time of the incident. I cannot see that I need concern myself with this issue, as neither party addressed it in argument.

DAMAGES

68 The issues before me are:

1. General damages
2. Special damages
3. Lost future income calculated by taking into account the following factors:

    a) chances of employment with the Edmonton P.D.
    b) whether it is reasonable for the plaintiff to move to British Columbia
    c) appropriate contingency rate
    d) residual earning capacity

4. Cost of future care

    a) life expectancy
    b) whether it is reasonable for the plaintiff to move to British Columbia

5. Tax Gross-up

    a) portfolio mix
    b) tax changes
    c) management fee
    d) timing of house purchase

6. In trust claim to parents - agreed at $5,000.00

Like the trial judge in Unruh, I am asked to decide these issues not knowing if there will be money available to carry them out or whether the plaintiff's ultimate decisions will be compatible with my conclusions. All I can do is set out what appears to me to be reasonable and prudent in the circumstances and on the evidence before me.

69 While I recognize that my task is to assess damages, not to calculate them, after dealing with the various arguments and reaching my conclusions, I must leave the calculations of the amounts for cost of future care, loss of earning capacity and tax gross-up to be done by an actuary in accordance with my findings. If the parties cannot agree on the calculations, they may be spoken to.

Background

70 This accident occurred on November 7, 1992 when the plaintiff was 18 years old. He is now 21. He suffered a severe bursting compression fracture of the 4th cervical vertebra. His diagnosis is incomplete quadriplegia due to a C4-C5 fracture dislocation, which means he has no motor function below the lesion level, but has some sensory sparing over most of his body. He will be in a wheelchair for the rest of his life. He has no use of his legs, but can move his arms in all directions, although his motor power, other than in his elbow flexors and to a slight degree his elbow extensors, is non-existent. He cannot make a grip and has no use of his fingers. He requires attendant care to perform all his daily functions, including bowel and bladder care, although he is able to tell when either is full and so does not experience episodes of incontinence.

71 His mental faculties, hearing and eyesight are unimpaired, and he is otherwise a healthy young man. His state of mind is positive. He does not suffer from depression or self-pity. His determination and outlook are extraordinary.

72 Following the accident, Mr. Zapf underwent surgery to stabilize his neck. After being discharged from acute care on November 24, 1992, he entered Glenrose Rehabilitation Hospital, where he remained until June 1993. Upon his release from Glenrose, he went to Houston, Texas to attend a clinic called Walkback, and to look into the possibility of experimental surgery. He returned from Houston only three months before the trial started, so when examined by the various experts, he was not established in a routine in Canada. At present, he lives in a specially built extension to his parents' house in Edmonton.

73 It was clear from Mr. Zapf's evidence that he wishes to be as independent as is possible in his situation and minimizes his disability as much as he can. He devotes much of his time to exercise and maintaining his strength and flexibility. I am satisfied that if there is a method of functioning which may be more difficult but which allows him to manage on his own, he will take it. At present he uses only a manual wheelchair which he can wheel on his own for short distances on flat smooth surfaces. He realizes an electric wheelchair would increase his mobility, but would be heavier, wider and more expensive. As well, he feels people in electric wheelchairs get lazy and are perceived differently.

74 Mr. Zapf requires an attendant. At present, he has a registered nurse who comes to the house in the mornings for four hours and returns at night. His parents both work but their hours are coordinated so that Mr. Zapf is seldom left completely alone for periods of time. However, he says he enjoys and requires time alone and has no difficulty being left for short periods, if he is in his wheelchair and has a phone, which he is able to operate on his own. He has many friends in Edmonton who visit regularly.

75 He wishes to drive and there is a possibility that he may be able to, but his capability to do so has not yet been assessed.

General Damages

76 This is a "catastrophic injury." The parties are agreed that the plaintiff is entitled to the maximum permitted by the Supreme Court of Canada. The present capped amount will be calculated by an actuary.

Special Damages

77 The defendants accept the plaintiff's figure of $91,379.00, subject to a finding respecting renovation of future accommodations. Plaintiff's counsel, although originally arguing an award should be made which would allow Mr. Zapf to renovate his accommodation every time he decided to

move, reached agreement with counsel for the defendants that the cost for renovations would be $50,000.00, with the only question being whether the plaintiff, having spent that amount to renovate his parents' home, should also be accorded the cost of renovating a future residence. The plaintiff argues that he cannot be expected to live with his parents for the rest of his life and when he does buy a house, it must have an extra room and modifications that he would not have to pay for, but for the accident. The defendants argue that if the plaintiff immediately moves out of his parents' home, as he testified at discovery he would like to do, it was unreasonable to renovate it for such short term use and would be unfair to expect the defendants to pay for two sets of renovations.

