COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Moskaleva v. Laurie***,
2009 BCCA 260

Date: 20090610
Docket: CA034897

Between:

Natalia Moskaleva

Respondent
(Plaintiff)

And

Mildred Laurie

Appellant
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, February 28, 2007,
Moskaleva v. Laurie, M034207

Counsel for the Appellant:	J.D. Baker, Q.C. W.M. Finch
Counsel for the Respondent:	D.G. Cowper, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia September 5, 2008
Place and Date of Judgment:	Vancouver, British Columbia June 10, 2009

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[1] In an action for damages for personal injuries caused by the appellant's negligence, the jury awarded the respondent $245,000 for non-pecuniary damages, $300,000 for past loss of income, $1,350,000 for future economic loss, and $32,500 for future care costs. Special damages were agreed at $2,734.43.

[2] The appellant seeks to set aside the verdict on five grounds. In the first three grounds the appellant argues that she was deprived of a fair trial because: (a) the opening submissions of respondent's counsel were improper and prejudicial; (b) the cross-examination of a psychiatrist called by the appellant exceeded the bounds of proper cross-examination and thereby prejudiced the jury; and (c) the trial judge's interventions and questions during the testimony of three expert witnesses called by the defence impugned the credibility of those witnesses. In the fourth ground of appeal, the appellant alleges that the trial judge erred in his instructions to the jury by failing to explain properly the law relevant to past and future economic loss and by inaccurately stating the appellant's position on that issue. The relief the appellant seeks on the first four grounds of appeal is an order for a new trial.

[3] In the fifth ground of appeal, put forward in the alternative, the appellant argues that the awards for non-pecuniary damages, past wage loss, and future economic loss are inordinately high, not supported by the evidence, and inconsistent with the jury's award for cost of future care.

[4] For the reasons which follow, I would not accede to any of the grounds of appeal the appellant advanced.

II. Background

[5] On 2 July 2002, the respondent was struck by the appellant's car while she was crossing with the light in a marked cross-walk in Maple Ridge. Liability was not admitted but there was ample evidence to establish that the appellant's negligence

caused the accident. There was no suggestion of any contributory negligence on the part of the respondent.

[6] At the instance of the appellant, the trial was scheduled to be heard by a judge and jury. The respondent's preliminary motion to discharge the jury was unsuccessful.

[7] The trial commenced in January 2007 and, following an eighteen-day trial, the jury gave its verdict, finding that the respondent's injury and loss had been caused by the appellant's negligence and awarding damages totalling $1,930,234.43.

[8] The main area of contention in relation to the respondent's injuries was whether she had suffered a mild traumatic brain injury as a result of the accident. Other issues seriously in contention were the respondent's pre-accident earning capacity and the extent to which the respondent's injuries had affected her income earning potential.

[9] The respondent was born in Russia in 1953. She had a post-secondary education in science and mathematics and had training and a work history as a computer software engineer both in Russia and in Canada. The respondent and her husband moved to Canada in 1997. Her employment in Canada was with WestNet Media, a business in which she and her husband were partners. At the time of trial, the respondent was 53 years old.

[10] The respondent's treating physician, Dr. P.D. Golin, and the specialists to which she was referred, Dr. Raymond Ancill, a psychiatrist, Dr. Donald A. Cameron, a neurologist, and Dr. F. Spellacy, a neuropsychologist, were all of the opinion that she has sustained a brain injury. The doctors called by the appellant, Dr. Alexander Levin, a psychiatrist, and Dr. Peter Rees, a neurologist, were of a contrary view.

[11] Dr. Golin was the respondent's family doctor. He speaks Russian and was readily able to communicate with the respondent. His final diagnosis was one of traumatic brain injury, post-traumatic headaches related to a head and neck injury, cognitive disorder due to traumatic brain injury, post-concussion syndrome,

depression with associated anxiety, chronic pain disorder, multiple bruises, abrasions of the left elbow, neck strain, back strain, right knee strain and tinnitus.

[12] The opinion of Dr. Ancill, the psychiatrist, was that the respondent had sustained a mild traumatic brain injury, and had developed a post-concussion syndrome. He was also of the view that the respondent continued to suffer from a number of cognitive, neuropsychiatric, functional and emotional deficits, a major depressive episode, as well as a pain disorder.

[13] The opinion of the neurologist, Dr. Cameron, given in his report dated 3 August 2005, was that the respondent probably sustained a mild traumatic brain injury and that she probably suffered from predominant symptoms of post-traumatic brain injury syndrome or post-concussion syndrome for a period of several months following the accident. He also thought it probable that the respondent developed predominant psychological dysfunction in the form of anxiety and depression.

[14] The neuropsychologist, Dr. Spellacy, said in his report dated 18 January 2005, that the respondent showed signs of cognitive impairment and thought it likely that her symptoms were, at least in part, the result of a mild traumatic brain injury. He also stated that the psychological symptoms of anxiety and altered mood, of which the respondent complained, were sufficient to account for many of the impairments she reported.

[15] Dr. Rees, the neurologist who examined the respondent at the request of the appellant, expressed his opinion in a report dated 19 March 2004 that the respondent had suffered a possible head injury but not a brain injury. He opined that the respondent had sustained an adjustment reaction anxiety state but was of the view that it was unlikely the respondent had sustained a brain injury.

[16] Dr. Levin, the psychiatrist who had examined the respondent for medical-legal purposes, expressed the opinion in his report dated 22 February 2005, that it was unlikely that the respondent had any clinically significant cognitive deficits to diagnose her with post-concussional syndrome or disorder. Dr. Levin, who also

spoke Russian, was not convinced that the respondent had sustained any clinically significant head or brain injury. He thought the respondent's description of her symptoms, as well as evidence from the medical documentation, suggested that she had developed a brief adjustment reaction, or at most, adjustment disorder.

[17] Dr. McPherson, an orthopaedic surgeon called by the appellant, stated in a report dated 16 June 2006, that he could find no objective evidence of the respondent having any physical disability related to the motor vehicle accident.

[18] There was a good deal of evidence called about the respondent's past ability and experience in the design of computer software and about her diminished cognitive ability and change in personality after the accident. The respondent's actual pre-accident earnings and her earning capacity in the field of computer software design after coming to Canada but before the accident were contentious. The evidence of the respondent and her husband was to the effect that, as a result of her injuries, the respondent was incapable of pursuing her vocation in software design. The medical evidence called by the respondent supported a conclusion that the effects of the brain injury on her cognitive abilities were permanent.

III. Grounds of Appeal

Ground One: Is a new trial required as a result of the opening statement given by respondent's counsel to the jury?

[19] Under the first ground of appeal, the appellant argues that the opening submissions of respondent's counsel were improper and prejudicial and resulted in an unfair trial. To support her submissions that the opening statement failed to conform to the proper function or purpose of an opening, the appellant refers to *Halsbury's Laws of England*, 3rd ed. (London: Butterworths, 1953), vol. 3, at 69, and to what was said by Finch C.J.B.C. in *Brophy v. Hutchinson*, 2003 BCCA 21 at paras. 24-25, 9 B.C.L.R. (4th) 46. As to the effect of an improper opening statement, the appellant refers to *Brophy* at para. 48.

[20] The appellant complains that the opening statement contained no explanation as to its purpose and, rather than outlining the facts the respondent expected to

prove, gave a description of the accident, the mechanism of a brain injury, and the respondent's training and employment background, all as if they were established fact, thereby giving the impression that all that was important for the jury to consider was the evidence of the respondent's symptoms in the aftermath of the collision. The appellant further submits that in the opening, the respondent's symptoms and the consequences of the accident were couched in pathos through an emotional appeal to the challenges faced by the respondent as an immigrant to Canada from Russia. The appellant argues that while the complete effect of the opening remarks of respondent's counsel cannot be known to a certainty, the character of those remarks was clearly prejudicial. The appellant contends that the fullness of their effect was to cement for the jury as fact the assertion that the respondent had suffered a brain injury, was incapable of performing work, and had suffered a significant economic loss.

[21] The appellant also complains that a phrase used by the respondent's lawyer at the conclusion of his opening improperly suggested that the accident, instead of being the result of negligence, was volitional. In that regard, the appellant refers to the statement in the opening that the appellant "chose to launch her car forward from that stop sign and not pay attention to who was in the cross-walk". In the appellant's submission, the effect was to present the appellant's case in the context of the respondent as victim and the appellant as culprit. The appellant argues that the effect was to demonize the appellant at the inception of the trial, thus implicitly characterizing her as a person who intentionally disregarded the interests of others, rather than being merely negligent.