78 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 of this judgment) or should pay for the set of renovations already done, but not both.

Loss of Capacity to Earn Income

Edmonton Police Department

79 The plaintiff wished to become a member of the Edmonton Police Department. This was the only career he says he had considered. Superintendent McCann, who had been in charge of recruitment for several years and who is a close personal friend of the plaintiff's family, testified that there is no question that the plaintiff would have become a member of the force, not-withstanding unfavourable demographics and large numbers of applicants.

80 Cst. Simioni, who is on the present recruitment team, testified on behalf of the defendants to the various requirements and examinations for selection, and said that a personal recommendation from a force member, even a superintendent, would add only one point out of one hundred to a candidate's chances, although he said that Superintendent McCann has a great deal of credibility in the area of recruitment. The normal size for a recruitment class is 24 - 26 students; the anticipated number of applicants for any given class is about 3000. Cst. Simioni confirmed Superintendent McCann's evidence that there will be no hiring for the Edmonton Police Department until 1998.

81 Mr. Zapf's background and personality suggest that he would have successfully completed the various preliminary selection procedures. The present demographics of selection (which emphasize recruitment of women and visible minorities) tell against him, as do the extremely large numbers of competing applicants, most with university degrees or other post-secondary education. Mr. Zapf's marks in high school were not good, likely due to his complete preoccupation with hockey. If Mr. Zapf had wanted to enter the Force, he would have had to have gone on to junior college, which he testified he had planned to do. In fact, while playing in Lloydminster, just prior to being transferred to Nanaimo, he had taken two courses at a junior college. He did not complete the term due to his transfer.

82 I note as well that although Mr. Zapf testified that he had intended to obtain a degree before applying for the police force, a step which would have increased his chances, the report of the defendants's vocational assessment expert, Mr. Hohmann, states that Mr. Zapf's high school marks were not high enough to meet entrance requirements, so he would have to have upgraded at a community college before transferring to university. Given Mr. Zapf's determination to became a policeman, I am

satisfied that he would have made the effort necessary to obtain the required additional education in order to increase his chances of success with the police force.

83 The test for future loss, according to the Court of Appeal in Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 is one of "substantial possibility". In my view, the evidence discloses a substantial possibility that Mr. Zapf would have become a member of the Edmonton Police Force after completing a course at college or university. It is likely Mr. Zapf could have passed the general written examination and the physical examination, which comprises 45 points. The remaining points are largely subjective, coming from the interview process and an assessment of the candidates personal characteristics and special initiatives.

84 The defendants say I should assign a percentage to this likelihood to reflect the reality of the situation: that is, that the plaintiff has lost only an opportunity for employment and should be compensated for the percentage of likelihood of his obtaining it, which the defendants says is 25-50 percent. That percentage should be applied to the difference between average male earnings and the police earnings. In Steenblok, the Court of Appeal said:

> ... in dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring...

85 In Pallos v. I.C.B.C. 100 B.C.L.R. (2d) 260, the Court of Appeal again examined the principles underlying assessment of future loss, recognizing other approaches besides that used in Steenblok. However in the case at bar, the approach suggested by the defendants is reasonable and provides the most convenient and appropriate way to deal with the evidence before me. The plaintiff put no other options or scenarios before me. Counsel rested their entire case on this issue on a guaranteed entry into the police force. This is not a conclusion I can come to on all the evidence.

86 I have considered the evidence of Superintendent McCann, to which I attach some weight, in light of his long experience and credible reputation in the recruiting area, and the evidence of Constable Simioni respecting the very real hurdles facing any applicant to the Edmonton Police Force. I have also considered that the plaintiff, although always expressing a desire to be a policeman, had, at his young age, taken no steps toward such a career. I assess the chance of the plaintiff becoming a member of the Edmonton Police Force at 60 percent. It is likely that he would have attempted to join the force at age 25 upon completion of either four years university, or two years of college and two years relevant work experience. The defendants accept that, had Mr. Zapf joined the police force, he would have written and passed the promotional exams, and would have been promoted to Senior Constable and Senior Constable II at seven and eleven years respectively.

87 I must also consider the likelihood of Mr. Zapf's being promoted to sergeant. According to Constable Simioni, whose evidence on this point is not contentious, at present there is a standing list of forty eligible candidates out of 550. In the past year there have been nine openings for promotion to sergeant; and the middle management contingent is downsizing so there will likely be fewer sergeant positions in the future.

88 The defendants have used a method based on taking the years of 45 to likely retirement at 55 and assessing a possibility of promotion within that time. They take 50 percent of the difference between a Senior Constable's salary and the average of a detective and sergeant's salaries and carry that amount through to retirement. I did not understand the plaintiff to take objection to this method and it

seems reasonable to me, given the impossibility of determining this issue with any degree of certainty. However, I have determined (see below) that the plaintiff would retire at 65, not 55.

89 I accept the general approach suggested by defendants' counsel for the calculation of loss of future earning capacity. That is, the plaintiff should recover an amount equal to the average earnings for Alberta males from age 25 to 65, plus 60 percent of the difference between that amount and the amount of earnings of a policeman from age 25 to 65. As the plaintiff presented no alternatives to entry into the police force, no argument was made on the appropriate statistics to be used in calculating the plaintiff's loss of earning capacity if he did not become a policeman. Mr. Collisbird's report uses the statistics for male high school graduates. It may be that further submissions are required on this point if counsel cannot agree on the calculations for future earning capacity, given the findings I have made.

90 There was a suggestion that the plaintiff, if he became a policeman, might retire early with maximum pension after thirty years service and might take another lower paying job. I am not prepared to speculate on this possibility on the evidence before me. I assume that the plaintiff would work as a policeman to age 65.

91 Mr. McKellar, the plaintiff's actuary, calculated the loss of pension benefits on the assumption that it would be indexed at 60 percent of general inflation; he said in cross-examination that if the indexing were actually at 50 percent, his numbers would have to be recalculated. In fact, according to Constable Simioni, the pension is indexed at 50 percent of the increase in the consumer price index, the assumption used by Mr. Collisbird, and which should therefore be used in the calculations. I understand that counsel for the plaintiff agrees with the figure for loss of pension benefits set out by the defendant of $52,000.00. Once again, if the parties cannot agree on the effect on pension benefits of my findings that Mr. Zapf had a 60 percent chance of becoming a policeman, and that his working life with the police force would continue to age 65, this may be spoken to.

Contingencies

92 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 percent, 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.

93 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.

Wage Loss Until Projected Entry into the Work Force

94 The parties agree Mr. Zapf would have made $2,000.00 per year in the summers of 1991 and 1992. The plaintiff argues that he should be compensated on the basis of full-time work and should not be penalized because he chose to use his time playing hockey. However, the plaintiff is being

compensated for wage loss. His evidence was clear that he intended to continue to play hockey until he had to leave Junior A. He was not intending to work, except for the part-time jobs he had held before. He is compensated for his lost hockey playing in general damagers and there is no evidence before me to show that his hockey playing bore any relationship to his earning capacity or was in any real sense training for a career.

95 In my view, the plaintiff should be compensated on the best estimate of past wage loss: that is in all probability $2,000.00/year. As the money was earned in the summer, the plaintiff should receive that full amount for 1993, 1994 and 1995, as he still expected to be playing Junior A hockey this year. That amount is $6,000.00.

96 For the subsequent summers during the period until 1999, when Mr. Zapf would be expected to enter the work force, he would likely be a student at least a good portion of that time, working only in the summers, as he testified he expected to go to college or university prior to attempting to enter the police force, which would be at age 25. Assuming some increase over the past years in the amount of summer wages he could make, and considering that the working summer is longer for university students than for high school students, but that there is a high cost associated with obtaining a degree, I assess the plaintiff's loss of this period at $12,000.00.

Residual Earning Capacity

97 The plaintiff testified that, if he married, he would be motivated to contribute financially to a family, and if he had the opportunity to work in the future he would do so.

98 The only viable option for the plaintiff is in the computer field, something in which he is currently uninterested. Mr. Mickelson, a quadriplegic of the same level as the plaintiff, who lives with his wife and children in Nanaimo, was called by the defendants and testified that he works on a contract basis in the computer area and made about $5,000.00 last year. He is expecting more work this year and hopes to get into home sales.

99 As mentioned earlier, the plaintiff has until recently been living in Houston and concentrating on exercising and strengthening. He has not begun to evaluate his functional level in an occupational context.

100 Plaintiff's counsel says no adjustment should be made for residual earning capacity and relies on evidence confirming the plaintiff's competitive unemployability. That is uncontroverted. However, Mr. Zapf obviously possesses great amounts of determination and motivation, and it is not probable that he would not take advantage of an occupational opportunity if one exists.

101 The vocational assessment expert called by the defendants, Mr. Hohmann, testified to the rehabilitation and employment opportunities available to the severely handicapped. Mr. Hohmann says in his report that there is a narrow range of jobs open to Mr. Zapf, but he would not be capable of maintaining competitive employment on a full time basis. There is a window of opportunity open to the plaintiff and Mr. Hohmann testified to the various programs and opportunities specially aimed toward employing the disabled. He candidly admitted to the limitations facing the plaintiff in the employment field, and these were confirmed by Dr. Reebye, the plaintiff's psyciatrist.