[22] Another complaint the appellant makes is that it was improper for respondent's counsel to use evidence in the form of photographs in the opening.

[23] In my view, none of the arguments put forward under the first ground of appeal can succeed.

[24] The appellant's characterization of what was said in the respondent's opening is overstated and, in some instances, inaccurate. Prior to counsel for the

respondent beginning his opening statement, appellant's counsel informed the trial judge that he did not dispute that the appellant was negligent but said he was not in a position to admit liability. As a result of the position taken, liability was obviously in issue. In the circumstances, for respondent's counsel to refer to the respondent's recollection of the accident in his opening statement is unremarkable. At trial, appellant's counsel did not object to the description given by respondent's counsel as to how the accident had occurred and did not complain that respondent's counsel had "demonized" the appellant.

[25] The suggestion that a miscarriage of justice occurred as a result of what was said by respondent's counsel in his opening about the circumstances of the accident is further undermined when considered along with the submissions on liability made later in the trial. Before making his final submission to the jury, respondent's counsel advised the trial judge and appellant's counsel that he intended to submit that "one of the reasons why we're here is because Ms. Laurie [the appellant] says she's not at fault". Appellant's counsel stated he did not have a problem with that submission and later agreed it was appropriate for the trial judge to instruct the jury to find the appellant negligent. I further note that during the course of his closing submissions, appellant's counsel told the jury:

> Now, you've heard that Ms. Laurie ran her vehicle into the plaintiff. There's no doubt. There's no doubt that Ms. Moskaleva was in the intersection. There's no doubt that Ms. Moskaleva had the right-of-way. There is nothing that I could say to suggest that Ms. Moskaleva did anything wrong, or that my client demonstrated all the care that she should have. She didn't. She didn't. As a result you may find that my client was negligent. I don't have anything to say on that. Nothing I can say. I think it's fairly obvious.

[26] In view of the foregoing, there is no substance to the submission that the remarks in the respondent's opening about the appellant's manner of driving at the time of the accident resulted in the kind of prejudice that would require a new trial.

[27] In his opening, respondent's counsel showed the jury some photographs of the respondent and her husband. Appellant's counsel had been informed in advance by respondent's counsel that he intended to use the photographs in his

opening and appellant's counsel told the trial judge he did not have "a problem" with the photographs. After the opening had been given, appellant's counsel repeated that he did not object to the use of the photographs.

[28] The appellant's contention that the respondent's counsel stated evidence as fact, thereby resulting in prejudice requiring a new trial, ignores the trial judge's opening instructions to the jury. Near the commencement of the trial, the judge gave the jury various instructions, including an instruction on the purpose of counsel's openings. After referring to the burden and standard of proof, the trial judge said, in part:

> I will turn next to the opening remarks of counsel. One of the Mr. Faheys will begin the trial once I have concluded my remarks. He will take the opportunity to explain to you what he expects the evidence will disclose and give you an overview of his case. Counsel for the defendant will do so at a later time after the plaintiff's evidence has been called. These opening remarks are made so that you will have a better understanding of the nature of the evidence that the parties intend to call; however, the opening remarks are not evidence and you cannot rely on what the lawyer says in his opening to prove the facts that you have to prove to decide the case. You must only accept that the case is proven based on evidence that is called at court.

[29] Counsel for the respondent referred throughout his opening to the types of evidence he intended to adduce and what that evidence would show. He specifically told the jury there would be controversy in the evidence concerning brain injury, concussion, and post-concussion syndrome and asked the jury to pay close attention to the evidence that would be led. There were some phrases or statements in the respondent's opening that might have been more carefully couched, but considered in the context in which they were uttered, they were not such as to exclude consideration of the case for the appellant.

[30] After the respondent's counsel had concluded his opening statement, appellant's counsel asked the trial judge to remind the jury that the opening was not evidence. The trial judge decided his earlier instruction was sufficient, and in his charge, the judge reminded the jury that they were to rely on their own recollection of the evidence, not anything said by counsel.

[31] Of considerable significance in regard to this ground of appeal is the fact that appellant's counsel told the trial judge he was not seeking a mistrial as a result of anything said during the opening. This is a case in which appellant's counsel specifically put his mind to the effect of the opening and elected not to seek an order discharging the jury. A deliberate election, such as occurred in this case, is a powerful circumstance militating against the appellant's submission that a new trial is required to rectify an unfair trial. While the facts of the case differ from the case at bar, the observation of Hall J.A. in *R. v. Doyle,* 2007 BCCA 587 at para. 28, 248 B.C.A.C. 307, is apposite:

> In my opinion, having made a reasoned decision not to seek a mistrial, I do not consider it is open now to counsel for the appellant to advance an argument that the discovery and use by the judge of the evidence resulted in an unfair trial proceeding. A rational choice was made at trial by experienced and competent counsel and it would not be appropriate to now allow this point to be the foundation of a contrary position in this Court.

[32] Further support for the view expressed by Hall J.A. may be found in *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513, 38 B.C.L.R. (2d) 1 at 10 (C.A.), and in *Morton v. McCracken* (1995), 7 B.C.L.R. (3d) 220 at para. 13, 57 B.C.A.C. 47.

[33] I would not accede to the first ground.

Ground Two: Did the cross-examination of Dr. Levin on his qualifications deprive the appellant of a fair trial?

[34] The appellant tendered Dr. Levin, a psychiatrist, to give opinion evidence concerning the occurrence of a brain injury, and the respondent's self-reported mental condition. Dr. Levin spoke Russian and was able to conduct his examination of the respondent in Russian. Dr. Levin's opinion, which was central to the defence case, was that the respondent could have had an adjustment disorder but had likely not suffered a brain injury as a result of the accident.

[35] At the outset of his testimony, Dr. Levin was examined and cross-examined on his qualifications. Following cross-examination, the respondent's counsel did not take issue with Dr. Levin being qualified to give opinion evidence, but he later urged

the jury not to accept Dr. Levin's evidence, based in part on his training and qualifications.

[36] The question of whether a witness is permitted to give opinion evidence is a question of law to be decided by the trial judge. The question of the weight to be given to opinion evidence is solely within the province of the trier of fact, in this case, the jury. Determination of the question of law may be made in an inquiry in the absence of the jury, but that was not the course followed here and no objection was taken at trial to the process or procedure being followed.

[37] Dr. Levin testified that he was first trained and qualified as a psychiatrist in Russia. Counsel for the respondent questioned Dr. Levin on his educational training and experience and, in particular, whether he had been trained at the Serbsky Institute. During his cross-examination, respondent's counsel made suggestions to the witness regarding scrutiny of the Serbsky Institute by international psychiatric organizations. Counsel also suggested that psychiatry was used in the Soviet Union to imprison people who disagreed with the State and that the Serbsky Institute received much negative publicity because many Soviet dissidents were incarcerated and tortured there.

[38] The appellant contends that the cross-examination was improper because respondent's counsel, without any evidence, suggested that Dr. Levin was associated with forms of State-enforced terror of psychiatric patients. The appellant further argues that the respondent's line of questioning was irrelevant and unrelated to the actual qualifications of Dr. Levin. In the appellant's submission, questions asked of Dr. Levin were deceptive and inaccurate and served to poison the minds of the jury so they would view his evidence with suspicion. The appellant further submits that the questions asked also served to unsettle the witness, for after the cross-examination by respondent's counsel, Dr. Levin said: "But I feel that I'm on trial here for what happened in Russia".

[39] To support her argument on this ground, the appellant refers to the decision of the Supreme Court of Canada in *R. v. Fanjoy*, [1985] 2 S.C.R. 233 at para. 9,

21 D.L.R (4th) 321, in which it was held that the failure of a trial judge to restrain abrasive or abusive cross-examination can constitute an error of law. The appellant also refers to the decision of the Ontario Court of Appeal in *R.v. Fair* (1993), 16 O.R. (3d) 1 at 23-24, 26 C.R. (4th) 220 (C.A.), in which Finlayson J.A. referred to the damaging effect of unsubstantiated suggestions made in cross-examination. In that case, Crown counsel, while cross-examining a character witness, posed a question suggesting anti-Semitism as a character trait of the accused. Of the cross-examination, Finlayson J.A. said:

> There was no follow-up of this remark. No attempt was made by the Crown to establish through the complainant or the appellant that such an instruction had ever been given. Nor could there have been on this collateral issue. This statement by Crown counsel was, in the vernacular, a "cheap shot". It is not even a question. It is a statement by the Crown that is completely unsupported by the record. Crown counsel then asked the witness if this news would surprise him knowing full well that it was highly unlikely that Dr. Spinner would have volunteered to be a character witness for the appellant if the statement was true and he had known of it. I am becoming increasingly concerned about the tendency of some trial counsel to throw out allegations in cross-examination which they make no attempt to substantiate. In this case, the statement in question raised a poisonous side issue which in no way was relevant to the charges against the appellant.
>
> Unfortunately, the trial judge did not help matters. In his charge to the jury, he properly instructed them that there was not a shred of evidence to support this statement. However, he then gave some measure of respectability to what was done by the Crown by stating "in my view discrimination is *violence"*.

[40] The appellant also makes reference to John Sopinka*,* Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. *(*Toronto: Butterworths, 1999) at 935, concerning the abusive power of cross-examination in which suggestions are made that are not subsequently proved:

> . . . it accords a power to cross-examining counsel that does not appear warranted in the interest of justice in some instances as it may be the subject of considerable abuse. … Juries, in particular, could be influenced by suggestions made in cross-examination, but not subsequently proved.

[41] The respondent's position on this ground is that the questions asked were neither improper nor irrelevant, and refers to the transcript to support her submissions about the reasons for the cross-examination taking the course it did.

[42] Witnesses who are permitted to give opinion evidence are nevertheless subject to cross-examination about their education, professional training and experience. Such questions are relevant, especially in cases in which there are conflicting opinions, to provide the trier of fact with some foundation for assessing what weight, if any, ought to be given to the expert's testimony. Where an expert obtained his or her qualifications may be of some significance in making such an assessment. For example, training obtained at an institution that is accredited is generally preferred to an unaccredited institution because it is reasonable to assume that an accredited institution adheres to certain recognized standards within the particular discipline or profession whereas that cannot be assumed with an unaccredited institution.

[43] According to his testimony, Dr. Levin received most of his psychiatric training in what was then the Soviet Union. He acknowledged he had received training in forensic psychiatry and medical-legal aspects of psychiatry in Moscow at the Central Institute of Forensic Psychiatry, which is also known as the Serbsky Institute. According to Dr. Levin's *curriculum vitae,* this part of his training took place in 1986-1987.

[44] Respondent's trial counsel cross-examined Dr. Levin at some length about his training, about apparent omissions and contradictions in his *curriculum vitae*, and about the Serbsky Institute in particular. Counsel also put propositions to Dr. Levin about Soviet psychiatry and the Serbsky Institute. Dr. Levin accepted, rejected or qualified the propositions put to him.

[45] The transcript shows that during cross-examination, Dr. Levin acknowledged that on his *curriculum vitae* he had not identified the institution at which he trained as the Serbsky Institute. He agreed that he had received ten years of education and training in the "Russian tradition of psychiatry" and that the Serbsky Institute is "the largest and most prominent psychiatric hospital in … the former Soviet Union". He agreed that he knew about complaints made to the World Psychiatric Association about techniques used at the Serbsky Institute and Russian psychiatry in general

and that, in response to the concerns raised, the Soviet All Union Society of Psychiatrists resigned from the World Psychiatric Association in 1983 and was not readmitted until 1989. Dr. Levin's training at the Serbsky Institute took place during this period.

[46] Before us, the respondent also submitted that Dr. Levin's responses to questions about the Serbsky Institute were evasive and uninformative. By way of example, when it was suggested psychiatry had been used in the Soviet Union to imprison those of whom the state did not approve, Dr. Levin did not deny psychiatric abuses in the 1980s; instead, he responded with a digression about a much earlier time when, according to Dr. Levin, Stalin had a paranoia about the conduct of certain doctors. Dr. Levin added "it doesn't mean that every psychiatrist in Russia, or every doctor, did anything wrong for Russian people." When Dr. Levin was asked whether Russian psychiatry had been "used by the state as a tool of suppression", Dr. Levin replied "[n]ot at the time when I was in the training and studying psychiatry in Russia".

[47] That juries may be influenced by suggestions improperly made in cross-examination is not contentious. In this case, an examination of the transcript shows that this was not a case of trial counsel throwing out abusive allegations in cross-examination without expectation of having to substantiate them. The questions asked in cross-examination about where and when Dr. Levin had taken his training in psychiatry, and questions about the withdrawal of the Soviet All Union Society of Psychiatrists from the World Psychiatric Association at the time Dr. Levin was learning his profession, were neither abusive nor unsubstantiated. Instead, the respondent's questions had a basis in fact acknowledged by the witness. The questions were relevant to the quality and standards of training of a student of psychiatry in Russia in the period when the profession in that country had none of the advantages afforded by membership in the World Psychiatric Association, including consideration of current theory and practice standards.

[48] Dr. Levin's subsequent qualification to practice psychiatry in Canada was, of course, also a matter to be weighed by the jury but the fact that he was qualified to practice would not make the questions about his initial training irrelevant.

[49] I would not give effect to the appellant's arguments on the second ground of appeal.

Ground Three: Were the trial judge's questions of Doctors Levin and Rees and Mr. Hildebrand unfairly prejudicial and such as to deprive the defendant of a fair trial?

[50] Under the third ground of appeal, the appellant takes issue with certain questions the trial judge asked during the testimony of Drs. Levin and Rees and Mr. Hildebrand. To support the argument on this ground, the appellant refers to what was said by O'Halloran J.A. in *R. v. Pavlukoff* (1953), 106 C.C.C. 249 at 267, 17 C.R. 215 (B.C.C.A.), about the stature of a trial judge trying a case with a jury and its potential for influence on the minds of the jury:

> The Judge in Court officially and physically occupies a position of great power and prestige. His power and his control of the trial plain to see in Court, are matched by his knowledge of the law and his experience in weighing and analysing evidence. His lightest word or mannerism touching the reliability of a witness and the guilt of the accused, cannot fail to bear heavily upon the members of the jury who naturally look up to him (and in more ways than one) as the embodiment of the great traditions of the law. To the jury the presiding Judge appears as the great neutral. Anything that emanates from him, carries for them at least all the ear-marks of balanced justice.

[51] The appellant complains that the questions asked of Dr. Levin unfairly impugned his credibility and suggested a basic scepticism of his testimony. In my opinion, this complaint is without substance.

[52] During Dr. Levin's very lengthy testimony, the trial judge asked some questions of the witness. A contentious issue at trial was whether the respondent has sustained a brain injury or whether, as the respondent's experts opined, there were other medical explanations for her condition, such as depression. In the direct examination of Dr. Levin, the judge asked some questions about Dr. Levin's opinion of the symptoms relative to depression, and during cross-examination, he asked

Dr. Levin why he would attach significance to the fact that the respondent took a painkiller without his permission during his examination of her.

[53] It is well established that judges may ask questions of witnesses for the purpose of clarification of evidence. In *Jones v. National Coal Board,* [1957] 2 All E.R. 155, Lord Denning said at 160:

> Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination.

[54] In this case, it was well within the province of the trial judge to clarify evidence given by Dr. Levin about the symptoms of depression and that is particularly so when the evidence was relevant to the pivotal issue at trial.

[55] It was unclear from his evidence what basis Dr. Levin had for attributing any psychiatric significance to the respondent's action of taking a painkiller without his permission during his examination of her, yet a paragraph in his medical report was devoted to making note of it. When asked by counsel in cross-examination why he included such a note in his report, he responded by saying that "it's very unusual that in the middle of an interview a patient would take a pill from her purse without any mentioning of that."

[56] The questions the judge asked with which the appellant now takes issue were directed at clarifying Dr. Levin's answer that suggested there was some psychiatric significance to the respondent's action. The answers the witness had given in cross-examination about why he had made a note of it in his report had been unresponsive to the question. The three questions the judge then asked the witness sought a responsive answer. One of the judge's questions, in which he expressed astonishment about the inclusion of the note in Dr. Levin's report, might have been more circumspectly stated, but when the three questions are viewed in the context of the doctor's responses in cross-examination, they appear to me to be unremarkable.

[57] The appellant's second argument under this ground is that the manner of the trial judge's interjections during the examination in chief of Dr. Rees expressed scepticism of the doctor's opinions. The appellant also argues that during the course of the cross-examination of Dr. Rees on the question of amnesia, the judge intervened and offered his own opinion, which had the effect of supplementing the thrust of the cross-examination.

[58] At trial, no objection was taken to the questions the trial judge asked and a review of the appellant's transcript references does not support the argument that the questions, taken in the context in which they were asked, demonstrated a reasonable apprehension of bias.