102 The defendants submit that the plaintiff will want to work and will receive some remuneration for it, and suggest that the figure accepted by the trial judge in Unruh for a similarly disabled man is appropriate. That figure is $100,000.00 over the lifetime of the plaintiff, which, according to the calculations of Mr. Collisbird, works out to working a little over 1/6 time.

103 In order to adopt this figure, I would have to be satisfied that the plaintiff could earn at least as much as Mr. Mickelson earned last year for the next twenty years. Although I accept that the plaintiff will avail himself of any opportunity he can, in view of the evidence of Dr. Reebye and Mr. Hohmann on this issue, I am not satisfied that he could achieve and maintain that level of income consistently. I assess his residual earning capacity at $50,000.00.

Future Care

Life Expectancy

104 Two different approaches were taken on life expectancy. The plaintiff suggests his life expectancy would be 48 years. This is based on a Canadian study by W.O. Geisler, "Survival in Traumatic Spinal Cord Injury", Paraplegia 21, 1983. The defendants's expert, Dr. Rally, also uses the Geisler study but refines it to some extent because that study makes no allowance for the various levels of quadriplegia or for the existence of sensory sparing. It was not disputed that with his level of sensory sparing, the plaintiff is less likely to develop pressure sores which are the main threat to a quadriplegic's health. As well, the plaintiff can shift his weight in his wheelchair, although he cannot lift his buttocks completely off the seat. The fact that he can shift his weight is also important to his ability to prevent pressure sores.

105 Dr. Rally referred to an American study conducted by M.J. DeVivo et al, "Prognostic Factors for Twelve Year Survival After Spinal Cord Injury". Dr. Rally states in his report that, in his opinion, Mr. Zapf's life expectancy is 41 years.

106 Counsel for the plaintiff submitted, after trial, the new Canadian Life Tables which increase the life expectancy of a 21 year old male from 53.34 years to 54.64 years. Counsel for the defendants agree that these tables would cause Dr. Rally to increase his estimate by 1.3 years, but say that Dr. Anderson had already taken such an increase into account in his figures.

107 The defendants says the plaintiff's expert, Dr. Anderson, made several erroneous assumptions in reaching his conclusion. Most important of these is that Dr. Anderson had the impression that the plaintiff is a C-6-7 quadriplegic, when in fact he is a C-4-5. The plaintiff's expert did not consider statistics which differentiate between the various levels of lesion or function, but lump all quadriplegics together, even though Dr. Anderson admitted that level of lesion and function are relevant.

108 On the other hand, Dr. Rally, the expert for the defendants, admitted that his tests for sensory sparing did not produce the same results as Dr. Vondette's, although he is willing to accept Dr. Vondette's findings and adjust his opinion by one year. The level of sensory sparing is particularly important as the level of sensation in the skin allows the individual to avoid developing pressure sores. Dr. Rally still considered that the plaintiff was likely to develop pressure sores and was the only health care professional to categorize an inflammation of some sort on the plaintiff's elbow as a pressure sore.

109 In my view, Dr. Anderson's report is more seriously flawed, in that the assumptions which proved to be erroneous are more fundamental. However, Dr. Rally could have been more generous respecting his adjustment for increased sensory sparing, as it is clear from the evidence that the plaintiff has had no pressure sores and has the ability to tell when his skin is being irritated, which are important aspects in determining life expectancy. It would have been reasonable, in my view, for Dr. Rally to have adjusted his estimate more substantially than he did, in view of Dr. Vondette's findings,

and also considering the evidence of the plaintiff which I have heard and which Dr. Rally did not have the advantage of.

110 Based on the new tables and the adjustment of Dr. Rally's figure, I therefore find that the plaintiff's life expectancy to be 45 years.

Place of Residence

111 Costs vary depending on whether Mr. Zapf moves to B.C. or remains in Alberta. Mr. Zapf says he wants to move because the climate is warmer and he generally finds it easier to function in a warmer climate. He keeps his apartment very warm because he says his body feels more connected as a whole and his spasms are less frequent when it is warm rather than cold. The plaintiff has been in Houston almost continuously since being discharged from the rehabilitation unit, so he has not spent a winter on his own in Edmonton since his injury.

112 Mrs. Zapf says it would be better for her son to move away from Edmonton because he is a well-known sports figure there. She fears that, although he is a novelty to his friends now, they will drift away as their focus changes and her son will have to face the reality of his life away from that milieu and get on with a new stage of his life. Mrs. Zapf is a sensible woman and shows a clear-sighted appreciation of her son's future and long-term welfare.