[59] As he had done with other expert witnesses, the trial judge asked questions of Dr. Rees in order to clarify his evidence on such matters as the source of the doctor's knowledge about the respondent's loss of consciousness or amnesia following the accident. At that time, counsel for the appellant did not raise any objection to the trial judge's questioning.

[60] Before Dr. Rees testified, expert witnesses called by the respondent had opined that loss of consciousness is not required for a diagnosis of mild traumatic brain injury. Prior to Dr. Rees being called as a witness, there was limited evidence concerning the events immediately following the accident. No eyewitness had testified about the mechanics of the accident or the respondent's condition or responsiveness immediately following the accident. The trial judge's questions to Dr. Rees were consistent with the evidence that had been led to that point.

[61] In my opinion, the appellant's arguments with respect to the questions the trial judge asked of Dr. Rees are unpersuasive and I would not give effect to them.

[62] Under this ground of appeal, the appellant also complains about the effect of questions the trial judge asked of the appellant's economist, Mr. Hildebrand, during his examination in chief, and with what the judge said at the conclusion of Mr. Hildebrand's testimony. In the appellant's submission, the following remark had

the effect of neutralizing the credibility of the witness by imparting to the jury the trial judge's view that Mr. Hildebrand's economic testimony was not comprehensible.

> Thank you, Mr. Hildebrand. I'm not sure I understand everything you say, but thank you. Thank you for attending.

[63] As the respondent pointed out in argument before us, the trial judge asked questions of the economists called by both parties. The judge made it clear that he was unfamiliar with the type of evidence they were giving and asked questions to clarify the experts' methodologies and conclusions. For example, during the examination in chief of the appellant's expert, Mr. Benning, the trial judge told the jury, "I'm not terribly familiar with it, economists' evidence" and "I have to really concentrate on it myself." The judge put a series of questions to Mr. Benning, seeking to summarize Mr. Benning's opinion "in my own simple language" and to clarify points he did not follow. The trial judge explained that "I really have trouble balancing my cheque book, never mind anything else" and apologized for his confusion and "lack of knowledge". During Mr. Hildebrand's testimony, the judge asked similar questions in order to clarify his understanding of the evidence.

[64] The appellant also argues that the effect of the judge's questions was to restrict direct examination, thereby excluding consideration of the subject of income splitting. Before Mr. Hildebrand testified, the respondent had led evidence that the income from WestNet, the company through which the respondent and her husband worked, had been allocated in accordance with the amount of work each had performed. In the appellant's submission, the trial judge's questions invited Mr. Hildebrand to comment on the evidence that had previously been led on the allocation issue. Mr. Hildebrand's report questioned whether the tax returns were an accurate reflection of their respective contributions but appellant's counsel had previously advised the trial judge he was not suggesting the respondent had participated in some form of tax evasion. Other questions asked by the trial judge during Mr. Hildebrand's testimony on both direct examination and cross-examination sought to confirm his understanding of Mr. Hildebrand's evidence.

[65] An examination of the transcript shows that the trial judge's questions and interjections during the testimony of the two economists were directed at understanding their evidence. The questions of Mr. Hildebrand reflect as well some concern over the meaning of some of his testimony which, from reading the transcript, was understandable.

[66] In my opinion, the judge's questions and interjections do not carry the negative connotations the appellant suggests and do not give rise to a reasonable apprehension of bias.

Ground Four: Did the trial judge err in his charge to the jury by failing properly to explain the law relevant to past and future pecuniary loss and by inaccurately stating the position of the appellant with regard to those claims?

[67] Under this heading, it is convenient to address the arguments the appellant advances under both the fourth and fifth grounds of appeal concerning the awards for past and future pecuniary loss. Under the fifth ground, the appellant challenges those awards on the basis that they were "inordinately high" but, in my view, the arguments the appellant makes, if accepted, would properly be characterized as misdirection.

[68] At trial, the respondent advanced future loss claims on two bases: general loss of earning capacity and loss of opportunity to profit from computer software programs the respondent was developing. Each party called an economist to give expert evidence pertaining to the future loss claim.

[69] The respondent's position was that she was no longer able to work in the specialized field in which she had training and experience, and that she was permanently disabled as a result of the brain injury she sustained in the accident. The appellant's position was that the evidence did not support a finding that the respondent suffered a total or permanent disability as a result of the accident.

[70] On the appeal, the appellant argues that the trial judge "erred in failing to properly instruct the jury on the use of the 'models' prepared by the two economists", and takes issue with the judge's description of the evidence and his summary of the

legal principles applicable to the assessment of loss of income or earning capacity. The appellant contends that the trial judge ought to have instructed the jury to calculate any loss to the respondent on the basis of diminution of earning capacity rather than instructing them in a manner of calculating loss on an arithmetic basis. To support that submission the appellant refers to *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, in which Dickson J. said, at 251:

> It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made. A capital asset has been lost: what was its value?
>
> [Internal citation omitted]

[71] Appellant's counsel also refers to *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314; *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24; and *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 53 B.C.A.C. 310, in which Finch J.A. (as he then was) said at para. 43:

> The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[72] The appellant also refers to the reasons of Macfarlane J.A. in *Friesen v. Pretorius Estate* (1997), 37 B.C.L.R. (3d) 255 at paras. 30-31, 33-34, 92 B.C.A.C. 232, to explain the importance of a trier of fact stepping back from mathematical calculations and considering the global reasonableness of the figure awarded as loss of earning capacity.

[73] The appellant's submissions focus in part on evidence the respondent presented about her and her husband's partnership earnings. The respondent's income tax returns for the years 2001 and 2002 were based on an allocation of partnership income between the respondent and her husband, as follows: 2001:

88.5% to the respondent and 11.5% to her husband; and 2002: 80% to the respondent and 20% to the husband. The appellant argues that the respondent advanced past and future loss claims by reference to the earning history of the respondent's husband and that the allocation of partnership income as between the respondent and her husband was deeply flawed. At trial, the appellant contended that the respondent's income for the two years before the accident was the product of income splitting and was not a true reflection of the respondent's earning capacity. The appellant complains that the trial judge improperly restricted the examination in chief of Mr. Hildebrand regarding the income splitting that was a part of Mr. Hildebrand's report. The appellant submits that Mr. Benning, the economist called on behalf of the respondent, relied upon the income allocation in the preparation of his report and that the jury was obviously misled by a faulty assumption, based on the income allocation, that the respondent would have earned wages in the range of $100,000.00 per annum had it not been for the accident.

[74] In reply, the respondent submits that the appellant is simply inviting this Court to come to different conclusions based on evidence the jury must have rejected, given the awards they made.

[75] As to the appellant's assertions of misdirection, the respondent argues that the judge's charge, when considered in its entirety and in the context of all of the evidence and the addresses of counsel, would not have left the jury in any doubt as to the issues and the appellant's position in respect to those issues. To support that argument, the respondent refers to *Alden v. Spooner*, 2002 BCCA 592 at para. 20, 6 B.C.L.R. (4th) 308, leave to appeal ref'd [2002] S.C.C.A. No. 535:

> [20] …[T]he charge in its entirety is to be considered in light of the whole of the evidence and in light of the positions of counsel as taken from their addresses to the jury. One statement in a judge's charge might constitute a misdirection, but it is the charge as a whole that must be considered to determine whether the misdirection may have misled the jury or whether the issues were placed before it fairly.
>
> [Internal citation omitted]

[76] Generally, I agree with the respondent's submissions.

[77] During his closing address to the jury, appellant's counsel made it abundantly clear that the appellant was inviting the jury to find that the respondent did not suffer a brain injury and was not totally or permanently disabled as a result of the accident. He submitted, for example, that the respondent's claims were "entirely disproportionate to the harm that occurred in the case", that there was "a real dearth of convincing evidence" with respect to the claims for past and future economic losses, and that "there is not enough evidence reliable [sic] for you to conclude that she's suffered a brain injury or has a significant ongoing condition which supports the suggestion that she cannot work ever again, at all." In view of the examination and cross-examination of the various doctors, the appellant's closing address to the jury, and the judge's charge, it is implausible to suggest that the jury could have misapprehended the defence position or misunderstood the issues they had to determine.

[78] There was ample evidence from which the jury could reasonably conclude that the respondent had suffered a brain injury as a result of the accident and that her ability to engage in her former vocation was permanently foreclosed. From the jury's awards, it is reasonable to infer that they accepted that evidence.

[79] Another aspect of the appellant's submissions on appeal questions the evidence concerning the respondent's earnings and earning capacity. I agree with the respondent that those submissions amount to little more than a challenge to the credibility of Mr. Serebrennikov, the respondent's husband, who testified in great detail about the respondent's role in, and the earnings from, WestNet. Mr. Serebrennikov gave evidence that the allocation of income from WestNet in 2001 and 2002 was an accurate reflection of the value of the respondent's services and that she worked full-time developing programs necessary for WestNet to complete projects. Mr. Serebrennikov testified that the respondent's work was essential to these projects and it would have been impossible for him to deliver the services required without her work in the background. WestNet was not paid for these projects on the basis of an hourly rate. Defence counsel did not suggest the respondent had engaged in some form of income tax evasion and accepted the trial

judge's guidance that he should avoid creating that impression. The issue was whether the income allocation was accurate and Mr. Serebrennikov testified it was. It was open to the jury to accept the evidence that the allocation of income from WestNet accurately reflected the respondent's contribution.

[80] I am also not persuaded by the appellant's submissions of error in the judge's instructions with respect to the two pecuniary loss claims. In his closing address appellant's counsel told the jury that there were a number of different methods or approaches they could take in arriving at their pecuniary awards, depending on the evidence they accepted as to the respondent's injuries. The address of appellant's counsel to the jury included the following:

> …you may find that she's only partially disabled, or that she's disabled now, but she may get better in a while, and then she can go to work. You're going to have to throw all that into your calculation, your mix of what you think is actually going on here, and you can do it in a variety of ways. You could just simply pick a number. Alternatively, you can use a method of calculation. If you choose to use the evidence of PEDA Consulting (phonetic), you would come up with, on their assumptions, a number for the future of $2,532,254, if you are going to find that she is totally disabled from now to age 70, and assuming that she would earn $250,000 a year from right now, forward. So that's one tool you could use. That's a total assumption. You're just assuming that out of the blue. Her husband hasn't ever earned that, but make that assumption and that's what you'll arrive with.
>
> There are similar assumptions made for $190,000 a year and age 65. You could adopt those as numbers, too. If you find that this is what would likely happen, it's your decision, then that's what you may have to calculate. Or you can use a multiplier, we've heard the multipliers, and then you're going to have to decide is she totally disabled, ten percent disabled, 20, 18, whatever the number is you want to choose, and how much you think she would have earned in a year, and then figure out what the disability is and then multiply it out. There are examples, and there isn't a great big difference between the multipliers for the two experts. They're economists. They're obviously going to come up with very similar numbers. You could use that approach.
>
> [Emphasis added]

[81] When summarizing the appellant's approach to the assessment of the respondent's loss of earning capacity, the trial judge told the jury:

> The Defendants have taken the approach that the best way to calculate the loss of income to date of trial, as well as into the future, is to

> look at people with similar education, in their view, to that of Ms. Moskaleva, and using essentially Statistics Canada summaries for people that they feel fall into Ms. Moskaleva's level of education and employment.

[82] Before he summarized the evidence, the trial judge expressly cautioned the jury not to rely on his recollection of the evidence if it conflicted with their recollection but to rely on their own memory or notes. When describing the models presented by the two economists, the trial judge said "[y]ou may accept one of these models or neither. It is up to you." The trial judge also specifically instructed the jury that they should not accept his interpretation of the parties' positions if they conflicted with what counsel had submitted.

[83] After the trial judge delivered his charge, defence counsel expressed concerns about the trial judge's summary of the defence position on income loss, with specific reference to the opinion of the defence economist. The trial judge recalled the jury and again instructed them to rely on their own memory of counsel's submissions. In my view, the trial judge's instructions in response to the appellant's complaint cannot be construed as misdirection. Regardless of whether the trial judge was entirely accurate in conveying the position of the defence in relation to the evidence of the economists, I am of the view that his charge, when considered as a whole and in light of the evidence and defence counsel's address to the jury, reveals no direction that could have had the effect of misleading the jury as to the issues they had to decide.

[84] The appellant has not demonstrated any reviewable error on the part of the trial judge in his charge to the jury on the two pecuniary loss claims under consideration and, therefore, I would not accede to the appellant's arguments in either ground four or five in relation to those awards.

Ground Five: Are there grounds to interfere with the jury's damage awards?

[85] The appellant's alternative argument on the appeal is that the jury awards for non-pecuniary damages of $245,000, past wage loss of $300,000, and loss of earning capacity or opportunity of $1,350,000 were inordinately high and cannot be

supported by the evidence. The appellant also argues that these awards are inconsistent with and contradictory to the jury's award of $32,500 for future care costs.

[86] Under this ground of appeal, I will address only the arguments concerning the non-pecuniary award. The appellant's arguments concerning the past income loss and the loss of earning capacity or loss of opportunity have already been considered under ground four and I need say no more about the challenge to those awards.

(i) The appellant's argument on the non-pecuniary award

[87] The appellant argues that the award for non-pecuniary loss is erroneous in that it is inordinately high, not supported by the evidence, and out of all proportion to the nature of injuries alleged. The appellant refers to *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248, 22 B.C.A.C. 118, leave to appeal ref'd [1993] 2 S.C.R. vii, as supporting appellate interference with jury awards that are "inordinately high, low, or disproportionate" when the award "falls substantially beyond the upper or lower range for damage awards in the same class of case".

[88] The appellant's submission on the proper range of non-pecuniary damages for injuries of the type suffered by the respondent is between $75,000 and $110,000. In support of that submission the appellant refers to the following cases as analogous examples: *Siemens v. Damien*, 2002 BCSC 1065, non-pecuniary damages of $75,000.00; *Clark v. Royal Oak Holdings Ltd*., 2003 BCSC 275, non-pecuniary damages of $85,000.00; *Tan v. Chui*, 2001 BCSC 663, non-pecuniary damages of $100,000.00, and *Joel v. Paivarinta*, 2005 BCSC 73, non-pecuniary damages of $110,000.00.

[89] The other argument advanced by the appellant is that the non-pecuniary award is inconsistent with and contradictory to the award for future care costs of $32,500 and must be set aside.

(ii) The respondent's argument

[90] The respondent submits that given the jury's substantial awards, supportable on the evidence before them, this Court must assume that the jury resolved all evidentiary conflicts in favour of the respondent. The jury must have accepted evidence that the respondent has suffered severe and permanent disabilities as a result of the accident, and that the accident has had a devastating, if not catastrophic, effect on her. The respondent's profession, which was central to her life, is now foreclosed because of the cognitive deficits from which she suffers as a result of the accident.

[91] The respondent argues that in light of the foregoing, the jury's award in this case is not so far above the range of damages for comparable injuries that this Court may interfere with the jury's verdict. Juries, as members of the community, are uniquely qualified to assess the damages suffered by a plaintiff, and a jury award cannot be set aside merely because it is above the upper limit of the range of damages awarded by trial judges for comparable injuries. On this point, the respondent relies on Lambert J.A.'s reasons in *Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184; and on *Boyd v. Harris*, 2004 BCCA 146, 237 D.L.R. (4th) 193.

[92] In the respondent's submission, the range of damages for permanently disabled plaintiffs, even where their physical injuries may have resolved, is wide. To support that submission, the respondent relies on, among others, *Boyd v. Harris* and *Alden v. Spooner*, where this Court upheld jury awards of $225,000 and $200,000 respectively. The respondent contends that taking into account inflation, an award of $245,000 five years after *Alden* is not excessive. The respondent also relies upon the judge alone decisions of *Sirna v. Smolinski*, 2007 BCSC 967 ($200,000 non-pecuniary damages), and *Lines v. Gordon*, 2006 BCSC 1929 ($225,000 non-pecuniary damages).

[93] Finally, the respondent submits that the award for non-pecuniary damages is not inconsistent with the award for future costs of care, because that award was based on the relatively modest claim put forth by the respondent herself on the basis

that her physicians felt there were limited treatment regimes that would be of benefit. Given those circumstances, the respondent submits, the jury's award of $32,500 is, in fact, substantial.

(iii) Discussion: Non-pecuniary damages and the standard of review applied to jury awards in actions for damages for personal injuries

[94] In a trilogy of cases issued in 1978, the Supreme Court of Canada established a "rough upper limit" of $100,000 for non-pecuniary damages in personal injury cases for catastrophic or near-catastrophic injuries: *Andrews v. Grand & Toy Alberta Ltd.*; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (the "Trilogy"). The rough upper limit is now over $300,000. A jury should be instructed on the rough upper limit only if the non-pecuniary award is anticipated to exceed that limit. In all other cases the jury assesses non-pecuniary damages in this Province without reference to the rough upper limit: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577; *Brisson v. Brisson*, 2002 BCCA 279, 213 D.L.R. (4th) 428.