113 His father will support him no matter which decision he makes.

114 It is indeed Mr. Zapf's decision, but it is not one the defendants should pay for. 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.

115 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.

116 In my view, the calculation of damages should be done on the basis of Alberta figures.

Cost of Care

117 In considering this issue, I have proceeded on the basis that the plaintiff is entitled to reasonable and medically necessary care. This head of damage is not a compensation for loss of amenities. As well, although earlier cases such as Andrews v. Grande & Toy, [1978] 1 W.W.R. 577 discussed the issue of live-in attendants versus institutional care, it is now accepted that home care is the appropriate standard and the defendants do not submit otherwise.

118 The defendants' expert, Ms. Kircher, took Mr. Zapf as she found him, two years post accident, and accepted his version of daily routine and requirements. Ms. Schulstad for the plaintiff took a more

protective view of the plaintiff, holding the opinion that he does not realize what his requirements are or what is safe and healthy for him.

119 Subject to one qualification respecting transportation, which I deal with below, I find Ms. Kircher's approach reasonable. I was impressed with her testimony and with the thoroughness of her research. Mrs. Shulstad's opinions are not based on the evidence, but are rather based on her private views of what is appropriate for spinal cord injured patients, regardless of the particular needs of this plaintiff. Her report contains many items that are not presently used by the plaintiff and would simply be wasteful. She also failed to consider the equipment he already has and recommended other equipment which would clearly be of no use, and assumed Mr. Zapf would never drive. Yet all the evidence before the Court, including Mr. Zapf's own determination, is that he will probably be able to, once assessed and properly equipped.

120 I do not intend to go through the many items provided for in each report in order to explain my preference for Mr. Kirker's approach. I will deal only with the major items. The areas of future care in which large expenditures are required are personal care attendant, wheelchairs and equipment, and transportation.

Personal Care Attendant

121 Many agencies were contacted by both experts, all with the intention of having a 24 hour presence, but with actual paid hours varying between 8 and 16. During the 24 hours, and assuming the plaintiff sleeps through the night, which he generally does, with at most one or two calls on occasion, the attendant is entitled to four hours off, divided according to negotiation with the client, and taken on or off the premises, once again through agreement. The plaintiff's parents, who have begun to share in his care in the past few months obviously and understandably do not like to leave their son alone at any time. However, the plaintiff requires his time alone and the preponderance of the evidence, including Mr. Zapf's own testimony, indicates that he can be left for 2 or 3 hours alone if properly set up beforehand. Ms. Kirker and Ms. Shulstad both recommended a live-in attendant who is qualified to perform catheterizations. They differed on the definition of "live-in" and on the necessary qualifications. Ms. Kirker said she researched three agencies who were prepared to provide 24 hour live-in care based on billing 8 - 12 hours a day, or $168 to $190, averaged out at $176. The attendants would get a four hour break a day, not necessarily all at once and not necessarily off the premises. They would expect to sleep through the night, but would accept being awakened once or twice. The defendants called five home care professionals who all agreed with this basic scenario, and testified that they could, on short notice, provide professional and competent attendants to meet these requirements.

122 All agreed as well that each of the attendants would be competent to perform intermittent catherizations (4 - 5 per day) and bowel requirements (every second day), either from prior experience or through training which would be provided at no extra expense to the client. Ms. Ang, the head of home care for G.F. Strong, testified that the standard of catheterization proposed by the defendants was in accordance with recommended practice.

123 Ms. Shulstad felt that unless an attendant was paid at the equivalent of 16 hours a day and was at least a Licenced Practical Nurse, Mr. Zapf would not receive the required level of care. However, none of the home-care professionals who testified would treat a 16 hour billing basis as a "live-in" situation, and none would require an LPN or nurse to do catheterizations. There was no evidence before me to support a medical requirement for 16 hours of care per day. The plaintiff's position

appeared to be based on a contention that, regardless of medical necessity, competent and professional help could not be had for less than a rate based on 16 hours. I am satisfied on all the evidence produced by the defendants that they can.

124 Ms. Leclair, called in rebuttal by the plaintiff, subject to the defendants's objections, testified that she would expect staff to burn out if paid 10 hours in a live-in situation. However all the home care workers testified that 2 or 3 attendants would share the job, with a back-up for breaks if necessary. Ms. Leclair also felt that Mr. Zapf, being only 20 years old, would likely keep late hours which would be difficult for an attendant who would need his sleep. However Mr. Zapf testified that he only socializes on weekends and there was no evidence before me to suggest that this is a problem with his current attendant, or that it would be a problem with any of the care-givers who testified.