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 129 D.L.R. (3d) 263; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19, leave to appeal ref'd [2006] S.C.C.A. No. 100; *Lee v. Dawson*, 2006 BCCA 159 at paras. 76-79, 267 D.L.R. (4th) 138, leave to appeal ref'd [2006] S.C.C.A. No. 192. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this

> nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".
>
> [Internal citations omitted]

[96] There is no issue that this Court has the jurisdiction to vary a jury award of damages upward or downward: *Vaillancourt v. Molnar Estate*, 2002 BCCA 685, 8 B.C.L.R. (4th) 260, leave to appeal ref'd [2003] S.C.C.A. No. 77. It is well-settled law that an appellate court cannot alter a damage award made at trial, either by judge alone or by jury, merely because on its view of the evidence it would have come to a different conclusion: see *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385. However, the test applied on appellate review of a jury award in a personal injury case in this Province cannot be regarded as well settled, as a review of the case authorities demonstrates. As Finch C.J.B.C. observed in *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 22 and 30, 250 D.L.R. (4th) 83, reviews of jury awards have become increasingly difficult.

[97] The articulation of the test for appellate review of damage awards found in two early authorities continues to be pertinent. In *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601 (H.L.), Lord Wright said, at 616:

> There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case.

[98] Lord Wright's statement was adopted by Viscount Simon in *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 at 613-614, [1951] 3 D.L.R. 705 at 713-714 (P.C.)[cited to A.C.], in which the Privy Council had for review a jury award in a negligence action. The following oft-quoted passage in the speech of Viscount Simon in *Nance* is generally regarded as the seminal statement on the question of appellate review of damage awards:

> The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then,

> before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (*Flint v. Lovell*, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries*). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (*per* Lord Wright, *Davies v. Powell Duffryn Associated Collieries*).
>
> [Emphasis added]

[99] The reasons of McEachern C.J.B.C., for the majority, in *Cory v. Marsh*, posited a comparative approach between the jury award under review and "analogous" awards made by trial judges sitting alone. Under *Cory*, appellate interference is justified if the jury's award falls substantially beyond the upper or lower range for comparable damage awards (at paras. 6-8):

> 6 The opinion of Lord Wright in Davies introduces the concept of proportionality between the award and the circumstances of the case. This must include reference to other cases because a priori reasoning is hardly a basis for reviewing damage awards.
>
> 7 In *Nance v. B.C. Electric* (1951), 2 W.W.R. (N.S.) 665 (J.C.P.C.), Viscount Simon delivered what is often regarded as the *loccus classicus* on this question. He said, at p. 675, that an assessment of damages by a trial judge should not be interfered with unless the appellate court is:
>
> > ... satisfied either that the judge ... applied a wrong principle of law ... or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
>
> 8 Because of its reference to inordinately low or high awards and to wholly erroneous estimates of the damage, Nance continues the proportionality approach taken in Davies. This calls for consideration of whether an award is inordinately low, high, wholly erroneous or not erroneous in relation to both the circumstances of the case, and to other cases. In my view, an award is inordinately high, low, or disproportionate, if it falls substantially beyond the upper or lower range for damage awards in the same class of case.
>
> [Emphasis added]

[100] The reasons of McEachern C.J.B.C. in *Cory* emphasized the first portion of the passage from *Nance* rather than the part in which Viscount Simon adopted the statement of Lord Wright in *Davies*. As a result, the majority judgment in *Cory* can be interpreted as conflating the two standards of review in *Nance*, one applicable to a judge alone award of damages and the other, a jury award.

[101] The language of "so inordinately low or so inordinately high" as to amount to a "wholly erroneous estimate of the damage" was the standard referred to in *Nance* that was applicable upon review of a judge alone damage award. The test for interference with jury damage awards, according to *Nance* and *Davies*, is that they be wholly "out of all proportion" to the circumstances of the case.

[102] The two standards set out in *Nance* applying, on the one hand, to a judge-alone award, and on the other, to a jury award, are not merely two ways of saying the same thing. That is evident from the statement in *Nance* that "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone."

[103] In his dissenting reasons in *Cory*, Gibbs J.A. made clear the distinction between the two standards and relied exclusively on the "out of all proportion" articulation of the test in relation to the case on appeal (paras. 33-37) . According to Gibbs J.A., a jury award would be "out of all proportion" if it were one that "would shock the conscience, would be so outrageously large, considering the nature and extent of the injuries sustained" (para. 37).

[104] That *Nance* describes two different tests for appellate review of damage awards is made clear in the dissenting reasons of Laskin C.J.C., with which Spence and Dickson JJ. concurred, in *Wade v. C.N.R.*, [1978] 1 S.C.R. 1064, 80 D.L.R. (3d) 214. In *Wade*, the jury had found the defendant railroad liable in negligence for the injuries of an eight-year old plaintiff, the loss of a leg, sustained while the child was attempting to board a passing train. The jury found that the plaintiff lacked the capacity to be contributorily negligent and awarded general damages at $150,000.

The Nova Scotia Appeal Division agreed that the railroad had been negligent but overturned the jury finding with respect to contributory negligence. The Appeal Division also held that the damages awarded were inordinately high and excessive and reduced the award to $75,000. The majority of the Supreme Court of Canada found that the jury had erred in finding the railroad negligent on the ground that there was no duty of care in the circumstances and therefore it was not necessary to decide the issue of damages. The minority concluded that the jury's verdict should be restored on all points and for that reason, addressed the Appeal Division's reduction of the jury award for damages. On the question of what standard of review applied, Laskin C.J.C. stated at 1077-1078:

> In making this reduction, McKeigan C.J. applied as the only available test (there having been no misdirection by the trial judge) whether the sum awarded was "either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage". The authorities cited for this standard of measurement by an appellate Court were Viscount Simon in *Nance v. British Columbia Electric Ry.* [,[1951] A.C. 601], at p. 613 and Ritchie J. in *Sparks and Fairfax v. Thompson* [,[1975] 1 S.C.R. 618], at pp. 628-9.
>
> Unfortunately, the test applied by Chief Justice McKeigan through the use of the quoted words from the judgment in the *Nance* case was that assigned by the Privy Council when an appellate Court is considering damages fixed by a judge alone. The *Sparks and Fairfax* case was of that kind, and my brother Ritchie (I too was a member of that Court) quoted and applied the words of Viscount Simon in the *Nance* case only in so far as they expressed the test that an appellate Court should follow in reviewing damages fixed by a judge. Where the review relates to damages fixed by a jury, it was the view of Viscount Simon that (to quote his words, at p. 614 of [1951] A.C) "The disparity between the figure at which they [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly out of all proportion".
>
> Having applied the wrong test for appellate Court interference with damages, the learned Chief Justice of Nova Scotia then wrongly found comparisons to support his reduction of the jury's assessment in this case by invoking cases in which the trials were held before a judge alone,… This Court is in no worse position than the Appeal Division in reviewing damages and, accepting as I do the test propounded in the *Nance* case, the simple and yet difficult question is whether an award of $125,000 by a jury for the loss of a leg by an 8-year old boy, with all that this imports over his life expectancy in respect of mode and condition of life, career and activities, is an award that is out of all proportion to that at which a jury could properly have arrived. It undoubtedly

> presses to the outward limit of what an award for such an injury should be, but I am not prepared to interfere with it.
>
> [Emphasis added]

[105] While parts of the majority judgment in *Cory* contain references to authorities that hold that a jury award is accorded more deference than a judge alone award (see paras. 5, 9, and 10), the Chief Justice's reasons do not emphasize the point. In *Cory* the majority's articulation of the test to be applied on appellate review does not draw the distinction between the two standards set out in *Nance* and to which Laskin C.J.C. referred in *Wade*. As a result, a number of cases subsequent to *Cory* have wrongly merged the two tests referred to in *Nance* so that the question on review of a jury award is expressed as whether "the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" or "is inordinately high, low, or disproportionate", assessed by whether "it falls substantially beyond the upper or lower range for damage awards in the same class of case."

[106] In *Cody v. Leonard* (1995), 15 B.C.L.R. (3d) 117, [1996] 4 W.W.R. 96 (C.A.), Legg J.A. interpreted the majority judgment in *Cory* as implicitly distinguishing between jury and judge awards. In *Cody*, the defendant appealed from the jury's award of $225,000 for non-pecuniary damages for injuries resulting from the defendant's negligence in a motor vehicle collision. On the basis of *Cory*, the defendant submitted that the jury's award for non-pecuniary damages was "so inordinately high as to be a wholly erroneous estimate of the damages." The plaintiff argued, in part, that the majority decision in *Cory* created a new test that was inconsistent with previous authorities and submitted that a five-member division was required to reconsider *Cory*. In *Cody*, Legg J.A. held, at paras. 16-26 of his reasons, that *Cory* did not apply a new test but had applied the *Nance* test in accordance with the principles of reasonableness and proportionality "long established" by case law. In his reasons, Legg J.A. acknowledged that jury awards are to be accorded further deference but in doing so emphasized the fact that the majority in *Cory* had awarded an amount above the range for judge alone damage awards of the same class of

case and, on that basis, concluded that *Cory* was not inconsistent with previous authorities (at paras. 25-26):

> 25 … This Court must recognize that a jury award is not necessarily wrong if it does not conform with damage awards made by judges when considering whether a jury award is out of all proportion to the circumstances of the case. This was stated in *Scott v. Musial* [[1959] 2 QB 429, [1959] 3 All ER 193 (C.A.)] by Morris L.J. whose reasons were quoted with approval in *Bisson v. Powell River (District)* [(1968), 66 D.L.R. (2d) 226, 62 W.W.R. 707 (B.C.C.A.)] by Bull J.A. and quoted in *Cory*.
>
> 26 I see no inconsistency, however, between adopting the approach stated in Scott *v. Musial* and adopting the test described in *Cory v. Marsh* by considering whether the award of non-pecuniary damages in the case before us was inordinately high or disproportionate by examining whether the award fell substantially beyond the upper range for damage awards in the same class of case.

[107] In the result, based upon his survey of awards made by trial judges from $50,000-$75,000, Legg J.A. held that the jury's award for non-pecuniary damages "was inordinately high and wholly out of proportion because it was substantially beyond the range of personal injury awards for this class of case" and reduced it to $80,000 (para. 33).

[108] In a number of other decisions, this Court has carefully distinguished between the two standards for appellate review in damage awards in personal injury actions. In *Foreman v. Foster*, at para. 32, Lambert J.A., in his concurring reasons, referred to the erroneous blurring of the two standards in *Nance* when he stated that appellate interference with a jury award is not justified when the award is merely inordinately high or low:

> [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which [they] could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to

> change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1984), 58 B.C.L.R. 273 (B.C.C.A.).
>
> [Emphasis added]

[109] In *Foreman*, the narrow issue before the Court was whether the case was suitable for a Rule 18A summary trial, and therefore Lambert J.A.'s discussion of jury awards is, as he noted, properly regarded as *obiter* (although concurred in by Braidwood J.A.). However, the paragraph from the reasons of Lambert J.A., quoted above, has subsequently been referred to with approval in *Boyd v. Harris*, at paras. 13-14; *White v. Gait*, 2004 BCCA 517 at paras. 10-11, 244 D.L.R. (4th) 347; and *Courdin v. Meyers*, 2005 BCCA 91 at para. 22, 250 D.L.R. (4th) 213.

[110] In *Boyd v. Harris*, Smith J.A. sought to reconcile the test set out in *Cory* with an acknowledgment that the standard for interference with jury awards is higher than that for interference with judge alone awards. He stated that the test in *Cory* is a comparative one, holding that "this Court should not interfere with a jury award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case", but emphasizing that in this exercise an allowance must be made for the fact that the award was assessed by a jury, which allows for a "greater margin of deviation" from the range than would be given damages assessed by a trial judge (paras. 5, 41-42).

[111] In the context of appeals from damage awards made by trial judges, the Supreme Court of Canada has used a formulation for appellate review that accords with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The Supreme Court has held that as damages are a question of fact, only palpable and overriding error can justify interference: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 at para. 62; *M.B. v. British Columbia*, 2003 SCC 53, [2003] 2 S.C.R. 477 at para. 54.

[112] An earlier articulation of the same approach is found in *McCannell v. McLean*, [1937] S.C.R. 341, in which the test was expressed this way, at 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

[113] The Supreme Court's approach to appellate review of jury damage awards was also taken by Finch C.J.B.C. in *Dilello*, at paras. 34-39. In that case, the Chief Justice referred to s. 6 of the *Negligence Act*, R.S.B.C. 1996, c. 333, and held that the amount of an appropriate non-pecuniary damage award in a negligence action is, by statute, a question of fact. He went on to hold that, as a result, "[d]amages as findings of fact, whether made by judge alone or by jury, are reviewable on appeal only for palpable or overriding error." Citing *Nance*, Finch C.J.B.C. further stated that "[f]indings of fact by a jury are entitled to even greater deference on review than findings of fact by a judge alone." He went on to note, at para. 49, that "[n]on-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases."

[114] The Supreme Court of Canada's articulation of the appellate review test for damage awards as hinging on the award being a question of fact does not depend on a statutory regime. That is clear from the Court's decision in *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108, a case originating in Newfoundland. In *Young*, the jury had awarded $430,000 in non-pecuniary damages in a negligence action outside of the physical personal injury context. On appeal, the majority of the Newfoundland and Labrador Court of Appeal had set aside the award but the Supreme Court of Canada restored the trial judgment in its entirety. With respect to the award for non-pecuniary damages, the Court held that while the amount was higher than that which the Court would have awarded in the circumstances, it was nevertheless not so "wholly disproportionate or shockingly unreasonable" as to justify appellate interference (paras. 64, 66). The Supreme Court also held that a judicially imposed cap on non-pecuniary damages was not appropriate in that case, holding that the policy considerations arising from negligence causing catastrophic

personal injury which justified the Trilogy's upper limit in the contexts of accident and medical malpractice had not been established in the case before it (para. 65), and left open for consideration in another case the issue of "whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context" (para. 66).

[115] In *Young*, the Court held that damage awards, as findings of fact, could not be set aside absent palpable and overriding error, which in the case of jury awards, meant an award that was "wholly disproportionate" or "shockingly unreasonable":

> 64 … Damage assessments are questions of fact for the jury. Jury awards of damages may only be set aside for palpable and overriding error. It is a long-held principle that "when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone": *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.), at p. 614. On this test, we cannot conclude that the award for non-pecuniary damages should be set aside. In light of the evidence, the jury's award cannot be said to be wholly disproportionate or shockingly unreasonable.

[116] The formulation of the test laid out in *Young* is consistent with other Supreme Court of Canada decisions on jury damage awards apart from claims for personal injury: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 159, 126 D.L.R. (4th) 129; and also *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 108, where the Court stated that in the case of jury awards of general damages, "the courts may only intervene if the award is 'so exorbitant or so grossly out of proportion [to the injury] as to shock the court's conscience and sense of justice'".

[117] This Court has held that that the Supreme Court of Canada's formulation requiring palpable and overriding error of a finding of fact does not, in substance, affect the standard of review already established, as previous articulations ("inordinately high or low", "wholly out of proportion", "unreasonable and unjust") would each demonstrate palpable and overriding error: *Lee v. Luz*, 2003 BCCA 640 at paras. 10-13, 20 B.C.L.R. (4th) 283; *Boyd*, at para. 5.

[118] In my opinion, the use of the phrases “inordinately high or inordinately low” and “wholly erroneous” in the context of review of jury awards ought to be avoided because those phrases tend to result in an incomplete articulation of the standard or to wrongly merge the two standards from *Nance.*

[119] I am also of the opinion that while some aspects of the comparative approach in *Cory* may be compatible with the “palpable and overriding error” test, as *Lee v. Luz* and *Boyd* suggest, the preferable formulation of the approach to appellate review of jury damage awards is the one set out by the Supreme Court of Canada in *Young*. The test in *Young* adopts both the “finding of fact” element common to judge alone and jury awards, as well as the added deference traditionally given to jury awards. *Young* imports not only the distinction made in *Nance* between review of judge alone awards and review of jury awards, but in using the specific language of “wholly disproportionate”, also the standard articulated in *Nance* that is to be uniquely applied with respect to jury awards specifically. Moreover, recognition of the applicability of the “palpable and overriding error” test to jury damage awards in personal injury cases would import the reasoning in *Housen v. Nikolaisen* which provides the underpinning or rationalization for the use of that standard not only to findings of fact but also to findings of mixed fact and law.