125 As for the admissibility of Ms. Leclair's evidence, counsel for the defendants said that her evidence could have and should have been given in the plaintiff's case, whereas the plaintiff said that Ms. Kirker's report had not specified hours per day but only daily rates, and Ms. Leclair was responding to the issue of daily hours of work required as put in issue by the defendants. The issue of the number of hours per day was obviously at the basis of each expert's opinion, but given that Ms. Kirker did not actually specify the hours used as a basis for daily payment in her report, I will allow Ms. Leclair's evidence to be admitted. It does not, however, for the reasons set out above, change my views on Ms. Kirker's report.

126 In addition, the defendants called Mr. Mickelson, who is a quadriplegic with very similar limitations as the plaintiff. Mr. Mickelson injured himself in a swimming pool and is dependant on his own resources and government assistance. He testified to the level of care he requires and the amount of time and functions he can manage on his own. As would be expected, his independence and privacy are important to him, and he is proud of his ability to manage with the minimum of assistance. He is married and does not require a live-in care-giver, but requires assistance with bowel and bladder functions. He is allotted four hours per day by the government, but says even if he could afford more he would not need it. If he lived alone he would need assistance with meal preparations and would want someone there at night.

127 Since Mr. Zapf has only recently returned from the WalkBack Clinic in Houston, where the emphasis appears to have been on exercising and increasing strength, rather than on functional independence, it is early to assess the actual level of independence he can reach. From his own testimony, however, it is clear that he is determined to be as functional as he can and has the patience, endurance and motivation to achieve maximum independence. In my view he will function at Mr. Mickelson's level of independence. Ms. Kirker's recommendations are more than adequate to achieve this level.

128 Ms. Schulstad's level of care is more appropriate for an older bedridden person who is incontinent and must be constantly turned, or for a quadriplegic who cannot do pressure shifts, is subject to pressure sores and who has no bladder or bowel sensation. This level is not, in my view, justified or desirable for the plaintiff.

Wheelchairs and Equipment

129 Ms. Kirker makes provision for Mr. Zapf to obtain an electric wheelchair, to be replaced every seven years, and for his present manual chair to be replaced in three years, and every seven years thereafter. Ms. Shulstad recommended replacement for both every three years, but adjusted this replacement time to five years during her testimony. Her evidence was not entirely clear as to whether,

in establishing the replacement period for each chair, she assumed that each would be used 100 percent of the time, rather than considering that each would be used only a portion of the time. It is my view of her evidence that she did not make allowance for shared use on these items or on several others (for instance the Roho cushions), and her estimates should not be accepted.

130 In any event, I found Ms. Kirker's research and recommendation on these items persuasive and I accept it.

131 Ms. Shulstad recommended that Mr. Zapf purchase an exercise machine to allow him to exercise his lower limbs as well. Mr. Zapf has an arm bicycle which he uses regularly, but has no muscle strength in his lower limbs. An exercise machine is unnecessary.

132 Notwithstanding that Mr. Zapf's apartment is equipped with a ceiling track lift, Ms. Shulstad recommended the purchase of another bath lift immediately. Ms. Kirker recommended that the expensive ceiling track lift currently installed in the apartment be moved to any new residence, and then replaced in 12 years by a water-powered lift. The present apartment has a wheel-in shower, which Mr. Zapf could use on visits to his parents. I agree that the defendants should not have to pay for two fully equipped residences.

Transportation

133 The only item with which I would differ with Ms. Kirker is related to the cost of a vehicle. Ms. Kirker discounted the amount for the mini-van by $15,000.00, the average cost of a new vehicle, on the basis that Mr. Zapf would have had to buy a new vehicle in any event. At the time of the accident, Mr. Zapf was driving an old second-hand car worth $500.00. He was at that time an unpaid hockey player and part-time student, a state in which he was likely to remain for several years; it is unlikely he would have purchased a new vehicle for some time. I would therefore allow an additional $10,000.00 under this heading to compensate Mr. Zapf for an expenditure he would not have made at this time, but for the accident. Otherwise, I accept Ms. Kirker's estimates for transportation costs and replacement times.

Appropriate Multipliers

134 Mr. McKellar acknowledged that in setting the multipliers for his calculations he used two methods, first, the annuity sum certain method, which is not in accordance with generally accepted actuarial practices as it does not acknowledge any contingency other than death. He acknowledged that this method overstates the cost of care from an actuarial point of view. The second method he used, the actuarial present value method, was also used by Mr. Collisbird. In fact Mr. Collisbird's multiplier, calculated by the second method, is slightly higher than that calculated by Mr. McKellar. I accept Mr. Collisbird's multiplier of 22.909.

135 There were other issues argued before me respecting appropriate depreciation levels and deductions for items already purchased. I do not propose to deal with these matters, save to say that the approach of Ms. Kirker and Mr. Collisbird on these items is, in my view, fair and reasonable.