[120] In *Cory* at paras. 15 and 20, the majority held that in the face of a substantial jury award, the court upon appellate review must respect the role of the jury and assume that the jury resolved all evidentiary conflicts in favour of the plaintiff. Adopting the Supreme Court’s approach to appellate review of damage awards articulated in *Young* would avoid the reliance on the assumption or presumption, postulated in *Cory,* about the jury’s findings or conclusions on the evidence, based on the size of the jury’s awards.

[121] The rationale set forth by the Supreme Court of Canada in *Housen* in support of a deferential standard of review for factual findings of trial judges – the restriction of the number, length, and cost of appeals; the promotion of the autonomy and integrity of the trial proceedings; and the recognition of the expertise of the trial judge

and his or her advantageous position – apply equally to civil jury trials: *Boyd*, at para. 6. There are many statements in the case authorities to the effect that judge-made awards are not inherently superior to jury awards: *Brisson*, at para. 26. Juries, unlike a trial judge sitting alone, "bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life": *Boyd*, at para. 10. In *Hill* at para. 158, Cory J. for the Supreme Court of Canada said that jurors speak for their community and are uniquely qualified to assess damages, and went on to approve the principle that the "assessment of damages is peculiarly the province of the jury." It is for these reasons that "an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure."

[122] Additionally, in *Boyd* at paras. 7-9, Smith J.A. noted that there was some evidence that, contrary to popular opinion, the inherent unpredictability in civil jury awards actually enhanced settlement prospects and that appellate interference with jury awards, unless circumscribed, would "tend to remove from the system this incentive to settle cases."

[123] A possible further reason to accord greater deference to jury awards may arise from the fact that it is often the defendant who appeals such an award as excessive when it was that same defendant who had initially sought trial by jury, in the belief that a jury would award an amount lower than that which would be awarded by a trial judge sitting alone. In his dissent in *Stapley*, Finch C.J.B.C. remarked at para. 123 that:

> [123] … The defendant issued the notice for trial by judge and jury. It is, I believe, common knowledge at the bar, that this Court will almost invariably defer to an award made by a jury when it is said to be too low. In such a case the defendant can say – quite properly – that the jury must not have believed the plaintiff, that the award for general damages reflects the jury's view of the plaintiff's credibility, and that accordingly, this Court should not intervene. By opting for a jury trial, the defence may anticipate an award that is within the range a judge alone would have made, or less; but if the award is much higher than the range of judge alone awards, the defence can come to this Court to seek a reduction. It is a kind of "win win" equation for the defence, and has the appearance of unfairness.

[124] However, Smith J.A. observed at para. 11 of *Boyd* that the deference accorded to jury awards, while great, is not unlimited. Appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs, and that unadjusted outlier awards could lead to an undermining of public confidence in the courts through a perception that the judicial system operates "like a lottery".

(iv) Summary of the test to be applied on appellate review

[125] An appellate court cannot alter a damage award made at trial merely because on its view of the evidence it would have come to a different conclusion. Whether made by a judge sitting alone or by a jury, damage assessments are questions of fact or mixed fact and law and therefore awards of damages may only be set aside for palpable and overriding error (*K.L.B.* at para. 62; *M.B.* at para. 54; *Young* at para. 64; *Dilello* at para. 39).

[126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para 64 and *Dilello* at para. 39, both citing *Nance* at 614).

[127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" (*Foreman* at para. 32 citing *Nance* at 614, and referred to with approval in *Boyd* at paras. 13-14, *White v. Gait* at paras. 10-11, and *Courdin* at para. 22; *Wade* at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or,

in other words, when it is “wholly disproportionate or shockingly unreasonable” (*Young* at para. 64).

[128] Support for the view that in order to determine whether a jury award is “wholly out of all proportion” or “wholly disproportionate or shockingly unreasonable”, it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in “the same class of case” may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.’s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras. 33-43; and Finch C.J.B.C.’s dissent in *Stapley* at paras. 116-124.

[129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: *Cody* at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

[130] It is generally accepted that it is improper to compare the injuries of a particular plaintiff to those of the plaintiffs in the Supreme Court Trilogy for the purpose of making an award: *Boyd* at paras. 29-34, followed in *Stapley* at paras. 42-43. It is therefore inappropriate to “scale” an award for non-catastrophic injuries to the upper limit. In *Boyd*, Smith J.A. explained the function of the upper limit as follows (para. 32):

> [32] The governor on an engine is a useful analogy. Just as the operator of an engine may choose a speed appropriate to the circumstances, uninfluenced in that choice by the governor until the speed limit is reached, a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit. The legal ceiling, a rule of law and policy, operates, like a governor, to limit the amount of the judgment that may be granted for damages assessed under that head.

(v) Application of the standard of review to the award of non-pecuniary damages in the case on appeal

[131] There was evidence that the respondent suffered severe and permanent disabilities as a result of the accident and that she continues to suffer from the

effects of the mild traumatic brain injury and post-concussion syndrome. As described, her symptoms include debilitating headaches, fatigue, depression, memory loss and inability to concentrate, and these problems are exacerbated by anxiety, emotional liability, and frustration. Dr. Spellacy's evidence, based on the testing he did, showed that the respondent suffers from cognitive deficits. The evidence from her expert witnesses was that her condition is unlikely to improve. The respondent's profession, which from the evidence was clearly central to her life, is forever foreclosed to her because she cannot read complex material, cannot concentrate, and cannot retain what she has read. On the evidence, it was open to the jury to conclude that the accident had a devastating, if not catastrophic, effect on the respondent.

[132] While the non-pecuniary award in the case before us is undoubtedly high and may not have been one this Court would make, I am not persuaded that we ought to interfere in the jury's award of $245,000. The Supreme Court of Canada's decision in *Young* and, to a lesser extent, its decision in *Hill*, along with the relatively recent decisions of this Court in *Boyd* and *Dilello*, are powerful expressions of the deference to be accorded to jury damage awards. As indicated in the recent decisions of *Hill, Brisson*, and *Boyd*, the case law has long acknowledged the unique qualities of the jury that require its findings be respected above those of a trial judge. Furthermore, as directed by *Boyd*, since the jury's award in this case does not reach the Trilogy's upper limit, the amount of that limit and how the injuries in those cases compare to the respondent's injuries are irrelevant considerations.

[133] Given the unique nature and purpose of non-pecuniary damages and the deference demanded for review of jury awards, I am of the view that the jury's award in this case is not so "wholly out of all proportion", "wholly disproportionate" or "shockingly unreasonable" as to justify appellate interference.

(vi) Internally inconsistent or contradictory jury damage awards

[134] I turn now to the appellant's argument that it is open to an appellate court to interfere with a jury damage award if the award is internally inconsistent or contradictory.

[135] In *White v. Nuraney*, 2000 BCCA 536 at para. 53, 80 B.C.L.R. (3d) 307, this Court found it was inconsistent for the jury to have made no award for non-pecuniary damages while granting awards under other heads of damage. Most often when this Court has found jury awards to be "internally inconsistent", they are of this type: *Ferguson*, at paras. 62-64. However, in *Novak v. Lane et al*, 2000 BCCA 267, 139 B.C.A.C. 155, the Court ordered a new trial because it found that the jury's award of $3,000 for non-pecuniary damages was inconsistent with its award of $4,000 for cost of future care, in that it was too low; and in *Dubach v. Nahal*, 2003 BCCA 526, the Court based its judgment on its finding that the jury's non-pecuniary award of $5,500 was "inordinately low" (para. 10), but also remarked that the awards for pecuniary damages were "inherently inconsistent with the non-pecuniary award" (para. 11).

[136] Whether an appellate court can interfere when there is an apparent internal inconsistency between a "nil" or very modest award for non-pecuniary damages and a positive award for pecuniary damages may be resolved by asking whether, in the face of such apparent inconsistency, the jury must have misapprehended the principles to be applied in making an award for non-pecuniary loss.

[137] In this case, the appellant argues that the "low" award for costs of future care is inconsistent with the substantial award for non-pecuniary damage. To determine whether there is an inconsistency between the two awards, it is necessary to look at the foundation for the pecuniary award. Respondent's counsel argues that the amount the respondent sought for costs of future care award was limited because her medical advisors had said there was little more that could be undertaken by way of treatment for her injuries. That argument is not refuted by the appellant and is a persuasive one in this case. Put another way, there is no foundation for an argument that the jury must have misapprehended or misapplied the principles

underpinning a non-pecuniary award based on the award the jury made for costs of future care. Accordingly, I would not accede to the appellant's submissions on this point.

IV. Conclusion

[138] I would dismiss the appeal.

"The Honourable Madam Justice Rowles "

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice Smith"