136 Given that I have found that a house purchase is imminent, the cost of yard work provided for in the body of Ms. Kirker's report should go into the calculation for cost of future care. I was asked to express an opinion on whether this expense would be for "personal needs and care" and therefore not deductible under the Income Tax Act. I express no opinion. Unlike the issue of eligible medical expenses (see page 64 of these reasons), I have no basis on which to do so. The plaintiff will have to dispute this with Revenue Canada in the proper context and after proper argument.

Award for Future Care

137 Mr. Collisbird made his calculations on the basis of Ms. Kirker's report, and on the basis of Mr. Zapf having a life expectancy of 41 years and also of 48.5 years. This resulted in figures for the cost of future care, assuming Mr. Zapf continues to live in Alberta, of $1,585,360.00 and $1,706,407.00 respectively. It should be a simple matter to calculate the cost of future care based on a life expectancy of 45 years, with the minor adjustments for the vehicle and yard care. If counsel cannot agree it can be spoken to.

Tax Gross-Up

Portfolio Mix

138 The plaintiff says he should be provided with funds to enable him to pay taxes on an investment portfolio consisting only of bonds. The defendants say the portfolio should be a mixture of bonds and equity.

139 If the plaintiff invests only in bonds, the tax required will be much higher than if he invests in a bond/equity split.

140 Counsel for the plaintiff says Mr. Zapf will not be holding a sum of money to invest for profit. The money is his only provision for the future. He may indeed decide to speculate with it but that is his decision, and to risk it is simply not reasonable. Bonds do not give as high a return, but are secure and reliable. The plaintiff says a portfolio consisting partially of equities will not provide the necessary level of security.

141 The test is: What would a prudent investment counsellor recommend, given the plaintiff's special circumstances? The plaintiff needs these funds as "medicine money," as counsel terms it. He cannot afford to play around with them, but he also cannot afford to be shortchanged. Dr. Hamilton, the defendants's expert, testified that a 60/40 split would be conservative, but not unduly so. He said with 100 percent bonds you know exactly what you will get and when you will get it, but you cannot know what its real value will be because the effect of inflation is unknown and unprovided for, a point also made by the plaintiff's expert, Mr. McKellar, in re-examination. With a bond/equity split, the chances are much greater of obtaining a real return of 3.5 percent. Mr. McKellar did not say that he would recommend 100 percent bonds, and in fact said in cross-examination that a bond/equity mix would be less risky, provided the mix is right. He did not think a 60/40 split was unduly risky. Any risk of the equity portion is offset by the larger bond portion, a distribution of various stocks in the equity portion itself, and by the services of a money manager.

142 Support for a mixed portfolio is found in the report of the Law Reform Commission on fund management, and by the decisions of the Courts in Scarff v. Wilson 42 B.C.L.R. (2d) 273 (B.C.S.C.), and Morrison v. Hicks, 51 B.C.L.R. (2d) 203 (B.C.S.C.). The Court in Unruh decided that a 100 percent bond portfolio was appropriate, and the Court of Appeal was not persuaded the judge had erred in this finding. Counsel for the defendants wished to address the evidentiary basis upon which this finding was made, which is not evident from the judgment itself nor from the appellate decision. Counsel for the plaintiff objected. I have considered only the face of the decision and am unable to say that the evidence was similar to the evidence before me, the latter being, of course, the basis upon which I must make my decision.

143 I am satisfied that a prudent investment counsellor would recommend a mixed portfolio in a 60/40 bond/equity split.

Tax Changes

144 Mr. McKellar calculated tax gross-up on the basis of the existing tax structure, that is that tax brackets and personal exemptions will always be indexed at 3 percent less than inflation. This approach is based on the decision of Tucker v. Asleson (1991), 62 B.C.L.R. (2d) 78, following dicta of McEachern C.J.B.C. in the first decision of Scarff v. Wilson 33 B.C.L.R.(2d) 290. This issue was not dealt with in the appeal of Tucker.

145 The defendants's expert, Mr. Collisbird, admitting his approach differs from that of the Court in Tucker, assumed marginal tax brackets adjusted upwards for inflation each year. The Law Reform Commission of British Columbia considered this issue in 1994 and stated that without periodic adjustments to the tax brackets and fixed dollar amounts to recognize the effect of inflation, a gross-up for a young plaintiff with a modest income may project an outlandish rate of tax in later life, an unrealistic result. Mr. McKellar agreed that this was the result of his method of calculation, but was not confident that Revenue Canada would change its accounting practices in the future. The two approaches result in vastly different amounts for tax gross-up, the defendants suggesting figures ranging between $400,000.00 to $650,000.00, and the plaintiff between $1,900,000.00 and $2,300,000.00 (the difference partly accounted for by the different portfolio mixes and projected future care costs).

146 The trial judge in Unruh relied for the principles of tax gross-up on the report of the defendants' consulting economist, Mr. Taunton, who assumed that the personal income system would revert from partial to full indexing in 1997. Counsel before me disputed that the trial judge had actually adopted Mr. Taunton's assumption respecting full indexing of tax brackets, but after reading the relevant portion of the judgment, I am of the view that he did. An issue was raised before the Court of Appeal in Unruh respecting the mechanics of calculation of gross-up, but there was no issue taken with respect to the assumptions.

147 Notwithstanding the approach taken in Unruh, it does not appear from the judgment that argument was directed toward the appropriate assumptions to be made on this issue. The better course, in my view, is to rely on the clear statement in Tucker v. Asleson that the existing tax structure is the appropriate basis from which to calculate tax gross-up.

148 I reach this conclusion reluctantly in view of the report of the Law Reform Commission, and the evidence of both actuaries that the result is outlandish and unrealistic, but I have read Tucker v. Asleson carefully and recognize that the learned judge heard full argument on the issue and had before him the very concerns raised in the Commission's report. He nevertheless chose to adopt the statement of McEachern C.J.B.C. in Scarff v. Wilson supra, and I should be bound by that decision.

149 Counsel for the defendants also argues that I should assume the current provincial surtax will be removed as it was introduced as a temporary measure. I have no basis upon which to speculate on the likelihood of this occurring and will not do so.

Deduction of Medical Expenses

150 The defendants put before me a report of Chris Chong of Ernst and Young in which various items to be used for the future care of the plaintiff were said to be deductible as medical expenses for income tax purposes. The plaintiff objected to the Court receiving this evidence. However, there is no contrary opinion before me and no suggestion that Mr. Chong is incorrect in his statements. I accept that these items should be deducted for the purpose of calculating tax gross-up.

Management Fees

151 Given my finding with respect to the portfolio mix, I leave it to the parties to calculate an appropriate management fee, after consultation with an investment counsellor. If agreement cannot be reached, it may be spoken to.

Characterization of House Purchase Costs

152 The defendants ask me to determine from which portion of the damage award the house purchase moneys should come, as this will affect tax gross-up. Counsel for the plaintiff says the defendants should not be entitled to specify from which fund the housing purchase price will come and that the plaintiff should be able to take it out of the non-pecuniary damages, which would not affect the amount allowed for tax gross-up. Argument on this issue was brief and neither counsel cited any authorities for their respective positions.

153 I am assuming that Mr. Zapf will obtain separate housing whether he chooses to remain in Edmonton or not, and will buy a house in the near future. At discovery he testified that he would like to buy a house immediately and he said at trial that, if not for the injury, he would be living on his own now. He also said at trial that he might consider renting for awhile rather than jumping into a big purchase. From Mr. Zapf's testimony, I gather that he considers a house a large capital investment, something he wishes to think about, and not something he requires for medical reasons or solace. He said during his testimony on May 10, 1995, when his discovery evidence respecting buying a house immediately was put to him:

> Question on Discovery: So what time frame did you have for when you would like to be in a house; just as soon as you can afford it?
>
> Answer on Discovery: Exactly, yeah. If I could afford it today I would do it today.
>
> Answer at Trial: Yeah, I was asked that. I remember saying that too but I don't know. I have thought about it too like lately and I know that if -- I wouldn't just want to jump in and buy a -- buy a house just like that. Like I would like to, you know, live, maybe rent for a while just to live in an area knowing -- know the area first before I would jump into like buying property.

154 Taken as a whole, I am of the view that the evidence of the plaintiff discloses a wish to buy a house in the near future. A reasonable assumption would be within one year, that the purchase will be in Edmonton at the value proposed by the defendants ($150,000.00), there being no other evidence on this point before me.

155 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.

156 I leave the effect of this determination on tax gross-up for the parties to calculate.

Actuarial Fund Adjustment

157 All calculations should be adjusted appropriately to the date of this judgment.

Deductibility of Previous Insurance Payment as a Collateral Benefit

158 This is another issue which was argued briefly in passing, and without, as far as I can determine from my notes, substantive response from the plaintiff, except to say the matter was not pleaded.

159 The only evidence before me on this issue was the plaintiff's statement that he received an amount of $200,000.00 from the hockey league. There is no evidence before me respecting the nature of this payment or the reason for it. In these circumstances I am not satisfied that it should have any effect on the present judgment.

COSTS

160 The plaintiff will have his costs at Scale 3.

HUMPHRIES J.

cp/d/mrz